



# EMPLOYMENT TRIBUNALS

## BETWEEN

**Claimants**  
MS D FUDALA  
MRS I FUDALA  
MS B KOWALCZYK  
MS A WOZNICKA

**Respondents**  
AND (1) SMACZEK (WREXHAM) LTD  
(2) ZABKA WREXHAM LTD

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: MOLD  
COUNTY COURT

ON:

4<sup>TH</sup> SEPTEMBER 2018

EMPLOYMENT JUDGE R F POWELL

APPEARANCES: -

FOR THE CLAIMANTS:-

Ms D Fudala, in person

FOR THE FIRST  
RESPONDENT: -

Not represented and did not attend

FOR THE SECOND  
RESPONDENT: -

Mr M Cameron, consultant

## JUDGMENT

The Judgment of the Tribunal is:

1. The respondents are ordered to pay compensation to each of the six members of staff employed the first respondent on the date of their transfer of employment to the second respondent in the sum of thirteen weeks gross pay.
2. The second respondent is ordered to pay to Ms D Fudala compensation for the unlawful deduction of two days pay in the gross sum of £166.00.

3. The second respondent is ordered to pay compensation to the claimants in respect of the failure to provide written terms of their employment. The compensation for each claimant being:
  - a. Mrs I Fudala: £770.40
  - a. Mis Woznicka: £961.74
  - b. Ms Kowalczyk: £696.90
  - c. Ms D Fudala: £1,956.00
  
4. The second respondent is ordered to pay to compensation in respect of unpaid accrued annual leave to:
  - a. Ms Kowalczyk in the total gross sum of £3,126.20
  - b. Ms Woznicka in the total gross sum of £5,903.37
  
5. The second respondent is ordered to pay to the following claimants compensation in respect of their unfair dismissal:

Basic Awards:

- a. Ms D Fudala: £1,467.00
- b. Mrs I Fudala: £1,155.00
- c. Ms Woznicka: £961.74

6. Compensatory Awards:

- a. Ms D Fudala: £5,148.70 and £350 for the loss of statutory rights.
- b. Mrs I Fudala: £2,773.07 and £350 for the loss of statutory rights.
- c. Ms Woznicka: £8,433.52 and £350 for the loss of statutory rights.

## REASONS

2. This hearing concerned the various remedies sought by the four claimants in respect of a number of different claims. I heard evidence from all of the claimants and from Mr Muradi on behalf of the second respondent. All of the witnesses were cross examined. There were few points in evidence which were disputed. The contentious issue was the degree to which the claimants had made reasonable efforts to mitigate their loss.
  
3. Subsequent to the hearing, on my request, Ms Fudala sent copies of pertinent P60 and P45 documents for three of the claimants in respect of their earnings up to the date of this hearing. The respondents were allowed an opportunity to make written submissions but, on inspection of the correspondence on the Tribunal's file, it appears that opportunity was not taken.
  
4. I adopted the approach of dealing with each type of claim discretely in order that the claimants could more easily focus on one topic at a time. This approach was applied to the parties' evidence and their submissions.

5. So far as was practical, in a hearing which lasted one day I tried to explain the necessary concepts and considerations prior to the claimants' evidence and to encourage some structure in their submissions by reminding Ms Fudala of the pertinent issues as we progressed.
6. The following reasons apply the same structure.

**Breach of Regulations 13, 13A and 15 of the Transfer of Undertakings (Protection of Employment) Regulations 2006**

7. On this issue there was no additional oral or documentary evidence adduced beyond that which was before me at the liability hearing in June 2018. The findings I made at paragraphs 46-48 and 101 to 104 of the judgment and reasons on liability remain pertinent. I have also reminded myself that Ms Fudala's evidence included her statement that the first respondent, when asked in December 2016 if he was selling the business, denied that was his intention.
8. Mrs Fudala's submission was to the point; there had been no effort to consult and I should make an order for maximum award of 13 weeks gross pay. Mr Cameron pointed out the degree to which the first respondent was culpable for his failure to provide information to the claimants and, in respect of the second respondent that, but for the claimants' resignations on the 17<sup>th</sup> January 2017, consultation would have occurred shortly after the transfer.
9. I note that I am concerned with the respondents' duty of consultation before the transfer. I also note that Mr Muradi, owner of the second respondent, visited the shop around the 10<sup>th</sup> January 2017 without seeking to consult with the staff or obtain employee information. I further note that Mr Muradi had bought a retail business before and, in cross examination in June, stated that he was aware of the TUPE Regulations at the time he bought the first respondent's business.
10. Based on Ms Fudala's evidence, the general lack of documentation and the failure to provide the second respondent with information I have reached the conclusion that the conduct of the first respondent was not inadvertent; it was a deliberate and complete failure to consult. It is aggravated by the false statement made to Ms Fudala in December 2016. I have found no mitigating circumstance.
11. To some extent the second respondent is a victim of the first respondent's conduct but I have concluded that Mr Muradi was sufficiently experienced and aware of the second respondent's duty to consult that his failure to check what the first respondent had done, to require the first respondent to supply employee information and, when none was provided, his failure to discuss the impending transfer with the employees on the 10<sup>th</sup> January 2017 was inexcusable.
12. I have taken into account the following matters; the award I can make is one which is just and equitable in all the circumstances, it is punitive in nature. The exercise of my discretion should reflect that there is a broad range of possible breaches of the regulation; from the inadvertent and merely technical to the conscious and wholesale failure. I have considered

the guidance in *Susie Radin Limited v GMB & Others* [2004] ICR 893, *Todd v Strain & Others* [2011] IRLR 11 and *London Borough of Barnet v Unison & Others* UKEAT/0191/13.

13. In my judgment the failure was conscious, complete and unmitigated. I therefore award the affected employees thirteen weeks gross pay. For clarity there were six affected employees who are the four claimants and their two colleagues (referred to as Magdalena and Gosia in the course of the evidence) working at the respondents' premises on the 17<sup>th</sup> January 2017.

#### **Ms D Fudala's claim for two days unpaid wages**

14. Ms Fudala claimed £166.00 gross for unpaid wages and that sum was not disputed by the respondents. I therefore make an order in her favour in that sum.

#### **The claims of failure to provide written particulars of employment contrary to section 1 of the Employment Rights Act 1996 and section 38 of the Employment Act 2002**

15. At the date on which these proceedings were presented the statutory cap on a week's pay, calculated in accordance with sections 220 to 229 of the ERA 1996, was £489.00 gross.
16. In the case of three of the claimants I consider it just and equitable to award each of them two weeks' pay. The individual awards, based on their respective gross weekly wage, are as follows:
- a. Mrs I Fudala: £770.40
  - b. Mis Woznicka: £961.74
  - c. Ms Kowalczyk: £696.90
17. In Ms D Fudala's case she was subject to the same failure on two occasions; her initial employment and her promotion to manager. I consider the repeated failure to be a circumstance which aggravates the first respondent's default and I therefore award the higher sum of four weeks gross pay; £1,956.00.

#### **The Claims for unpaid annual leave**

18. The circumstances of each claimant are quite different and so my conclusion for each person is addressed separately following a brief discussion of the relevant findings common to all the claimants.
19. Based on the first respondent's accounting documents, the claimants' assumption that their holiday year commenced in April is correct. On a review of the available the pay slips I have concluded the precise date was 1<sup>st</sup> April.
20. Each employee had an entitlement to 28 days holiday per full year of employment.
21. Each claimant confirmed in their evidence that they had taken at least two days holiday each year because the shop was closed on Christmas and New Year's Day. This left a balance of 26 days which were available to be taken during the relevant year.
22. Less the two fixed days of holiday, the full year entitlement for each claimant can be expressed as 5.2 weeks.
23. The claimants' respective gross hourly rate of pay was:

- a. Ms D Fudala: £8.84
- b. Ms A Woznicka: £8.01
- c. Mrs I Fudala: £7.70
- d. Ms B Kowalczyk: £7.70

24. As all the claimants' holiday year commenced on the 1<sup>st</sup> April 2016, they all resigned on the 17<sup>th</sup> January 2017 and they all had taken the two fixed holiday dates, subject to any individual holiday's taken, a common approach to the calculation of their entitlement can be adopted for this year.

25. Applying the statutory formula set out in Regulation 14(3)(b), the claimants' respective (giving account for their differing average hours of weekly work) proportionate statutory entitlement was:

*Ms Kowalczyk*

26. Ms Kowalczyk worked 50 hours a week and was entitled to 224 hours of paid annual leave for the past year 2016/17. From that total a deduction 16 hours (for the two fixed days holiday) must be made: a total of 208 hours of accrued annual leave.

27. Ms Kowalczyk's gross hourly pay was £7.70. She was therefore entitled to compensation in the sum of £1601.60 for the Holiday Year 2016/2017.

28. With respect to Ms Kowalczyk's claim for the Holiday Year 2015/2016, I accept the formula adopted in her Schedule of loss but must deduct the two days of fixed holiday she had taken, which leads to a corrected figure of 198 hours of annual leave. Ms Kowalczyk's gross hourly pay was £7.70. She is therefore entitled to compensation in the sum of £1,524.60.

*Ms Woznicka*

29. Ms Woznicka gave evidence that she had not taken any holiday because she was unaware of her entitlement and had been told by the first respondent that annual leave was unpaid.

30. As with her colleagues, at the remedy hearing, she confirmed she had received the two days fixed holiday each year. There has been no dispute of the content of the Ms Woznicka's schedule of loss and I accept her position. Ms Woznicka's gross rate of pay was £8.01 per hour.

31. For the year 2014/15 Ms Woznicka's entitlement was 179 hours. The value of her untaken leave is £1,433.79.

32. For the year 2015/16 Ms Woznicka's entitlement was 316 hours. The value of her untaken leave was £2,531.16.

33. For the year 2016/17 Ms Woznicka's entitlement was 242 hours. The value of her untaken leave was £1,938.42.

*Ms D Fudala & Mrs I Fudala*

34. Ms D Fudala has made claims for unpaid holiday pay which she claims had accumulated throughout her employment. As noted in the liability judgment her bank account details from 5<sup>th</sup> January 2015 to 22<sup>nd</sup> December 2016 demonstrate that the payments which she associated with her salary amounted to “full pay” for the periods of annual leave.
35. In evidence before me she confirmed that she had taken:
- a. 14 days holiday in 2015 (late April and September) and;
  - b. 21 days in 2016 (late April and September).
  - c. In each year she had also taken the two fixed days referred to above.
36. Mrs I Fudala confirmed that she had also taken the same holiday leave as her daughter in the year 2016/17. Again, her bank details lead me to the conclusion she had received a full pay during the weeks of annual leave.
37. I note that the evidence concerning the Christmas and New years’ day holiday was not before me at the date of the liability judgment.
38. Thus, I have concluded that both Ms and Mrs Fudala took twenty-three days paid annual leave in the eight and a half months between 1<sup>st</sup> April 2016 and 17<sup>th</sup> January 2017.
39. I have reached the conclusion that, by reason of the new evidence concerning the two fixed days holiday, Ms and Mrs Fudala received their full entitlement to holiday pay in for the holiday year commencing on 1<sup>st</sup> April 2016. I make no award in respect of the Holiday year 2016/17 for either claimant.
40. A complaint under the Regulation 30(2)(a) of Working Time Regulations 1998 must be presented to the Employment Tribunal within three months of the date on which the claimant alleges she should have been allowed to exercise the specific right under the regulations. If a claim is presented after that period the Employment Tribunal “shall not consider” it unless the tribunal reaches the conclusion that timely presentation was not reasonably practicable and it was then presented as soon as practicable.
41. In the case of Ms D Fudala, who managed the respondent’s staff, calculated and paid the staff wages to herself and the other members of staff and took 23 days paid holiday after the 1<sup>st</sup> April 2016, it is clear that her claim for unpaid holiday prior 1<sup>st</sup> April 2016, presented in 2017 was considerably out of time.
42. In the case of Mrs, I Fudala, she was aware of her right to take holiday and she had, with her daughter taken paid leave in the financial years 2015/16 and 2016/17. Because she also took 23 days paid leave after the 1<sup>st</sup> April 2016, her claim is also “out of time”.
43. In my judgment both knew of their rights, both had exercised them fully in 2016/17. As Ms D Fudala who managed the work of all the staff and made holiday payments for herself and her mother I am not persuaded that there was any reason why her claim in respect of the financial year 2015/16 could not have been brought earlier.

44. Mrs I Fudala was working, residing and holidaying with her daughter and clearly knew she had the right to paid holiday; she exercised that right in two “holiday years”. In my judgment Mrs Fudala, through her own conduct and the conduct of her daughter, as her manager, was sufficiently aware of her rights to have presented a claim for untaken holiday pay 2015/2016 within three months of 1<sup>st</sup> April 2016.
45. By reason of the above I make no awards to Ms D Fudala or Mrs I Fudala in respect of their claims for holiday pay.

**Unfair dismissal: the basic award**

46. The respondent agreed the sums set out in each of the three successful claimants’ schedule of loss. Accordingly, the second respondent is ordered to pay to the claimants the following basic awards:

47. Ms D Fudala: £1,467.00  
48. Mrs I Fudala: £1,155.00  
49. Ms Woznicka: £961.74

**Unfair Dismissal Compensatory loss**

50. Mr Muradi gave evidence, which I accept that, after the 17<sup>th</sup> January 2017 he employed six members of staff, three of whom work between 40 and 48 hours a week and three part time staff who each work 16 hours a week. Taking an average of those figures the staff hours equate to a cumulative 132 hours for the full-time staff and 48 hours for the part time staff. In total 170 hours on an average week.
51. Under the first respondent’s regime the four claimants’ hours amounted to 230 hours per week, their two colleagues, according to Rana & Co’s spread sheet, were each working “30+” hours a week. That is a weekly minimum total of 290 hours. At that time Ms Fudala was the person managing the staffing and the rotas.
52. The total hours (and its associated wage cost) seems extraordinary for a delicatessen in a moderate sized town and I find Mr Muradi’s evidence, that on the 17<sup>th</sup> January 2017 he told the staff that their hours would reduce, to be consistent with the number of hours his staff work now. That is particularly so since he has become the active manager of the shop; taking on the duties previously undertaken by Ms D Fudala.
53. On the balance of probabilities, I consider it highly likely that Mr Muradi, for reasons unrelated to the transfer, would have reduced the number of hours staff worked to a level where no member of staff was required to work in excess of 48 hours a week and, if all six of the staff employed on 17 January 2017 had wanted to work full time, their average weekly hours would have been closer to 37/38 hours per week.
54. I am also satisfied that the second respondent would, when faced with a choice of offering hours to Mrs D Fudala (at an hourly rate of £8.80) or Ms Kowalczyk and Mrs I Fudala (at an hourly rate of £7.70) would have chosen the employees who were on the lowest hourly pay.
55. I have also concluded that a reasonable employer would have consulted with its staff appropriately before reducing their hours and implemented changes after a months’ notice.

56. Had the claimants remained in employment I am of the view their weekly wage would necessarily have decreased according to the decreasing number of hours of work needed under Mr Muradi's management.
57. I also find that he currently pays his staff, including those who remained working with him after the transfer, the national minimum wage. As the minimum wage increased Mr Muradi did not maintain the differentials in pay evident under the first respondent's regime.
58. In my judgment, by late February of 2017, the claimants, had they elected to remain working with the respondent, would have been earning a weekly gross wage in the region of:
- a. Ms D Fudala: £335.92
  - b. Ms Woznicka: £304.38
  - c. Mrs I Fudala: £292.60

*The claimants' periods of unemployment and mitigation of loss to the date of this hearing*

59. **Ms D Fudala** was unemployed between the 18<sup>th</sup> January and the 13<sup>th</sup> April 2017.
60. On the 14<sup>th</sup> April she was employed in a bakery working around 40 hours a week. She gave evidence that she increased her hours to 48 a week and worked 12-hour shifts. Ms D Fudala produced a P45 for her work at the bakery which recorded that she earned £3,178.81 gross in ten weeks of her employment there.
61. She left that job on the 20<sup>th</sup> June 2017 for one which provided fewer hours; 37.5 hours a week at £7.93 an hour. Compared to her hourly rate with the second respondent (she was earning £8.84 per hour gross) in her new role she earned 89 pence less per hour. That is £33.75 less per week gross. To match her old income the claimant would need to work an additional 4.25 hours a week; just under 42 hours a week.
62. Prior to her dismissal she had worked 70 hours a week an average of around ten hours every day. She also worked up to 48 hours a week in the bakery. She now chooses not to work weekends and, on average, works a little over half the number of hours she did for the respondents.
63. Given Ms Fudala's history of management of staff (rota's holidays and wages), managing and ordering stock and the general management of a shop on a seven day a week basis I am persuaded that Ms Fudala could have obtained a more senior role and/ or a modest increase in her weekly hours in her current employment if she had wished to do so. She had worked between 40 and 48 hours a week in her first role following her dismissal.
64. Taking the above points together, the respondent has proven on the balance of probabilities. that Ms D Fudala has not made reasonable efforts to mitigate her loss from the time she decided to no longer make herself available to work weekends (June 2017) and that she would have been capable of achieving a role with increased responsibility and pay before the date of this hearing.



65. Between the 17<sup>th</sup> January and the 20<sup>th</sup> June 2017, but for her dismissal, Ms D Fudala would have earned the following amount £8,327.50. In that period, she mitigated her loss by earning £3,178.81. I therefore award Ms D Fudala compensation for loss of income in the gross sum of £5,148.70.
66. Mrs I Fudala stated that she was unemployed from the 18<sup>th</sup> January to a date which she described as "around the end of June or early July" 2017. Her evidence was that due to her very limited English language ability she found it hard to obtain employment.
67. She stated that she initially worked in a shop called Caspar doing 22 hours a week at £7.83 an hour. She then gained a job in a food processing factory at the same hourly rate but with extra hours, she now works 32 hours a week at £7.85 an hour.
68. Mrs I Fudala produced a P45 for her work at Casper Stores limited. It shows that her leaving date was the 13<sup>th</sup> July 2018 and that her gross cumulative earnings with Casper Stores, prior to that date, were £ 2,910.49.
69. I find it doubtful that Mrs Fudala earned that sum between the end of June and the 13<sup>th</sup> July 2017.
70. She avers that she was working 22 hours a week, at £7.83 per hour for Casper stores. If that is correct, she was employed by Casper stores for about 16.85 weeks and her employment must have commenced in late March of 2018. I therefore have a degree of doubt as to the extent to which Ms I Fudala was, and is, impaired in her ability to obtain employment.
71. I also note that Ms Woznicka commenced employment with Casper Store on the 10 of July 2017 and was able to work forty hours a week. This is at the point Mrs I Fudala was, on her evidence, limited to working 22 hours a week in the same store. I am doubtful that Mrs I Fudala was limited to 22 hours a week whilst working at Casper Store and I am equally doubtful that she is limited 32 hours a week in her current role given her ability, and willingness, to work up to 50 hours a week when she was employed by the respondents.
72. In my judgment the second respondent has discharged the burden of proof upon it to the extent that I am satisfied that, had Mrs I Fudala made reasonable efforts, she would certainly have extinguished her on going losses by the 14<sup>th</sup> July 2017.
73. Had Mrs Fudala remained in the respondent's employment and under the new working regime from mid-February 2017, in the period from the 18<sup>th</sup> January to the 13<sup>th</sup> July she would have earned the gross sum of £5,683.5.
74. From that sum must be deducted the sum she earned in that period; £2,910.43.
75. I therefore award Mrs I Fudala a gross compensatory award of £2,773.07.
76. Ms Woznicka was unemployed from the 18<sup>th</sup> January to the 10<sup>th</sup> July until she started work at Casper Store the same shop as Mrs Fudala. Ms Woznicka is earning £7.83 an hour and working an average of 40 hours a week.

77. Ms Woznicka has not obtained work at an equivalent hourly rate; she earns 18 pence less per hour than she would have done but for her dismissal. On a 38-hour week (the likely number of hours she would have worked if she had remained in the respondent's employment), that equates to a loss of £6.84 week.
78. Ms Woznicka works forty hours a week. Those two additional hours of work equate to £15.66 in gross earnings and extinguish the residual weekly shortfall evident from a comparison of her old and current jobs.
79. I am satisfied that Ms Woznicka has acted reasonably and mitigated her losses. I am satisfied that she has no on going loss.
80. But for her dismissal I am satisfied she would have remained in the respondent's employment and taking into the account of the reduction of hours which would have occurred in mid-February 2017, Ms Woznicka would have earned the gross sum of £8,433.52 between the 18<sup>th</sup> January and the 9<sup>th</sup> July 2017.
81. I therefore award compensation to Ms Woznicka in the gross sum of **£8,433.52**

**The loss of statutory rights**

82. In respect of each claimant I award the sum of £350.00.

**Future loss**

83. I make no award for any of the successful claimants because Ms Woznicka's current income exceeds that she would have earned but for her unfair dismissal and I have determined that both Ms D Fudala and Mrs I Fudala would, but for their proven failure to make reasonable efforts to mitigate their losses, have gained an equivalent income by the date on which they took up their current employments.

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**EMPLOYMENT JUDGE Powell**

**Dated: 5<sup>th</sup> December 2018**

**Judgment entered into Register  
And copies sent to the parties on**

**.....8 December 2018.....**

**.....  
for Secretary of the Tribunals**