



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss L M Jones

**Respondent:** Galliford Try Employment Ltd

**Heard at:** East London Hearing Centre

**On:** 24 May 2017 and following reconsideration on

**Before:** Employment Judge C Lewis

**Members:** Mr L Purewal  
Dr J Ukemenam

**Representation**

**Claimant:** In person

**Respondent:** Mr R Briggs (Solicitor)

## JUDGMENT ON REMEDY FOLLOWING RECONSIDERATION

The unanimous judgment of the Tribunal is that: -

1. The Tribunal are satisfied that it was not practicable for the Respondent to reinstate the Claimant.
2. The Claimant is entitled to an award of compensation under the Employment Rights Act 1996 according to the principles in Section 118 – 126 as follows:

**Basic award**

2.1 The Claimant is awarded the sum of £1,425.00. Based on 2 complete years service at aged 41 or over.  $1.5 \times \text{week's pay} @£475 \times 2 = £1425.00$ .

#### Compensatory award

2.2 The compensatory award for unfair dismissal is calculated as follows:

##### Prescribed element

(a) Loss of income from date of termination to the date of this hearing, 24 May 2017, (less credit given for the notice pay award of 4 weeks) being a total of  $85 \frac{1}{2}$  weeks at the sum of £873.23 net per week = £74,661.16 That forms the prescribed element of the award. The award is in excess of the statutory maximum and falls to be reduced under s 124(b) of the Employment Rights Act 1996.

(b) The prescribed element is reduced by the formula of the prescribed element  $\times$  the limit  $\div$  by the total compensatory award before applying the cap and that brings the new prescribed element to £26,786.48. That is the sum to which the recoupment regulations apply.

##### Non-prescribed element

(c) (i) car allowance at £116.53 per week = £9,963.32;

(ii) private health cover at £5.07 per week = £433.49;

(iii) pension contribution in the sum of £3,156.66; and

(iv) loss of statutory rights two weeks at the statutory maximum week's pay of £489 = £978.

The total of the non-prescribed element is £14,531.47.

(d) The grand total of prescribed and non-prescribed element of the compensatory award is £89,192.64 and that is the sum to which the statutory cap applies.

##### Application of statutory cap

2.3 The Claimant's gross annual pay was the sum of £32,000 and that is the level at which the statutory cap under Section 124(b) applies, the maximum award we can make being 52 x a week's (gross) pay. The compensatory award is reduced to the level of the cap.

2.4 The total award for unfair dismissal is £33,425 being the total of the basic award in the sum of £1,425 and compensatory award of £32,000.

**Employment Protection (Recoupment of benefits) Regulations 1997**

**3. The particulars required for the purposes of the Recoupment Regulations are as follows:**

***(i) the monetary award is £33,425.00;***

***(ii) the amount of the prescribed element is £26,786.48;***

***(iii) the prescribed period is 11 September 2015 to 24 May 2017;***

***(iv) The amount by which the monetary award exceeds the prescribed element is £6638.52.***

**Breach of contract – failure to pay notice pay**

**4. The Claimant is awarded four weeks' notice pay in the sum of £4,974.15 (4 x £1243.54 gross per week).**

## **REASONS**

1 At an earlier Remedies Hearing held on 16 December 2016 the Tribunal had ordered that the Claimant be reinstated by the Respondent and that she be paid the sum £46,024.95 in respect of her losses in the intervening period. The Respondent failed to comply with that order and asserts that it was not reasonably practicable for it to do so. A further Remedies Hearing was listed for 24 May 2017 to determine whether it was reasonably practicable for them to comply with the order for reinstatement and if not to determine the appropriate remedy. The Respondent prepared a bundle of documents and witness statements from Mr Dempsey and Mr Smith, the Claimant relied on her witness statement prepared for the December Remedy hearing. The Respondent also provided the Tribunal with a bundle of authorities, which included the following cases: *Timex Corporation v Thomson* [1981] IRLR 522; *Freemans v Flynn* [1984] ICR 874; *Cold Drawn Tubes Ltd v Middleton* [1992] ICR 318; *Port of London Authority v Payne and others* [1994] ICR 555; *Wood Group Heavy Industrial Turbines Ltd v Crossan* [1998] IRLR 680; *Central & North West London NHS Foundation Trust v Abimbola* [2009] UKEAT/0542/08/LA; *Arhin v Enfield Primary Care Trust* [2010] EWCA Civ 1481.

2 Having considered the evidence of Mr Dempsey, Mr Smith and Miss Jones the Tribunal, after careful deliberation, accepted Mr Dempsey's and Mr Smith's evidence. The Tribunal accepts Mr Dempsey's evidence (paragraph 7 of his statement) that the Respondent was unable to continue without replacing the Claimant after a short period of time. We find that in the short term Ms Jones' workload was absorbed by Roseanne Bullen but due to the level of activities the decision was taken to replace Ms Jones with a permanent replacement at similar seniority. We accept Mr Dempsey's evidence that in effect Ms Bullen was left managing one site whilst also covering the director level responsibilities in the absence of the recruitment of a sales director and that Mr Cansdale

was given four sites to manage. We are satisfied that the Respondent decided to promote Aaron Cansdale from his contract progression position due to a business need to cover the existing work of site manager. This promotion was formally notified to him on 18 February 2016. Whilst we accept Ms Jones evidence that the Respondent had been contacted by that date by Acas to inform them of her potential claim, we also accept the Respondent's evidence that they found that they were unable to continue to cover the Claimant's work without replacing her.

3 Therefore we are in the position where we must take into account the effect on the replacement in considering whether it was reasonably practicable to reinstate the Claimant under Section 117 of the Employment Rights Act 1996.

4 We accept the Respondent's submission that if they were to reinstate the Claimant that would result in over manning and potentially lead to the redundancy of either the Claimant or Mr Cansdale. We are persuaded by the authorities presented to us that we are not able to order reinstatement where that is the consequence, nor are we able to instruct the Respondents on how to run their business.

### **Compensation**

5 Having found that it was not reasonably practicable to reinstate the Claimant we went on to consider compensation for unfair dismissal under Section 118 – 126 ERA 1996. The Claimant and the Respondent had each served schedules and counter schedules before the remedy hearing.

#### *Breach of contract- failure to pay notice pay*

6 We found that the Claimant was dismissed without notice and is entitled to succeed in her claim for notice pay: we make an award in the sum of £4,974.15 gross, as per the Claimant's Schedule of Loss.

#### *Basic award*

7 The figure in respect of the basic award was agreed: the Claimant being over the age of 41 and with two years complete service at the effective date of termination, her basic award is the sum of £1,425.

#### *Compensatory award – following reconsideration*

8 The Respondent made further written submissions as to the correct calculation of the Claimant's pay and whether a week's pay should include her payments for bonus and commission. We have previously found, in our initial decision on liability, that the Claimant was contractually entitled to bonus payments. We are satisfied on the balance of probabilities the Claimant would have earned the bonus and commission payments that she claims in her Schedule of Loss and that those amounts are properly included in her schedule and form part of the loss she sustained in consequence of the dismissal and attributable to the action of the Respondent in dismissing her.

### **Reconsideration of a week's pay**

9 However, on Reconsideration, the Respondent's solicitors having drawn the tribunal's attention to the decision of the Court of Appeal in *Evans v Malley Organisation Ltd t/a First Business Support [2003] IRLR 156* and the Claimant having been given an opportunity to make further representations, we find in the light of that authority that we are bound to exclude the commission and bonus payments from the amount of the Claimant's "week's pay" under s 221 of the Employment Rights Act 1996 which is used for the purposes of calculating the level of the statutory cap under s 124(1ZA) (b). In accordance with s 221 of the Employment Rights Act 1996 the Claimant's week's pay is therefore to be taken as the sum of £615.38. The sum of 52 x her week's pay is £32,000.00 and that is the level at which the statutory cap falls to be applied under s 124(1ZA) (b).

10 The parties schedules contended for different amounts for loss of statutory rights but we award two weeks' pay at the current statutory maximum week's pay, one week's pay for each year it will take the Claimant to accrue the statutory entitlement not to be unfairly dismissed. We have calculated each element of the award of compensation doing the best we can with the figures and the information that we have been provided with by both parties. For the avoidance of doubt we accepted the Claimant's claims as set out in her schedule of loss.

11 The compensatory award for unfair dismissal is calculated as follows:

*Prescribed element*

10.1. Loss of income from date of termination to the date of this hearing, 24 May 2017, less credit given for the notice pay award of 4 weeks, being a total of 85 ½ weeks at the sum of £873.23 net per week is £74,661.16 this amount is in excess of the statutory maximum.

*Non-prescribed element*

10.2 (i) car allowance at £116.53 per week = £9,963.32;

(ii) private health cover at £5.07 per week = £433.49;

(iii) pension contribution in the sum of £3,156.66; and

(iv) loss of statutory rights two weeks at the statutory maximum week's pay of £489 = £978.

The total of the non-prescribed element is £14,531.47.

12 The grand total of prescribed and non-prescribed element of the compensatory award is £89,192.64 and that is the sum to which the statutory cap applies.

***Application of statutory cap – s124 ERA 1996***

12 On reconsideration we find that the Claimant's gross annual pay was the sum of £32,000 and that is the level at which the cap under Section 124 (1ZA)(b) applies. The compensatory award is therefore reduced to £32,000.00, the level of the cap.

13. For the purposes of recoupment the prescribed element is reduced by the formula of the prescribed element x the limit ÷ by the total compensatory award before applying the cap; that brings the new prescribed element to £26,786.48 and that is the sum to which the recoupment regulations apply.

Employment Judge C Lewis

13 October 2017