



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss J Hughes

**Respondent:** Office Equipment Systems Ltd.

**HELD AT:** Mold

**ON:** 18 – 19 January 2019

**BEFORE:** Employment Judge T Vincent Ryan  
Mr. P.H. Bradney  
Mrs P. Palmer

## REPRESENTATION:

**Claimant:** Mr. D. Flood, Counsel

**Respondent:** Mr P. Clarke, Consultant

# RESERVED JUDGMENT

Further to the liability judgment of Employment Judge Cadney signed on 11 March 2016 and sent to the parties on 15 March 2016, the unanimous judgment and declaration of the tribunal is that the respondent dismissed the claimant unfairly, failed to pay holiday pay due to her, made unauthorised deductions from her wages, breached her contract with regard to notice of termination, that each of those acts amounted to direct discrimination in relation to the protected characteristic of sex and the respondent shall pay to the claimant an award of £237,891.46 made up as follows:

1. Unfair Dismissal:

1.1 Basic Award:	£2,375.00
1.2 Compensatory Award:	
1.2.1 Loss of statutory protection: £350.00	
1.2.2 Expenses in finding work: <u>£50.00</u>	
1.2.3 Total	<u>£400.00</u>
	£ 2,775.00
1.3 Uplift s207A TULR(C)A 1992	<u>£693.75</u>
1.4 TOTAL (to which recoupment does not apply)	£ 3,468.75

2 Holiday Pay: No separate award claimed.

3	Wages (unauthorised and discriminatory): 01.09.14 – 06.07.15	£ 22,913.89
4	Notice: No separate Award claimed.	
5	Sex Discrimination:	
	5.1 Financial Losses: 06.07.15 – 18.01.19	£ 85,351.03
	5.2 Interest on 3 & 5.1 above:	£ 15,329.13
	5.3 Future Financial losses: 18.01.19 – 18.04.19	£ 4,840.29
	5.4 Injury to feelings	£ 20,000.00
	5.5 Interest on damages at 5.4	<u>£ 2,831.78</u>
6.	Grossed up total	<u>£237,891.46</u>

## REASONS

### 1. The background and issues:

1.1. Following the late presentation of a response to the claimant's claims, which response was rejected by the tribunal, Employment Judge P. Cadney entered judgment in favour of the claimant on 11 March 2016 (judgment sent the parties on 15 March 2016) upholding the claimant's claims in respect of liability and ordering that the matter would proceed to hearing on remedy.

The upheld claims were:

- 1.1.1. unfair dismissal
- 1.1.2. unpaid holiday pay
- 1.1.3. unpaid wages
- 1.1.4. sex discrimination
- 1.1.5. breach of contract

1.2. the parties agreed today that the liability judgment must be confined to the matters contained within the claimant's claim form as judgment was made on the basis that her claim had not been properly resisted and other evidence had not been heard or adduced. It was accepted by both parties that the purpose of this hearing was limited to remedy matters only; it had already been established that it was no longer open to the respondent to attempt to re-argue matters relating to liability. In these circumstances the respective representatives agreed the seven liability factors listed below which this tribunal must take into account as being the basis of the liability judgment on which any awards are made, enlightened further only by evidence heard and produced at this remedy hearing on issues relevant to remedy. The seven agreed factors supporting the liability judgment are:

1.2.1. the claimant, who had been employed by the respondent from 18 February 2009 as office administrator and office manager working a 40 hour week, was excluded from attending at work and performing work for the respondent in September 2014;

1.2.2. in November 2014 the claimant was instructed to "stay away" from work;

- 1.2.3. the claimant's salary was reduced during her absence;
  - 1.2.4. on 6 July 2015 the claimant was dismissed without cause or procedure;
  - 1.2.5. no further wages were paid to her after 6 July 2015;
  - 1.2.6. the claimant did not receive notice or pay in lieu of notice of termination;
  - 1.2.7. the claimant was not paid accrued holiday pay.
- 1.3. The parties accepted that it followed from the above and the judgment entered that each of the above allegations amounted to direct sex discrimination in addition, as applicable, to breach of statutory provisions under the Employment Rights Act 1996 and breach of contract.
- 1.4. The claimant's claim was to be considered without a formal hearing and without the respondent having an opportunity to be represented. The draft decision that had been prepared in those circumstances was the subject of an appeal to the Court of Appeal. By order dated 1 August 2018 the appeal was allowed, the draft decision on remedy set aside and the case was remitted to the tribunal to consider the issue of remedy. This hearing is in consequence the Court of Appeal Order.
- 1.5. This tribunal heard evidence from the claimant and on her behalf Mr Groves and Mr Hughes. We heard evidence on behalf of the respondent from Mr Richardson and Mr Jackson. We were presented with an agreed remedy bundle of documents comprising 166 pages and a subsequent remedy bundle prepared by the respondent comprising some 13 pages. We heard evidence from each of those witnesses, who were cross-examined, and we were referred to many of the documents produced. We heard oral submissions from both parties. Mr Flood for the claimant presented a schedule of loss dated 17 January 2019 which he prepared with the aid of a Microsoft Excel spreadsheet and we are grateful to him for the work that he put into that which was of assistance to both the respondent and the tribunal. Mr Clarke for the respondent thanked Mr Flood and confirmed that he accepted the method of preparation of that schedule.
- 1.6. The respondent conceded:
- 1.6.1. the accuracy of the figures shown in table 1 of the claimant's said schedule in respect of the claimant's net average monthly and annual salary at various relevant points of the applicable chronology;
  - 1.6.2. the basic claim as set out;
  - 1.6.3. the claim for loss of statutory protection;
  - 1.6.4. that the claimant was entitled to a 25% uplift in the unfair dismissal award because of its failure to follow applicable ACAS codes of practice

specifically a grievance procedure and by implication the disciplinary code before dismissing the claimant.

1.6.5. the method of calculation of interest on past earnings,

1.6.6. the method of calculation of interest on an injury to feelings award (but not the sum sought by way of award) and

1.7. The respondent however challenged:

1.7.1. the figures in table 2 of Mr Flood's schedule with regard to money that it says is paid to the claimant for which credit has not been given (being alleged repayments of loans and mortgage commitments);

1.7.2. the level of damages claimed in respect of injury to feelings;

1.7.3. that the claimant had done enough to mitigate her loss since 6 July 2015 in obtaining only part-time work initially and then subsequently full-time work but at a significantly lower salary than that which she enjoyed whilst paid by the respondent.

1.7.4. Without pressing too hard either way Mr Clarke left the matter of £50 claimed expenses in finding work to the tribunal.

1.8. The respondent attempted to evidence and submit to the tribunal that the claimant had not worked for the respondent as an employee and that she did not earn the payments that were attributed to her (which were paid only as a means of tax avoidance by Mr Jackson who was at that time her personal partner, a matter he raised in his evidence under oath); it submitted that the background to all of the claimant's claims was a breakdown in the personal relationship between her and Mr Jackson and that as this was her fault, or no less than 50% her fault, she was not "coming to equity with clean hands", should not receive the compensation that she claims and in any event the circumstances of the breakdown of the relationship show that she was under stress regardless of work and at the same time was not suffering the injury to her feelings that she claims.

2. Facts relating to remedy: the tribunal's unanimous findings of fact in relation to remedy, further to the agreed facts listed in paragraph 1.2 above are as follows:

2.1. Wages/Benefits:

2.1.1. Prior to her dismissal the claimant's net average monthly wage was £3,453.11 and her net annual wage was £41,437.32. She was dismissed summarily on 6<sup>th</sup> January 2019.

2.1.2. The claimant was unemployed and actively sought employment between 6 July 2015 and 23 October 2015 during which time she received Job Seekers' Allowance. She received £438 in this period.

- 2.1.3. The claimant obtained part-time employment on 23 October 2015. Whilst she was employed part-time post dismissal her net weekly wage was £123 and her part-time annual wage £6,396.
- 2.1.4. The claimant was unemployed between jobs from 1 June 2016 until 8 June 2016. She received no income or state benefits during this period.
- 2.1.5. The claimant started her current full-time employment on 8 June 2016. Her current average monthly wage is £1,817.27 and her net annual wage is £21,807.24.
- 2.2. The claimant did not have a written statement of terms and conditions of employment or contract. She did not give to the respondent any signed authority to make deductions from her wages.
- 2.3. Mr Jackson is the controlling mind of the respondent. For many years until September 2014 he was in a personal relationship with the claimant and they lived together. The claimant had been employed by companies of which Mr Jackson was the managing director or controlling mind from the age of 19 at about which time the relationship started. She became a director of the respondent company. She did not attend work at the respondent's premises on a regular or daily basis but she carried out office administration, managerial, and work related social duties as and when required which was frequently if not regularly, in that she did not keep regular office hours. In addition to her salary she was provided with a company car and mobile phone.
- 2.4. The personal relationship between the claimant and Mr Jackson ended in September 2014 at which time the claimant was told not to attend work and she was required to leave the home she shared with Mr Jackson. During the period from September 2014 and June 2015 the claimant repeatedly tried to contact Mr Jackson and the respondent's management via a director, Mr Jones, and the company secretary, Mr Richardson. She was repeatedly rebuffed. In November 2014 Mr Richardson told her to stay away from the workplace. The claimant was constantly referred to Mr Jackson for answers to her questions about her situation but he refused to take her calls. She had to telephone and speak to reception staff and received the same reaction. On occasion she phoned using a false name but this was unsuccessful. On 17 June 2016 the claimant wrote a grievance letter to the respondent and the respondent did not deal with the claimant's grievance save to reply on 6 July 2016 saying that it had assumed (from her continued absence) that she had resigned. This letter brought the claimant's employment to an end.
- 2.5. During the claimant's absence from work as described above the respondent reduced her salary without her authorisation or consent to £3,000 in September 2014 and to £1,131.55 per month in October 2014. The respondent has never made good the difference in payment between her pre-September and post-September 2014 salary. The claimant did not receive accrued holiday pay from the respondent on termination of employment, which termination was summary without the respondent having followed any

procedure or shown cause save that it said it relied on an assumed resignation.

- 2.6. The respondent's witnesses gave oral evidence that the reductions in payment to the claimant were in respect of her loan and mortgage liabilities. They did not produce any documentary evidence of either. The claimant denied both. The respondent did not produce documentation establishing where or to whom it made such payments, or how they featured in the respondent's accounts; Mr Richardson instead produced for this litigation a spreadsheet which he populated with narrative and figures self-justifying his evidence. Considering the material provided and the manner in which all witnesses gave their evidence the tribunal preferred the evidence of the claimant which was clear, consistent and cogent. The respondent's witnesses were not credible particularly considering how matters evolved as described above and their failure to evidence what they were saying with appropriate documentation which ought to have been available to them and disclosed during this litigation. The respondent only produced Mr Richardson's "Claimant Payment Schedule from 2009 to 2015", RBS Bank statements showing payments made to the claimant 2009 to 2014 (the reducing sums) and a counter-schedule to support its allegation about loan and mortgage payments. The tribunal finds that the claimant was not liable to make payments of any loan or mortgage from her pay and did not authorise any such, or any other deductions.
- 2.7. The respondent's witnesses said that the claimant had settled her claims by agreement in or about September 2014 accepting the said reductions in pay and transfer of the car to her name. For the reasons stated previously the tribunal preferred the evidence of the claimant who denied any such agreement. There is no documentary evidence of one either. The tribunal finds that there was no such settlement of potential claims as alleged by the respondent.
- 2.8. Over and above any stress caused to the claimant by the breakdown of the personal relationship she had had with Mr Jackson, the claimant suffered work-related stress and anxiety from her exclusion from work and ostracisation, reduction in pay, the respondent's failure to communicate effectively with her, its failure to deal with her grievance and eventually its dismissal of her. She lost status, employment, work security and financial security, and the wages that she had previously received by agreement with the respondent in a situation where there was no realistic prospect of her securing employment with a commensurate status and remuneration package. The tribunal accepts that having worked for the respondent, and under other guises for and with Mr Jackson, since 1997 in what had been considered a secure situation, she had acquired somewhat limited managerial expertise and experience hampering her job prospects, or at least the prospects of obtaining new employment with earning levels such as enjoyed whilst employed by the respondent. This caused the claimant anxiety and loss of confidence; her dismissal came as a "huge blow". She has been worried about her job prospects. The conduct to which she was subjected during her protracted exclusion from employment as described above was felt by her as demeaning and abusive. The claimant believed that there was a

deliberate attempt to cause her harm not least because she was blocked by colleagues from resolving the matter in that they referred her only to Mr Jackson who was not prepared to speak to her; they and he fobbed her off. It is clear from her efforts to contact him through a fellow director, the company secretary, and reception staff that a number of the respondent's employees knew the situation, one in which she felt obliged to falsify her identity in failed attempts to make contact with Mr Jackson; all this severely dented her confidence and self-esteem causing her distress and hurt. This has been felt by her over the entire period from September 2015 to date.

2.9. Given the claimant's circumstances she was unable to find suitable work immediately; she did not have the required confidence; she did not have employment references from the respondent although she asked for one. She claimed JSA, and for the period 6 July – 23 October 2016 she actively sought employment and satisfied the requirements of the Department of Works and Pensions by maintaining a satisfactory diary of her job searches. She made numerous job applications online and attended five job interviews all of which were unsuccessful. The claimant did not provide any documentary evidence in support but her evidence was convincing and the tribunal accepts that she was truthful. She incurred £50 expenses in attending the five job interviews.

2.10. The claimant secured a part-time job and worked part-time hours during the period 23 October 2015 to 1 June 2016. This not only provided income but helped her to regain work experience and confidence. She secured a full-time post to commence on 8 June 2016 and for a brief period from 1 June to that date she was unemployed and did not receive any benefits, as she was merely between jobs. She has worked in that full-time post from 8 June 2016 to date and intends to remain in that employment which is rewarding, is one which her skills and experience match, and it is worked with commensurate pay.

### 3. The law:

3.1.1. Unfair dismissal: an employee has the right to be unfairly dismissed. Section 98 of the Employment Rights 1996 provides potentially fair reasons for dismissal being reasons related to capability, conduct, redundancy, illegality and some other substantial reason. Once an employer/respondent has established a potentially fair reason for dismissal it is for the tribunal to decide whether the employer/respondent acted fairly and reasonably in all the circumstances in treating that reason as sufficient reason to dismiss. In respect of each of the potentially fair reasons case law has set out guidelines, principles, to assist in the application of the statutory definition. There is an ACAS code in respect of disciplinary dismissals. In general, there is an expectation that even where there is a summary dismissal, that is a dismissal without notice, the employer will follow a procedure that at very least gives an employee the opportunity to understand and respond to any matters of concern to the employer before a decision is reached. It follows that where an employee is unfairly dismissed he/she is entitled to compensation. A tribunal may award a basic award calculated along the

lines of a statutory redundancy payment by reference to gross weekly pay (subject to a weekly), age at date of dismissal, and the duration of employment. That award may be reduced if an employee's conduct prior to dismissal is such that in the opinion of the tribunal it would be just and equitable to reduce the award. In addition to the basic award an unfairly dismissed employee may be entitled to a compensatory award to reflect losses incurred by the employee that are attributable to the actions of the employer, that the tribunal considers to be just and equitable having regard to those losses. A claimant before a tribunal has a duty to mitigate those losses. Such an award may be reduced to reflect the risks facing the employee of his/her being unfairly dismissed and may be further reduced as far as the tribunal considers just and equitable in circumstances where the employee is found to have to any extent caused or contributed to the dismissal.

- 3.1.2. Unpaid holiday pay: The Working Time Regulations provide an employee with rights with regard to annual leave specifying the statutory paid leave available. On termination of employment an employee is entitled to be paid holiday pay in respect of holiday accrued but not taken. The remedy for failure to pay holiday pay that is due is to make good that default either by reference to the contractual formula or by default to the formula set out in the applicable regulations.
- 3.1.3. Unpaid wages: section 13 Employment Rights Act 1996 provides an employee with the right not to suffer unauthorised deductions from wages. An employer may make a deduction to correct an error or in compliance with a legal obligation but otherwise only where there is a prior signed authority from the employee to make the deduction(s). The remedy where there has been unauthorised deduction from wages is an award to make good the employer's default.
- 3.1.4. Sex discrimination: section 39 Equality Act 2010 prohibits discrimination in respect of specified protected characteristics including sex. Section 13 Equality Act 2010 prohibits less favourable treatment being given to a person than that afforded to an actual comparator, or hypothetical comparator, because of the protected characteristic in question. Where sex discrimination is proven a tribunal may award damages to a claimant to reflect losses occasioned by that discrimination and furthermore damages for any injury to feelings. There is Presidential Guidance on the banding for awards in respect of damages for injury to feelings setting out three financial bands with a narrative in each case in accordance with authority ("Vento"). An award of damages in respect of injury to feelings is not to be punitive; it must reflect the injuries suffered and it ought to bear some relation to awards such as may be made for personal injury (although this is not a personal injury head of damages). Such an award must be proportionate, being neither so low or so high as to cause disrepute to the tribunal. It is intended to reflect the injury suffered taking into account the duration of suffering and its extent.
- 3.1.5. Interest is payable on awards in respect of losses attributable to discrimination and on damages for injury to feelings.



3.1.6. Breach of contract: contracts may have expressed or implied terms and it is incumbent on a party to a contract to abide by those terms. Section 86 Employment Rights Act 1996 provides minimum periods of statutory notice which have the effect of being implied into a contract of employment. Where there is no written agreement those statutory notice periods apply, albeit an employer may summarily dismiss an employee for matters such as gross misconduct or gross negligence. Effectively, in compliance with this contractual provision an employer ought only to end the contract in accordance with the notice provisions save where the employee is in breach of contract such as by their conduct. The remedy is the loss occasioned by the breach.

3.1.7. Awards in excess of £30,000 are potentially liable to income tax. To avoid a successful claimant suffering effectively a tax penalty, any awards made in accordance with the matters set out above must be grossed up such that the successful claimant actually benefits from receiving the net sum reflecting each element of the award made. The respondent against whom an award is made must pay the sum gross and the claimant will bear the tax liability that is levied.

#### 4. Application of law to facts:

4.1. As previously explained at this hearing we were to deal with remedy only; liability had been established without any findings of fact saving so far as the implied acceptance of the seven factors set out above in paragraph 1.2, and the claimant's ET1 form; the respondent conceded that they were given in the circumstances described. In addition, we have made findings of fact relevant to remedy.

4.2. The parties agreed the Unfair Dismissal Basic Award; in all the circumstances it could not be subject to deduction and it was not contended that it ought to be.

4.3. The Compensatory Award similarly was not challenged with regard to the Polkey Principle or Contribution. The respondent contended that the claimant had not taken into account loan and mortgage repayments that were made for her benefit, and that she had failed to mitigate her loss. The tribunal disbelieved the respondent when it said that the claimant had either mortgage or loan repayments; it was not satisfied on the basis of the evidence that any such repayments have been made out of monies withheld by the respondent from the claimant's wages. This finding is relevant both to dismissal losses (because Mr Clarke submitted that they are still being made on behalf of the claimant although no evidence was adduced to that effect) and the claim for unauthorised deduction from wages. The deductions were unauthorised; the claimant has not subsequently authorised any further payments to the respondent or any third party in respect of loans or mortgage. The tribunal is not satisfied that any such payments were or have been made. The claimant did not agree to compromise any claims that she may have and did not accept any "settlement package".

- 4.4. The tribunal is satisfied that the claimant incurred the expenses that she has claimed in trying to obtain employment and furthermore that she made serious and reasonable attempts to mitigate her losses by getting back into work at the earliest opportunity. It was reasonable for the claimant to consider her position, rebuild her confidence and resilience and to seek work experience in a part-time job whilst actively seeking employment in accordance with the requirements of DWP. The tribunal is satisfied that the claimant secured part-time work within a reasonable period. She also secured full-time employment as soon as she reasonably could; that job is reasonably suitable for her and matches her skill and experience, paying her proportionately; she has remained in that employment utilising their skills and experience to earn a reasonable wage commensurate with those skills and her experience. The fact that the respondent now contends that the claimant was overpaid or ought not to have been paid at all is irrelevant; the claimant was paid at what may have been a generous rate by the respondent but that was the agreed rate of pay; she lost that pay through the discriminatory and unfair treatment she received. It was not the tribunal's task to evaluate the claimant's pre-dismissal employment and to set a notional salary that might better have reflected the time, effort, and expertise expended by the claimant and the responsibility she bore. We made findings of fact as to the pre-dismissal wages and the claimant lost those through the respondent's actions such that she should be properly compensated by reference to those wages. The claimant made satisfactory efforts to mitigate her loss and has continued to do so to date. The fact that in all circumstances the claimant may take several years and training before she can again reach the pre-dismissal salary level is not her fault and we are satisfied that she is making suitable effort to make good her losses.
- 4.5. Injury to feelings: the tribunal accepted the claimant's submissions following due consideration of the evidence relating to the extent and duration of the claimants suffering. The claimant's ostracisation and exclusion from the workplace coupled with the unmerited reduction in pay and subsequent dismissal, and the respondent's ignoring of her grievance, amounted to a concerted and sustained campaign by the respondent having the effect described by her on her self-esteem and confidence. She was caused stress and anxiety that hampered their ability to obtain employment and she was distressed. Considering the applicable guidance, the tribunal eventually concluded that the figure of £20,000 was appropriate amount of damages.
- 4.6. Initially the tribunal was surprised at the total claimed as shown in a Mr Flood's schedule of 17 January 2019. Our provisional view was that it was unlikely any award would reach the level contended for by the claimant. That was only a first impression. Following careful fact-finding, consideration of the law, and deliberation in the light of that, we concluded that the schedule was in fact reasonable and reached an appropriate total award. We wish to emphasise that this was not in any respect an exercise where it could be said that the claimant was "pushing at an open door"; she most certainly was not. Each and every item of the claimant's schedule was carefully scrutinised by us and the fact that we do not find fault with it is not to be taken as an indication that we have merely adopted it. We scrutinised the matter conscientiously. We were very conscious that the whole point of the Court of

Appeal's order was to ensure that our hearing was to allow the respondent the opportunity to challenge the claimant's application for an award or for an award of the level claimed, and to seek to minimise any award. The respondent failed in that task. It did not produce adequate evidence to satisfy the tribunal that any part of the schedule was unsustainable, inflated, or unreasonable. The tribunal gave careful consideration to the evidence and submissions of both parties, and applied the law as described above together with all statutory tests as supported by authorities, in arriving at its own calculations and assessments which happened to agree with the claimant's schedule.

Employment Judge T.V. Ryan

Date: 25.01.19

JUDGMENT SENT TO THE PARTIES ON

26 January 2019

FOR THE TRIBUNAL OFFICE

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.