EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss A Griffiths	**AND**	Dimax Services Limited

HELD AT Cardiff **ON** 29 January 2018

EMPLOYMENT JUDGE NW Beard (sitting alone)

Representation

For the Claimant: Ms K Devonald-Davies (Solicitor)

For the Respondent: Mr R Anderson (Consultant)

JUDGMENT

The judgment of the tribunal is that:-

1. The claimant's claim of unfair dismissal within the meaning of Sections 95(1)(c) and 98(4) of the Employment Rights Act 1996 conceded by the respondent.
2. The claimant's claim for an unlawful deduction of wages including holiday pay is well founded.
3. The claimant's claim of breach of contract in respect of notice pay is not well founded and is dismissed.
4. The respondent is ordered to pay to the claimant the sum of £12,480.42 in compensation calculated as set out below.
5. The claimant's application for costs was dismissed.

AWARD

Basic Award	
£450 x 1.5 weeks	£ 2,764.56
Compensatory Award	

Loss of Statutory Rights	£ 350.00
Unlawful Deduction of Wages During employment: Holiday Pay (agreed by parties)	 £7,130.00 £ 746.94
Loss of earnings due to no redundancy process	£1,488.92
Total Award	**£12,480.42**

REASONS

Preliminaries

1. The claimant claims constructive unfair dismissal, a redundancy payment and unlawful deduction of wages along with a breach of contract claim. The respondent conceded liability in the claimant's unfair dismissal claim but still disputed the notice pay claim and unlawful deductions claim.

2. I raised the issue of the notice pay claim at the outset with Mr Anderson asking how, if a breach of contract was admitted for the purposes of the constructive dismissal claim, the respondent intended to defend the notice pay claim.
   2.1. Mr Anderson then informed me that the respondent disputed the terms of the claimant's contract arguing that these had been changed in June of 2015 from those which the claimant relied upon.
   2.2. Similarly, the claimant's claim for unpaid wages and holiday pay were disputed on the basis that they were calculated using the wrong contractual terms.
   2.3. The respondent also contended that the respondent could not afford to retain the claimant at the salary level she was earning at the time of her resignation.
   2.4. On that basis the issues between the parties revolved around the contract issue and whether, in terms of ongoing loss, the respondent was correct in arguing that it could not maintain that salary level and if so whether claimant would have remained in the respondent's employment at the lower salary level. I considered that resolving those issues would allow the parties to consider the schedule of loss and whether there were any remaining disputes for me to resolve.

3. The claimant was represented by Ms Devonald-Davies the respondent by Mr Anderson. I was provided with a bundle of documents running to 168 pages. I heard oral evidence from the claimant on her own behalf and from Mr David Thomas, who owns the respondent business, on behalf of the respondent.

The Facts

4. The claimant commenced employment with a predecessor business of the respondent in April 2010 as a sports therapist. It is common ground that the claimant's employment transferred to the respondent pursuant to the TUPE regulations in June of 2015. The claimant was constructively dismissed on 22 August 2016.

5. Mr Thomas told me that the claimant's original contract of employment was on a zero hours basis. The claimant said that this was not the case as she had worked for a considerable period working more than a 37 hour week which she states is the full time contract hours to which she was entitled.
   5.1. Mr Thomas stated that the claimant had worked additional hours after for two years because he had been suspended and she was covering his work. He indicated that prior to this two-year period the claimant had only worked Monday to Thursday.
   5.2. The claimant said that she was not aware of any zero hours term and had worked consistently for many years in excess of 37 hours and not only after Mr Thomas had been suspended.
   5.3. There is no documentary evidence about the claimant's contract of employment as it existed when she commenced employment in 2010.
   5.4. There is no real factual dispute other than the extent of the claimant's hours of work increasing during Mr Thomas' absence during suspension. On both accounts the claimant was working regularly and was paid for doing so.
   5.5. In my judgment the claimant's evidence is to be preferred. If there were a zero hours contract in place it is most likely that this would be set out in a document. Both witnesses' evidence points to the claimant having consistent and regular working hours. I consider the claimant is better placed to state what those hours were than Mr Thomas, given that she worked them and he has provided no documentary evidence to contradict her account.
   5.6. On that basis I consider that the claimant was employed under a full-time contract working an average of 52 hours per week.

6. The respondent contends that the claimant agreed to a different contract in June of 2015. It is to be noted that this contract was to be put in place because of the transfer of undertaking.
   6.1. Mr Thomas told me that although there was a TUPE situation it was his understanding that the respondent was entitled to change terms and conditions of employment if those changes were more advantageous to the employee.
   6.2. His position was that the terms and conditions offered were of 37 hours per week and therefore more advantageous than the previous zero hours term. He did not explain how the reduction in the hourly rate was considered more advantageous to the claimant.
   6.3. Mr Thomas understood that the claimant was invited to a meeting with David Williams to discuss new contractual terms and that the

claimant had agreed to those terms on 14 June 2015. He accepted that the claimant had not signed the written contractual documentation.

6.4. The claimant denied that she had agreed to the terms in 2015 and pointed to the fact that she had only received a copy of the proposed contract in mid July 2016 after a meeting in June 2016. The claimant raised a grievance about all these matters.

6.5. I prefer the claimant's evidence. There is no evidence that the claimant signed any document. There is no evidence in the form of notes that the claimant agreed to a change. There is no certainty in the terms that were said to be agreed by the claimant in June 2015. In my judgment the claimant did not agree to any change of her terms of employment in 2015 or in the consultation during 2016.

7. Mr Thomas told me that the respondent was in financial difficulty in paying salary levels. This is supported by the process adopted by the respondent of attempting to consult and agree new terms with the claimant and others. The claimant contends that Mr Thomas had an ulterior motive in reducing the claimant's salary in that he was attempting to ensure her resignation because he did not like the claimant.

7.1. In August 2016 the respondent was intending to reduce the claimant's working hours to seventeen per week. The respondent also intended to reduce the hourly rate from £8.50 per hour to £7.20 per hour. This was to be done by dismissing the claimant from her existing contract terms.

7.2. The respondent undertook a general consultation process with staff in 2016 attempting to agree lower salaries.

7.2.1. At a meeting on 2 May 2016 the claimant was told that the respondent was experiencing financial difficulties and that contracts were under review and that there might be a redundancy.

7.2.2. At a further meeting on 14 June 2016 the claimant was told that her contract, on the existing terms, was being terminated with immediate effect. The claimant made clear to the respondent that notice was required in order to terminate the contract. At that meeting no information was given to the claimant about the proposed new terms.

7.2.3. On the 13 July 2016 the claimant received a letter from the respondent setting out the proposed new terms for her contract. This letter indicated that her dismissal would take place on 22 August 2016.

7.2.4. The claimant made clear her unwillingness to accept this change in terms raising a grievance about this and all earlier matters.

7.2.5. The claimant received no response to her grievance and as a result did not attend work after the 22 August 2017.

7.3. The claimant's evidence was that another member of staff refused to agree to the contracts and resigned.

7.4. The respondent reduced the claimant's salary without notice (hence its acceptance that it had breached the claimant's contract).

7.5. The consultations process was conducted on behalf of the respondent by Mr Williams who was an HR advisor.

7.6. In my judgment this was not an action directed only at the claimant but was a general attempt to reduce the costs of employees to the business.

7.7. In my judgment the claimant was and would not be prepared to work for the respondent where her terms were altered so radically under any circumstances.

7.8. In my judgment had the respondent given the correct notice for termination of the claimant's original terms that would have so radically changed the contract as to be a different employment.

7.9. However, in the circumstances of this case, had that happened that would have amounted to a dismissal for some other substantial reason, a potentially fair reason for dismissal. The reason being that the respondent could no longer, economically, afford to operate with the claimant being remunerated at the same rate.

7.10. Further to this was the intent of Mr Thomas to take up some of the hours where the claimant would work. This was a reduction in the claimant's hours to such a significant extent that the dismissal would fall into the category of a redundancy.

7.11. This has led me to the conclusion that it was the financial circumstances that led to the claimant's dismissal.

7.12. On that basis I concluded that, on the balance of probabilities, had the respondent engaged in a fair process the claimant would have been dismissed in any event. There was no prospect of the claimant remaining employed when her salary was reduced to such a significant extent.

The Law

8. The tribunal is required to consider the question of the claimant's loss, under section 123 of the employment Rights Act 1996 which provides:

> *(1) Subject to the provisions of this section and sections 124[, 124A and 126], the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*

9. In ***Scope v. Thornett [2007] IRLR 155 the Court of Appeal*** reminds the tribunal of its need to engage in a certain amount of speculation in the appropriate circumstances, in the words of Pill LJ at paragraph 34:

> *"The employment tribunal's task, when deciding what compensation is just and equitable for future loss of earnings will almost inevitably involve a*

> *consideration of uncertainties. There may be cases in which evidence to the contrary is so sparse that a tribunal should approach the question on the basis that loss of earnings in the employment would have continued indefinitely but, where there is evidence that it may not have been so, that evidence must be taken into account."*

And at paragraph 36

> *"The EAT appear to regard the presence of a need to speculate as disqualifying an employment tribunal from carrying out its statutory duty to assess what is just and equitable by way of compensatory award. Any assessment of a future loss, including one that the employment will continue indefinitely, is by way of prediction and inevitably involves a speculative element. Judges and tribunals are very familiar with making predictions based on the evidence they have heard. The tribunal's statutory duty may involve making such predictions and tribunals cannot be expected, or even allowed, to opt out of that duty because their task is a difficult one and may involve speculation."*

10. Therefore, as Elias P set out in ***Software 2000 Ltd v Andrews & Ors [2007] UKEAT 0533_06_2601***:

> *In assessing 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 the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.*

Analysis

11. The parties agreed that I should set out the principles upon which compensation should be calculated at which point they would agree the relevant figures and would provide them to me and any other matters remaining in dispute could then be resolved by me.

12. The respondent contended that the claimant was employed on different terms to those put forward by the claimant, having agreed a variation in 2015. This was the basis on which it opposed all of the other claims than unfair dismissal. In other words the respondent had conceded liability if I were to decide that there was no variation. On my findings there was no such agreement in 2015. I concluded that there could be no implied agreement to

vary the terms for two reasons: firstly, the claimant was protesting this change throughout and secondly the variation in terms was imposed in breach of the TUPE 2006 regulations and therefore without express agreement such changes would be unlawful. There having been no variation then the claimant was entitled to compensation on the basis of the terms which she advanced as applicable. I therefore uphold the claimant's claims for holiday pay and unlawful deduction of wages to be calculated using those terms. In respect of the claimant's claim for breach of contract notice pay I dismiss the claim because, although there was a breach of contract that results in the claimant's claim of unfair dismissal being upheld; any remedy is met within the compensation for that claim.

13. In respect of the claimant's claim for unfair dismissal the major question for me to resolve was the appropriate period for which the respondent should be responsible for compensating the claimant. In doing so I am required to consider the reality of the situation.
    13.1. The claimant would not have been prepared to work on the new terms offered.
    13.2. The respondent was dealing with financial circumstances which it considered meant it was necessary to reduce the contractual terms to those offered to the claimant.
    13.3. In my judgment the claimant would not have worked beyond the appropriate period of notice in those circumstances.
    13.4. The claimant received actual notice on 13 July 2016 and was entitled to 6 weeks' notice pursuant to section 86 of the Employment Rights Act 1996.
    13.5. In my judgment consultation could not properly take place until at least some of the suggested terms were put before the claimant to consider and offer a meaningful response to. This was not done until 13 July 2016.
    13.6. In my judgment consultation on the basis of those terms would not have taken more than 4 weeks, in which case notice would have been given to the claimant on 11 August 2016.
    13.7. In my judgement that means that the claimant received only two weeks' notice and is entitled to be compensated in respect of losses for a further four weeks.

14. In respect of holiday pay the parties agreed the specific figure. On the basis of my findings the parties agreed all other figures calculated and set out in the table above.

15. The claimant made an application for costs. The application was made on the grounds of unreasonable conduct. The argument advanced was that there had been a previous listing of the hearing and the respondent had sought an adjournment at the last moment. The file revealed that the adjournment had been granted on the grounds that a member of the respondent's witness's

family had been taken seriously ill in the night before the hearing. Enquiries were made by the clerk on the day which demonstrated that there was indeed a patient at hospital as described by the respondent in the adjournment application. The adjournment was granted on that basis. In those circumstances there was no unreasonable conduct demonstrated and the threshold for making a costs award was not reached. Reference was made to seeking a preparation time award for the claimant's work in preparing proceedings equally the threshold was not reached. In any event it is not permitted to seek a preparation time order and a costs order in the same proceedings.

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Employment Judge Beard
Dated: 20 March 2018

Judgment sent to Parties on
3 April 2018

For the Tribunal Office