



EMPLOYMENT TRIBUNALS

Claimant: Mrs Leanne Wilcox
Respondent: Nationwide Diamond Contracts Limited
Heard at: Hull **On:** 20 February 2018
Before: Employment Judge T R Smith
Representation
Claimant: Mrs Leanne Wilcox, litigant in person
Respondent: Mr Morton, Solicitor

RESERVED JUDGMENT

The unanimous decision of the Tribunal is: –

1. The Respondent is ordered to pay the Claimant £7125.53 by way of compensation for unfair dismissal.
2. The Recoupment Regulations do not apply.

REASONS

Issues.

1. Following a hearing held at Hull on the 11th and 12 of December 2017 with a reserved judgement being sent to the parties on 29 December 2017 (“the liability hearing”) the Claimant’s complaint of unfair dismissal was upheld.
2. Today the Claimant confirmed she did not seek reinstatement or re-engagement but pursued compensation as her remedy.

Documents and evidence.

3. The Claimant produced a bundle of documents totalling 208 pages.
4. The Claimant relied upon her statement dated 15 January 2018 (which ran to 30 numbered paragraphs) together with a document entitled “How I will be challenging redundancy” as her evidence in chief.
5. The Tribunal heard oral evidence from the Claimant.

6. No evidence was called on behalf the Respondent. The Respondent relied upon the documentation in the Claimant's bundle and cross examination of the Claimant.

Background.

7. This judgement should be taken to include all the Tribunal's findings of fact contained in the liability hearing judgement.
8. The Tribunal also made further findings of fact relevant to remedy.
9. The relevant facts are as set out, below.

Findings of Fact.

10. The Respondent is a limited company involved in industrial concrete flooring.
11. Up until December 2016 the company had two directors, Mr Bamford, who held 51% of the issued share capital and Mr Jon Wilcox who held 49% of the issued share capital.
12. The Claimant is the wife of Mr Wilcox.
13. Mr Bamford was described as a production director and Mr Wilcox as its Commercial Director.
14. In addition to being officeholders and Company Act directors, they were also employees of the Respondent.
15. In approximately August 2016 the relationship between Mr Wilcox and Mr Bamford started to deteriorate.
16. By December 2016 Mr Wilcox made it clear he wished to leave the Respondent.
17. A post termination agreement ("the Agreement") was drawn up and signed on 23 December 2016 between Mr Wilcox, Mr Bamford and the Respondent.
18. The Agreement (103 to 107) provided that Mr Wilcox would cease to work for the Respondent on 23 December 2016 and then start a period of garden leave which was to terminate when Mr Bamford purchased Mr Wilcox's shares, and in any event, on or before 28 February 2017.
19. The Agreement contained extensive post termination restrictions which limited, inter alia Mr Wilcox competing with the Respondent for a period of 90 days from the settlement date. The settlement date was the date of the expiration of the garden leave.
20. As it transpired payment was made to Mr Wilcox before 28 February 2017 and the garden leave expired on 10 February 2017.
21. The Tribunal found at the liability hearing that the Claimant's principal activities were supporting Mr Wilcox as his personal assistant. For the vast majority of her time she worked from home. She was contracted to work 20 hours per week.
22. As the liability hearing the Tribunal reached the conclusion that the Claimant's command of English and use of English far exceeded that of Mr Wilcox and he therefore depend heavily on the Claimant, when working as the Respondent's Commercial Director, for written documentation. The Tribunal further found that as Mr Wilcox's personal assistant the Claimant researched customers, organised receipts and expenses, helped to manage Mr Wilcox's diary, took messages, printed out documents and drafted and checked emails.

23. Whilst the Tribunal in the liability judgement accepted the Claimant did some work for the Respondent, other than acting as personal assistant to Mr Wilcox, the vast majority of her work was supporting Mr Wilcox.
24. When Mr Wilcox was placed on gardening leave the Claimant accepted that she spent time winding down Mr Wilcox's office and shredding papers. She is not work out of the Respondents premises for her contracted 20 hours per week.
25. The Claimant received a salary of £30,000. This equated to a gross salary of £576.92 per week (£30,000 divided by 52 weeks).
26. The Claimant's net pay per week was £456 per week.
27. "A weeks pay," for the purposes of the Employment Rights Act 1996 ("ERA96") was capped at £479 as at the effective date of termination of the Claimant's employment.
28. The Claimant's salary was extremely generous for the hours worked and duties involved. Mr Bamford's wife received a similar sum.
29. Payment was made by both director's wife's as a method of tax planning.
30. The effective date of termination of the Claimant's employment was 22 February 2017.
31. The Claimant was born on 15 August 1973.
32. The Claimant started work with the Respondent, as an employee on 6 April 2012, although she had supported Mr Wilcox prior to this date with the Respondent for no remuneration pending the business being profitable.
33. On 19 January 2017 the Respondent enrolled the Claimant in the government NEST scheme. The Respondent's contribution was 2% of gross.
34. The Claimant's work history is that she is an intelligent woman and on leaving school went to university and obtained a degree in engineering.
35. Thereafter, in approximately 1997 the Claimant spent about a year servicing sand blasters.
36. Between approximately 1998 and 2006 the Claimant worked as a production manager for a pharmaceutical company.
37. Between about 2007 and 2009 the Claimant undertook administrative work. At approximately the same time the Claimant retrained to become a teacher and obtained Qualified Teacher Status("QTS") in approximately 2009.
38. As part of the Claimant's training to obtain QTS she required placements and obtained placements with East Riding of Yorkshire Council ("the Council")
39. The Claimant continues to work for the Council working part-time, term time after obtaining her QTS.
40. The Claimant was undertaking this work when acting as Mr Wilcox's personal assistant.
41. The Claimant has a medical condition which is controlled and she takes hydrocortisone medication. The condition does not impact on her ability to work.
42. The Claimant has not received any state benefits since the effective date of termination.
43. The Claimant has not attended any interviews for alternative employment.

44. The Claimant has not applied for any of the jobs.
45. The Claimant has not registered with a teaching agency obtain additional work.
46. The Claimant has undertaken occasional extra hours for the Council as a supply teacher since her effective date of termination.
47. The Claimant in cross examination said she didn't want to work full-time as a teacher because she found all the marking and lesson planning and preparation tiring.
48. On 13 March 2017 the Claimant was registered as a company director for Level Best limited. This is a company owned by Mr Wilcox and is in direct competition with the Respondent. This would appear to be in breach of the Agreement. The Claimant accepted that Level Best Limited was a rival to the Respondent.
49. The Claimant alleged she only spent two hours per month working for Mr Wilcox at Level Best Limited.
50. The Tribunal did not accept the Claimant's evidence on this point for a number of reasons.
51. Firstly, the Claimant and her husband are involved in extensive litigation with the Respondent. Eviction proceedings were taken by the late Claimant's father against the Respondent which rented premises. It is clear the Claimant is intensely hostile to the Respondent and Mr Bamford and the Tribunal concluded that Mr Bamford has similar hostility to the Claimant. The Claimant was not a witness that would concede any point that was not to her advantage. Her hostility to the Respondent, was evident in the previous proceedings and before this Tribunal at the remedies hearing.
52. Secondly given the Tribunal's findings of the extensive support Mr Wilcox required for the Claimant it is not credible that the Claimant would only supply 2 hours support a month.
53. Thirdly when Mr Wilcox left the Respondents employment he enjoyed a relatively generous remuneration package. In the Tribunal's judgement the Claimant would have done everything she could to support her husband to ensure his business was a success particularly as it was in competition with the Respondent. It was noticeable that the Claimant worked without pay for her husband until the Respondent was profitable before going on the payroll which adds weight to the Tribunal's conclusion.
54. It follows the Tribunal did not accept the Claimant's account and came to the conclusion she spent far more time working for Level Best Limited than she admitted. This work, coupled with her work for the Council in the Tribunal's judgement explained why the Claimant had taken so little steps to obtain alternative employment. Whilst the burden is on the Respondent to show a failure to mitigate, in this particular case the Tribunal found on looking at all the evidence in its totality that the Respondent had discharged that burden and the Claimant had failed to mitigate her loss.
55. The Tribunal will return to when that failure to mitigate occurred later in this judgement.
56. The Respondent has not recruited a new Commercial Director.
57. The Claimant was adamant there was still a role for her within the Respondent and her job had not ceased. The Tribunal rejected that argument. In essence the

Claimant was Mr Wilcox's personal assistant. When he voluntarily exited the Respondents almost all of the duties of the Claimant disappeared. It was for this reason that the Claimant did not go to the Respondent's office to work after Mr Wilcox began his gardening leave, remaining at home shredding documents and closing down his office.

58. The Claimant contended her role still existed as the Respondent advertised for a "commercial assistant" on 9 January 2018, some 11 months after the Claimant's effective date of termination.
59. A copy of the job advertisement was in the bundle (128). The job was described as requiring someone *"to enhance our commercial team we require a flexible and motivated salesperson. This person will be ambitious personable and capable of dealing with customers..."*. The Tribunal came to the conclusion this was a sales representative post. It was not the Claimant's post as personal assistant to the Commercial Director.
60. The Claimant did not identify any specific vacancies she was aware of which she claimed she could fulfil within the Respondents organisation.
61. The Claimant contended that one of her financial losses as a result of her unfair dismissal was the cost of Bupa membership. The Tribunal does not accept that contention. Bupa health cover was provided to Mr Wilcox as is clear from the bundle (100 B). Mr Wilcox was described as the *"main member name"*. What Mr Wilcox has done is he has added his family to the policy. When Mr Wilcox voluntarily left the Respondents his membership of the Bupa scheme ended as did that of his family. There was no causal connection between the Claimant's unfair dismissal and the termination of the Bupa cover for her.

Submissions.

Mr Morton.

62. Mr Morton did not dispute that the Claimant was entitled to a basic award which he calculated to be £2155.50.
63. Nor did Mr Morton dispute the Claimant was entitled to a sum for loss of statutory rights which he agreed in the sum of £500 as requested by the Claimant.
64. Mr Morton made reference to Section 123 ERA 96 and stressed the compensation had to be just and equitable. He submitted that in these unique circumstances the Claimant's employment was effectively linked to that of her husband.
65. Mr Wilcox had voluntarily chosen to leave the Respondent and his job of Commercial Director had not been replaced so the post of PA to the Commercial Director had also disappeared.
66. He invited the Tribunal to limit any compensation. Mr Morton argued in the alternative that the Claimant would inevitably have been dismissed once the Respondent discovered she was a director of Level Best Limited, a company operating in direct rivalry to that of the Respondent and in breach of the Agreement. No employer could have a person having access to confidential information in such circumstances.

Mrs Wilcox.

67. The Claimant submitted that her employment was not tied to that of her husband. She claimed there was no reason for the Respondent to fairly dismiss her.
68. The Claimant said there was still work to be done within the commercial department and she should have been given a job.
69. If there was no job then she had transferable skills and could have been trained, for example, to do health and safety work.
70. The Claimant said she was not working Level Best limited. She said she looked extensively for alternative employment but could not work full-time in teaching as it was too tiring.

Conclusion.

71. The Tribunal reminded itself of the relevant provisions of the ERA 96.
72. Section 119 of the ERA 96 sets out the formula to be utilised in calculating a basic award.
73. It was not contended the basic award should be subject to any reduction under section 122 ERA 96.
74. Turning to the compensatory award the Tribunal had regard to section 123 (1) ERA96 which reads: –

“Subject to the provisions of this section and section 124, 124A and 126, the amount of the compensatory award shall be such sum as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer”

Section 123(3) ERA96 states: –

“The loss referred to in subsection (i) shall be taken to include in respect of any loss of

(a) any entitlement or potential entitlement for payment on account of dismissal by reason of redundancy... or

(b) any expectation of such a payment.”

Section 123(4) ERA96 reads: –

“in ascertaining the loss referred to in subsection (i) the Tribunal shall apply the same rule concerning a duty of a person to mitigate his loss as a point damages recoverable under the common law of England and Wales...”

75. The Tribunal reminded itself of the guidance given by Elias J. (as he then was) in decision of **Software 2000 Ltd -v-Andrews 2007 IRLR 568** when he said: –

“The following principles emerge from these cases:

(1) in setting compensation, the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In a normal case that requires it to assess how long the employee would have been employed but for the dismissal.

(2) If the employer seeks to content that the employee would or might have ceased to be employed in any event had fair procedures being followed, or

alternatively would not have continued in the employment indefinitely, it is for him to have used any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself (he might, for example, had given evidence that he had intended to retire in the near future).

- (3) *However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the Tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can be properly made*
- (4) *Whether that is the position is a matter of impression and judgement for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might be; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence....”*

76. The Tribunal applied the above principles.

77. The Tribunal started with the basic award.

78. The Claimant was aged 43 as at the effective date of termination.

79. The Claimant had four complete years of service as at the effective date of termination. The multiplier is 5 given the Claimant's age.

80. Her basic award is therefore $5 \times \text{£}479$ (capped) = $\text{£}2395$

81. The Tribunal then turned to the issue of the compensatory award which is divided into two separate concepts, past and future loss.

82. Having weighed up all the evidence carefully the Tribunal came to the conclusion that on the evidence before it the Claimant's post was linked to the employment of Mr Wilcox, the Respondents then Commercial Director. The vast majority of the Claimant's time was spent supporting Mr Wilcox. When his employment ended there was a substantial diminution in the Claimant's duties. Mr Wilcox has not been replaced. There is no Commercial Director. There is no PA to a Commercial Director.

83. Had the Claimant not been unfairly dismissed on 22 February 2017 the Tribunal finds the Claimant would have been fairly dismissed shortly after for one of two possible reasons.

84. Firstly, the Claimant's post was redundant. The Tribunal did not accept the Claimant's argument that she should have been pooled with other administrative staff. The Claimant was not part of the administrative team. She had a distinct role which was stand-alone as personal assistant to the Commercial Director. She did not work in the office. She worked from home. She did not do general administrative work. She concentrated on working as a PA to her husband.

85. The Claimant did not identify any other vacancies that existed at the effective date of termination or since that the Tribunal considered a reasonable employer would have had to offer to the Claimant.
86. Whilst the Claimant contended she could have done other jobs for the Respondent such as health and safety following suitable training, the Tribunal did not consider that the Respondent had any duty to invent a job for the Claimant.
87. The Claimant also contended she could have done the work undertaken by external agents, IT Express Ltd with training. It is noticeable the annual bill from IT Express Ltd to the Respondent was only £1338 per year (124). This argument is rejected.
88. The Tribunal is satisfied that this Respondent, soon after 22 February, would have commenced discussions with the Claimant with a view to terminating her employment on the basis of the cessation or diminution of her duties such as to amount to redundancy.
89. As the Tribunal has already observed no reasonable employer would have pooled and no reasonable employer would have been required to pool the Claimant.
90. There were no suitable vacancies and the Tribunal finds the Respondent was not under a duty to create a job for the Claimant.
91. A reasonable period of consultation would have been required and a fair process needed to have been undertaken. The Tribunal has come to the conclusion that this process would have been undertaken in no more than four weeks at the most.
92. The Tribunal is mindful that it is a bold decision to conclude that the Claimant's employment would have fairly ended within four weeks.
93. In many cases where there is a risk of a fair dismissal the appropriate approach for a Tribunal is to seek to assess that chance in percentage terms. Here however this is one of those relatively rare cases where the Tribunal has sufficient information adduced by the respondent to have clear evidence to allow it to make an assessment as to when the Claimants employment would have ended.
94. It follows, therefore that by way of a compensatory award the Claimant is entitled to 4 weeks net pay together with a statutory redundancy payment.
95. Four weeks net pay amounts to £1824 ($£456 \times 4$).
96. The Tribunal has added to this figure the sum of £46.15 amounting to 2% of the claimant's gross salary for four weeks to cover the Respondent's pension contribution ($£11.53 \times 4$).
97. A statutory redundancy payment amounts to £2395. The Claimant would have been entitled to this had she been fairly dismissed as the Tribunal finds she would have.
98. The Claimant is further entitled to a sum for loss of statutory rights which are agreed in the sum of £500
99. The total sum therefore amounts to £7125.53.
100. The Claimant did not receive any benefits to which the Recoupment Regulations apply.
101. The Tribunal did mention that the Claimant had, in its judgement, failed to mitigate her loss.

102. The Tribunal has not adjusted any of the above figures to take into account failure to mitigate because the Tribunal came to the conclusion that the failure to mitigate would only have occurred after the period of the calculation of the above loss.
103. It would not be unreasonable for the Claimant to take a few weeks to start to make enquiries as regards the job market and to see what further hours were obtainable from the Council before there was a failure to mitigate. It would not be just and equitable to find a failure to mitigate within 4 weeks of the effective date of termination.
104. If the Tribunal is wrong on its conclusion that the Claimant would have been fairly dismissed by reason of redundancy the Tribunal came to the conclusion that an adjustment for a failure to mitigate would only be appropriate three months after the effective date of termination.
105. For completeness the Tribunal should also address the argument Mr Morton that the Claimant would have been dismissed in any event once it was discovered she was a director of Level Best Limited. The Tribunal accepted the validity of that argument. However, the Tribunal came to the conclusion that the Respondent would have started proceedings to fairly dismissed the Claimant by reason of redundancy and would not then, once it discovered the Claimant's role in Level Best Limited have started dismissal proceedings for some other substantial reason. If the Respondent had the Tribunal does accept the Claimant would have been fairly dismissed.
106. Given, however, the Tribunal's primary finding no further discussion on this argument is required.

Employment Judge T R Smith

Date: 26 February 2018