EMPLOYMENT TRIBUNALS

Claimant: **Mrs L Davies**

Respondent: **Tailor Maid Care Solutions Ltd**

Heard at: **Nottingham** **On:** **Monday 12 November 2018**

Before: **Employment Judge Evans (sitting alone)**

Representation

Claimant: **In Person**
Respondent: **Did not attend and was not represented**

JUDGMENT having been sent to the parties on 12 December 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

JUDGMENT

1. The Respondent's application of 4 October 2018 for a reconsideration of the liability Judgment in this matter sent to the parties on 21 September 2018 is dismissed.

2. The Respondent is ordered to pay the Claimant damages for breach of contract (wrongful dismissal) of £4,635.40.

3. The Respondent is ordered to pay the Claimant the following amounts in respect of her successful claim for unfair dismissal:
   - 3.1 Basic award of £1,467.
   - 3.2 A compensatory award of £9,522.13.

4. The Employment Protection (Recoupment of Job Seeker's Allowance Income Support) Regulations 1996 apply to the monetary award:
   - 4.1 The monetary award is £10,989.13.
   - 4.2 The prescribed element is £8,462.30.
   - 4.3 The dates for which the prescribed element is attributable are 12 January 2018 to 12 November 2018.
   - 4.4 The amount by which the monetary award exceeds the prescribed element is £2,526.83.

REASONS

Background

1. The Respondent dismissed the Claimant without notice on 12 January 2018. Following her dismissal the Claimant brought various claims which I heard in September this year in Nottingham.

2. By a reserved judgment sent to the parties on 21 September 2018 I found that the Claimant had been unfairly and wrongfully dismissed. However I also found that there was a 75% chance that her employment would have terminated in any event by 17 July 2018.

3. When I sent out the judgment and written reasons I made case management orders setting down a remedy hearing for today.

Preliminary matters

Adjournment

4. The Respondent applied for an adjournment of the remedy hearing on the last working day before it was due to take place. In that application the Respondent stated:

> *I would like to postpone the remedy hearing for a month so I can bring myself up to speed on it properly. Mr Dunbar has been dealing with this case and has now gone off with severe depression so I am now left to try and resolve things on my own. We are not being represented now so I just need some time to find new representation and also bring myself up to speed on the whole case. I have got proof of Mr Dunbar's illness if you require proof. Can you let me know asap please. Kind regards John Lawler.*

5. I rejected the application on the same day in the following terms:

> *The Respondent's application for a postponement is refused. Employment Judge Evans considers that the inability of Mr Dunbar to attend on Monday is not a sufficiently good reason for the hearing to be postponed. However the Respondent may repeat its application on Monday at the beginning of the hearing. If it wishes to do this it should consider the Employment Tribunals (England and Wales) Presidential Guidance – seeking a postponement of hearing (available on-line) and in particular its paragraphs 1, 3 and 4 under the heading "examples". The Respondent must ensure that any application made on Monday is supported by the necessary information and documentation. The case remains listed for hearing on 12 November 2018.*

6. In rejecting the Respondent's application in these terms and in exercising my judicial discretion I took into account:

i. The history of this matter which had seen the Respondent seeking adjournments on a number of occasions prior to the original hearing (including as a result of its late instruction of representatives);

ii. The fact that Mr Lawler had given evidence at the liability hearing and so was aware of the issues arising in the claim;

iii. The fact that the remedy issues to be dealt with today were in legal terms straightforward: any competent employment specialist instructed by the Respondent last week after its previous representatives had come off the record would have been able to pick up the hearing bundle which had already been prepared by the Respondent's previous representatives and dealt with the matter at the hearing today.

7. In fact the Respondent did not attend this morning and therefore did not make any further application for an adjournment. I asked the clerk to call the Respondent to find out if they were intending to attend. The Respondent said that they still wanted an adjournment but that they would not be attending the hearing.

8. There was as such no live application for an adjournment before me: no application had been made following my rejection of the previous application and telling a clerk on the phone on the morning of the hearing that one is not attending but wants an adjournment is not an application for one. I therefore went on to consider the question of whether we should proceed in the absence of the Respondent under Rule 47 of the Tribunal Rules of Procedure. Given that there was no satisfactory or reasonable explanation for the Respondent's absence today, I exercised my discretion to proceed with the hearing in its absence.

<u>The application for a reconsideration</u>

9. The Respondent had made an application for a reconsideration under Rule 71 of the Tribunals Rules of Procedure on 4 October 2018. That was not referred to me until 6 November 2018 so I instructed the Tribunal's staff to reply to the Respondent and to the Claimant (who opposed the application) telling them that it would be dealt with at the beginning of the hearing today. The Respondent had stated in its application that the interests of justice required a reconsideration because the Claimant had not raised until the morning of the liability hearing the fact that she claimed to have retracted her resignation made in November 2017. The Respondent said that it had therefore been ambushed in relation to this significant issue. The Respondent said that it would have produced documents relevant to that issue which it now produced with its application for a reconsideration if it had known that that issue was in play.

10. Having carefully considered the application I have concluded that the interests of justice do not require a reconsideration for the following reasons and have therefore dismissed that application. The original Claim did not refer to the employee's resignation in November 2017. Further the Response of the Respondent to the Claim did not refer to the Claimant's resignation either.

11. It was in fact raised as being a potentially relevant issue for the first time at the liability hearing by the Respondent in its witness statements and in the documents included in its bundle. The witness statements had not previously

been exchanged and the Claimant had only been provided with the Respondent's bundle at a very late stage. Prior to the date of the liability hearing the pleadings would have led the Claimant reasonably to take the view that the Respondent was not raising an issue in relation to her resignation. Further, as set out in paragraph 15 of my liability judgment, the correspondence between the parties around the time of her dismissal did not refer to her resignation.

12. In short prior to the date of the liability hearing both parties had acted as though the Claimant's resignation was of no relevance to the claims brought. That is to say both parties had dealt with the dismissal and consequent litigation in a manner which was entirely consistent with the Claimant having agreed with the Respondent that she would retract her resignation and that her employment would continue.

13. The Respondent argued in its application for a reconsideration that it was "ambushed at the hearing" by the Claimant asserting she had retracted her resignation. I conclude that this is disingenuous. The reality is that the Respondent had not raised the resignation as a potentially relevant issue until the hearing. If anyone was guilty of "ambush" it was the Respondent.

14. In these circumstances the interests of justice do not require a reconsideration of my liability decision. It would have been obvious to the Respondent (and its advisers) that if the Respondent was going to raise the question of the resignation then the Claimant would argue that it had been retracted. Consequently the Respondent should have included in its documents and therefore the bundle, all documents relevant to the issue. The interests of justice do not require me to consider further documents which the Respondent could but did not produce at the liability hearing. The Respondent's application is therefore dismissed.

15. In any event I note that the correspondence on which the Respondent sought to rely in support of its application for a reconsideration does not provide any real support for its contention that it had been seeking to find a replacement for the Claimant in December 2017 (because she had by then resigned). She was the "area manager" but the correspondence provided (6 pages of e-mails and attachments) refer expressly only to the Respondent's attempt to employ a "registered manager". That was a different role within the Respondent's organisation. The documents are not as such obviously relevant to the issues which the Respondent identified. Consequently, if I had concluded that the interests of justice required a reconsideration then, having taken account of the additional evidence provided by the Respondent, I would have confirmed my original decision.

The Claimant's unfair dismissal claim

16. At the hearing on 12 November 2018 the Claimant represented herself. For the reasons set out above the Respondent did not attend and was not represented. I had before me a witness statement prepared by the Claimant. I also had before me a bundle running to 180 pages which had been prepared by the Respondent's representatives.

17. The Claimant took the oath and gave some brief additional oral evidence. I asked her about her job search and in particular why she had not applied for jobs similar to those which she had held with the Respondent. I also asked her

questions about why she had chosen to become self-employed rather than seeking other better remunerated employment.

The issues

18. The issues for me to determine at the remedy hearing were as follows:-

i. The amount of damages due to the Claimant in respect of her claim for breach of contract.
ii. The amount of her basic award.
iii. The amount of her compensatory award.

19. At the beginning of the hearing I explained my power to make a re-employment order. The Claimant explained that she did not wish me to exercise that power. She only wanted to receive an award of compensation.

The Law

20. An employee who is unfairly dismissed is entitled to a basic award. The basic award is calculated in accordance with section 119 of the Employment Rights Act 1996. An employee who is unfairly dismissed is in principle also entitled to receive a compensatory award. This should be calculated in accordance with section 123 of the Employment Rights Act 1996. As section 123 notes an employee is required to mitigate the loss which they have suffered as a result of their dismissal. This duty can be summarised as follows:

> *It is the duty of an employee who has been dismissed to act reasonably and to act as a reasonable man would do if he had no hope of seeking compensation from his previous employer.* (**Archibald Freightage Limited v Wilson** [1974] IRLR 10.)

21. The operation of the principle of the duty to mitigate was clearly expressed as follows in **AG Bracey Limited v Iles** [1973] IRLR 210:

> *The law is that it is the duty of a dismissed employee to act reasonably in order to mitigate his loss. It may not be reasonable to take the first job that comes along. It may be much more reasonable, in the interests of the employee and of the employer who has to pay compensation, that he should wait a little time. He must, of course, use the time well and seek a better paid job which will reduce his overall loss and the amount of compensation which the previous employer ultimately has to pay … [A] man who is dismissed from a £40 a week job may act unreasonably if he does not accept a job bringing in, say, £35 a week. If he does not do so, a tribunal is fully entitled to say, "We are going to take no account of any loss which he could have avoided by taking the £35 a week job". But that still leaves him with a loss of £5 a week, the difference between £40 and £35. A tribunal is fully entitled to take account of that loss, which could not have been avoided by taking the job which they think he should have taken*

22. However the duty to mitigate does not arise until the employee has been dismissed and if the Respondent seeks to argue that the employee has not mitigated their loss then the burden of proof is upon the Respondent making that allegation.

23. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 means that a Tribunal has discretion to increase the compensatory award by up to 25% if it considers it just and equitable to do so in light of any failure by the Respondent to comply with the relevant ACAS code.

Findings of Fact

24. The Claimant was employed by the Respondent as an Area Manager. She earned £837.00 gross (or £550.00 after tax) a week. She was provided with a 12 year old Tigra company car with a 1600 cc petrol engine. She had to pay for all the petrol which the car used both for business and personal use. She was however permitted to use the car for personal use.

25. The Claimant details in her witness statement her attempt to find employment after her dismissal. She explains that she applied for various jobs in relation to which she included documents in the bundle. They were generally speaking jobs which were more junior than the role she had held with the Respondent. Naturally I was concerned to establish why it was that the Claimant had applied for more junior and therefore less well remunerated jobs.

26. I find in accordance with the Claimant's evidence that this was because she had been dismissed for gross misconduct. The care sector in which the Claimant worked is highly regulated. I find that in order to obtain a relatively senior job such as that which she held with the Respondent it would inevitably have been necessary for her to provide a reference from her most recent employer. I find that such a reference would have recorded that she had been dismissed for gross misconduct (and indeed this is what the Respondent told the DWP when asked by the Job Centre). I find that consequently the Claimant's decision to seek more junior roles represented a realistic assessment of the options initially open to her following her dismissal and that she acted reasonably in not seeking similar jobs to the one she had previously held in February and March.

27. I find that in February and March the Claimant made significant efforts to find alternative employment. I find that she applied for over 20 jobs but that none of her applications were successful. I find that this was largely due to the reason for her dismissal.

28. From April 2018 the Claimant has taken advantage of her own background in the care business and begun to run and build up her own business providing care to individuals who are in need of it. I find that the business is going well. The Claimant's evidence was to the effect that she hopes and expects to have reached a profit level reflecting her salary with the Respondent by the year end. I find that she will have done so.

29. The Respondent included a number of vacancies for posts similar to the one held by the Claimant with it in the bundle. The dates on which those posts were vacant is not altogether clear. However, insofar as the Respondent alleges that the Claimant's failure to apply for such posts shows a failure to mitigate her loss, I reject that contention. I find that until September 2018 (when I found that the Claimant had been unfairly dismissed and had not been dismissed in circumstances where there had been gross misconduct proven by the Respondent) it was reasonable for the Claimant not to apply for jobs similar to

the one that she held with the Respondent because of the problems presented by the reason for her dismissal in applying for such jobs.

30. I further find that in respect of the period since September 2018 it was reasonable for the Claimant not to apply for such jobs in light of the success of her new business venture. Overall, therefore, I conclude that the Respondent has failed to prove on the balance of probabilities that the Claimant has not taken sufficient steps to mitigate her loss.

31. Turning now to the question of the Respondent's compliance with the relevant ACAS code, in accordance with my decision in relation to liability, I find that the Respondent failed to comply with the code completely. I have therefore concluded that it would be just and equitable to increase the compensatory award made to the Claimant by 25%.

32. I turn now to the findings of fact relevant to the calculation of the award due to the Claimant.

Losses relating to the provision of the company car

33. I have used the RAC figures as set out in "RAC Motoring Services Illustrative Vehicle Running Costs Petrol Engines 2017" for the purposes of calculating the Claimant's loss relating to the provision of the company car. I have however adjusted the RAC figures to reflect the fact that the Claimant's car was around 15 years old and therefore ongoing depreciation would have been minimal. I have allowed a figure of £1,000 over a 3 year period instead of the £9,800 set out in the RAC figures.

34. I have also adjusted the RAC figures to reflect the Claimant's higher annual mileage (17,000 instead of the 10,000 used in the table). I have done this by increasing the costs by 20%. Insurance and maintenance would be higher for a motorist doing 17,000 rather than 10,000 miles a year. I have then used 17,000 miles as the basis of calculating costs per mile. Having made these adjustments a figure per mile for a 1.6 litre petrol engine car is calculated as follows. The RAC's table for total running costs over a 3 year period with these adjustments and with the adjustment for depreciation would be £5,567.00. This is increased by 20% to reflect the higher mileage. It therefore increases to £6,680. That is divided by 51,000 miles, that is to say 3 years at 17,000 miles each, and so a figure of 13 pence a mile excluding fuel is produced.

35. In fact the Respondent did not pay for fuel (whether for personal or business use). As such the benefits of the car to the Claimant is the 5,000 miles of personal mileage at the 13 pence a mile calculated as I have set out above. That gives a benefit value of £650.00 a year.

36. However the Claimant did 12,000 business miles a year (that being her evidence). The RAC table says that for a car with the engine size of that of the Claimant and with petrol costing £1.20 a litre the cost per mile of fuel would be 13.6 pence. That means that in fact the Claimant paid out £1,632.00 a year in business fuel. Consequently the car was not a benefit but in fact cost the Claimant in the region of £1,000 a year. No loss is therefore incurred in this respect as a result of the Claimant's dismissal.

The value of the stakeholder pension

37. The Claimant asserts that the Respondent did not set up a stakeholder pension scheme as required. I need make no finding in this respect but I should include in my calculation of her loss the value of the minimum required stakeholder pension contributions for the period covered by her loss. Those contributions would have been as follows. One per cent of her salary falling between the lower and upper earnings limit until 6 April 2018 and 2 per cent for the period thereafter. The Claimant's earnings between the lower and upper earnings limit were £721.00 per week. Consequently up to and including 5 April 2018 the Claimant's loss in respect of the pension contributions is £7.21 a week and from 6 April 2018 £14.42 a week.

Income from the Claimant's new business

38. The Claimant had included rudimentary accounts relating to her new business in the hearing bundle between pages 162 and 164. In addition when asked the Claimant said she thought her earnings from her new business venture would pick up steeply towards the end of this year so that by the end of 2018 she would be earning the same as she had been earning prior to her dismissal.

39. The Claimant further explains that in October her earnings had increased by £105.00 a week compared to her earnings in September (the last month for which figures were included in the bundle).

40. The Claimant's rudimentary accounts showed business expenditure for the period April to September of £639.00. The Claimant agreed that a reasonable assessment for annual business expenditure would be around £1,500.00 on the basis of increasing levels of business.

41. Doing the best I can with the figures provided I estimate that in the 9 months to the end of 2018 when the Claimant's loss will end the Claimant's gross income will be the £5,736.50 that she earned to the end of September plus amounts of £1,618.00 in October, £2,300.00 in November and £4,000.00 in December giving a total for 9 months of £13,654.50. If annual expenses are pro-rated then they amount to £1,125.00 for the 9 month period giving a profit for that 9 month period of £12,529.50. The annual equivalent would be £16,706.00.

42. I concluded that the best way to calculate the compensatory loss was to identify an average net income for the Claimant for the period from her dismissal until the end of December 2018. However I needed to establish a net figure rather than a gross figure.

43. The income tax on an annual income of £16,706.00 once a tax free allowance of £11,859.00 had been taken into account would be £969.40. That is calculated at the rate of 20 per cent. On the same profit class 2 and 4 of National Insurance contributions of £898.78 would be payable. That would give a net annual profit figure of £14,837.82 or of £285.34 a week.

Conclusions in relation to compensation

Notice period and wrongful dismissal

44. The Claimant's notice period would have run from 12 January and expired on 11 March 2018 which is a period of 8 weeks and 3 days. The net pay was

£550.00 a week. The amount due in respect of damages for wrongful dismissal is therefore £550.00 multiplied by 8.428 weeks giving a total of £4,635.40. The Claimant did not earn any amount during this period reducing her loss.

Unfair dismissal

Basic award

45. The basic award is calculated as follows. The Claimant was aged 49 at the date of her dismissal. As set out above her gross weekly wages was £837.00 and her net weekly wages were £550.00. The relevant statutory cap of £489.00 therefore applies. The basic award is 3 weeks' pay capped at £489.00 giving a total of £1,467.00.

The prescribed elements of the unfair dismissal compensatory award:-

46. Net weekly wages of £550.00 for 18.286 weeks equals £10,057.30 (period 12 March 2018 to 17 July 2018).

Less new earnings for that period from 1 April at 15.43 weeks gives earnings of £4,402.80.

Gives a loss of £5,654.50.

47. Net weekly wages of £550.00 for 16.857 weeks gives £9,271.35 (for the period 18 July 2018 to 12 November 2018).

Less earnings for that period which total £4,809.98 giving a loss of £4,461.37.

To be reduced by 75% on a **Polkey** basis gives a new reduced amount of £1,115.34.

48. The total compensation therefore after the **Polkey** reduction to 12 November 2018 is £6,769.84. I have increased that amount by 25% to £8,462.30.

49. The total prescribed element is therefore £8,462.30.

The non-prescribed element

50. Turning first to the loss of pension rights:-

- 12 January 2018 to 5 April 2018, 12 weeks at one per cent gives £86.52.
- 6 April 2018 to 17 July 2018, 14.714 weeks at 2 per cent gives £212.18.
- 18 July 2018 to 12 November 2018 is 16.857 weeks at 2 per cent giving £243.08.
- 13 November 2018 to 31 December 2018 is 7 weeks at 2 per cent giving £100.94.

51. The total amount to 17 July 2018 which is not to be reduced is £298.70.

52. The total amount from 18 July 2018 which is to be reduced on a **Polkey** basis by 75% is £344.02 which reduces to £86.01 which gives a total pension loss of £384.71.

Future loss of wages

53. 7 weeks from 13 November 2018 to 31 December 2018 is £3,850.00. Less profit from the new business, 7 weeks at £285.34 gives £1,997.38.

54. The loss therefore for this period is £1,852.62.

55. Reduced on a **Polkey** basis by 75% gives £463.16.

56. Add in the pension amount of £384.71 gives a new total of £847.87.

57. The net amount is increased by 25% as I have found above that it should be the total is £1,059.83. The total compensatory award that the Respondent is ordered to pay is therefore £8,462.30 plus £1,059.83 giving £9,522.13.

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Employment Judge Evans

Date: 28 January 2019

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE