EMPLOYMENT TRIBUNALS

Claimants:	(1) Judyta Marzec, (2) Edyta Sabat, (3) Tomasz Dziedzic
Respondent:	SH Pratt Group Ltd
Heard at:	Watford Employment Tribunal (in private)
On:	6 December 2018
Before:	Employment Judge Daniels (sitting alone)
Appearances:	For the claimant: Mr Kozik For the respondent: Did not appear (no response entered)

REASONS

1. FACTS

1.1 Ms Marzec commenced employment with the respondent, a fruit company, as an operative on 8 July 2007. Ms Sabat commenced employment with the respondent as an operative on 8 July 2007. Mr Dziedzic also commenced employment with the respondent as an operative on 8 July 2007.

1.2 As there are no material differences between the facts for each claimant the reasons given for the judgment on liability apply to each claimant.

1.3 The contracts of employment for these employees provided under the heading "remuneration" that "all authorised hours worked on a Saturday will be paid at one and half times of basic rate (sic) and all authorised hours worked on a Sunday will be paid at double basic rate. It also stated that "your normal hours per week are as per the published rota".

1.4 The employees worked on this contract for a considerable number of years until February 2018 when the respondent said a change was being made to their pay rate.

1.5 In a letter dated 5 February 2018 it stated:

> "I am writing to inform you that the Company proposes to make the following changes to your terms and conditions of employment with effect from 6 March 2018:
>
> To change your pay from being paid hourly to a basic annual salary of £16,848 per annum, but still paid weekly.
>
> To consolidate all enhanced payments as per your existing terms and conditions into this proposed salary…"

1.6 The effect of these changes was an overall average pay reduction for the claimants of around £2000 per annum (around 15%). It is also notable that the letter referred to the change taking "effect from 6 March 2018" without the service of a notice period. This meant the claimants would no longer receive overtime pay on a Saturday of time and a half or double overtime on a Sunday. Weekends were to be changed to "normal working days" but the variable shift pattern of working 5 days out of seven, including weekends, continued.

1.7 The letter added that consultation would "end on the 11 March 2018 when, unless alternatives are given, the new arrangements will become effective…".

1.8 The claimants did not agree to the change. The claimants each complained to their managers. The second claimant filed a grievance.

1.9 Ms Sabat wrote on February 2018:

> I am very sorry that after more than 10 years work in this company my position is not appreciated. On the contrary, my salary will be reduced and I do not agree the current proposals... I would like to know the reasons for reducing my remuneration…"

1.10 The respondent replied in a letter dated 7 February 2018.The letter referred to "legacy premiums" and stated (amongst other things); "I acknowledge that your total remuneration will reduce".

1.11 On 24 February Ms Sabat wrote:

> "The answer that I received from you unfortunately does not explain much. I can even say that it does not explain anything.
>
> "I am kindly asking you to explain what will happen if I do not agree to the proposed changes…"

1.12 The second claimant wrote back on 24 February 2018 asking step by step what would happen if she did not agree to the proposed changes. The claimants were informed that if they did not accept the variation they would be dismissed and re-employed on the new terms.

1.13 In a letter dated 27 February 2018 the respondent wrote:

> "In the event that you do not agree to the proposal then the Company will serve notice of dismissal on you (notice to terminate your existing terms and conditions of employment) the company will not make any payment in lieu of your notice period."

1.14 It is important to note that the company stated no payment for notice would be made and there was no reference to the contractual right to notice in this case of 10 weeks (under s86 ERA 1996). The claimants resigned to the HR dept on 7 March 2018 citing a breach of their contract.

1.15 The ET1s for unfair dismissal filed on 7 June 2018 was brought on behalf of all three claimants in identical terms. ACAS conciliation had duly taken place for each claimant.

1.16 The claims were served on the respondent in the usual way. No response was entered. The respondent did not appear at the Hearing.

2. RELEVANT LEGAL PROVISIONS

2.1 Dismissal

An employee is dismissed where:

> "the contract under which he is employed is terminated by the employer (whether with or without notice)" (section 95(1)(a), ERA 1996).

2.2 Constructive dismissal

2.2.1 An employee will be constructively dismissed if:

> "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct" (section 95(1)(c), ERA 1996).

2.2.2 Case law has established that there is a constructive dismissal when the following occur:

(a) There is a repudiatory breach by the employer of the express or implied terms of the contract.

(b) The employee resigns (with or without notice) in response to that breach.

(c) The employee does not delay unreasonably before resigning (otherwise the employee may be treated as having affirmed the contract and therefore loses their right to claim constructive dismissal).

2.2.3 A constructive dismissal is not always an unfair dismissal. The tribunal must look at the employer's conduct and decide whether it acted fairly despite having breached the contract (Allders International Ltd v Parkins [1981] IRLR 68).

2.3 Changes to terms and conditions

2.3.1 In the case of Greenaway Harrison Ltd v Wiles (1994 IRLR 380) GH Ltd decided to reorganise its switchboard by re-arranging the hours of two of the employees and making the third switchboard operator redundant. The claimant and another operator were given two weeks' notice of the proposed change in their shift hours. They both said they could not work them and, after some discussion, it was agreed that the change would not be implemented for four weeks. They were told that if they did not agree to the new hours, they would be given notice of dismissal. The claimant was told she could speak to the MD but that there was little possibility of him changing his mind. She therefore resigned, claiming she had been unfairly (constructively) dismissed. The tribunal decided that the employer, in threatening to serve notice of termination, had breached the contract of employment. The EAT held that, although there was no actual breach of contract, there was an anticipatory breach of contract. It rejected the company's argument that all the company threatened to do was to serve lawful notice of termination and that, since only full notice had been threatened, there could hardly be said to be a breach of contract - since the company was entitled to serve due notice to terminate the contract.

2.3.2 In Kerry Foods v Lynch [2005] IRLR 680, the EAT held that the lawful service of notice could not be a breach of the implied term of trust and confidence. Accordingly, an employer's stated intention to serve lawful notice under the contract was not capable of constituting an anticipatory breach of contract.

2.3.3 Kerry is rather at odds with the previous decision of the EAT in Greenaway Harrison Ltd v Wiles [1994] IRLR 380 that the employer's threat to terminate an employee's contract on notice could amount to an anticipatory breach of contract entitling the employee to claim that they had been constructively dismissed. Kerry Foods argued before the EAT that the tribunal was wrong to find that it was in repudiatory breach of contract. The EAT noted that Kerry Foods had not, in fact, amended Mr Lynch's contract but had merely served notice to terminate his employment and offered him re-employment on the new terms. The EAT held that the lawful service of notice could not be a breach of the implied term of trust and confidence as found by the tribunal, The EAT also held that there could not be an anticipatory breach of contract, either Mr Lynch's employment would have terminated lawfully on expiry of the notice period or he would have accepted the new terms and his employment would have continued. The EAT therefore concluded that Mr Lynch had "jumped too soon". The EAT therefore declared that there was no dismissal.

3. UNFAIR DISMISSAL

3.1 Refusal to accept changes to terms and conditions

At common law, a contract may be varied only in accordance with its terms or with the parties' agreement. Where an employee refuses to accept a change to their terms and conditions and the employer dismisses for that reason, the reason may constitute "Some other substantial reason" (SOSR), depending on the circumstances.

3.2 Is there a sound business reason for the change?

3.2.1 For a unilateral change to amount to some other substantial reason and a fair dismissal under s98 (4) ERA 1996 the employer must demonstrate that the changes were not imposed for arbitrary or capricious reasons but were in pursuit of a "sound business reason" (Hollister v National Farmers' Union [1979] ICR 542).

3.2.2 This does not have to be a reason that the tribunal considers sound, but one which a reasonable employer would consider sound. Tribunals should not substitute their own opinion for that of the employer on the question of whether the change is advantageous to the employer's business.

3.2.3 In Scott and Co v Richardson [2005] All ER (D) 87, the EAT overturned an employment tribunal's decision that the employer had failed to demonstrate that the change to the shift system gave the employer such a "discernible business advantage" that the employee's refusal to accept the change could not amount to SOSR. The EAT held that the tribunal had erred in allowing its own assessment of the new shift system to influence its decision and placing an even higher burden of proof on the employer by ruling that the advantage to the employer had to be so substantial that it mitigated the consequences of the dismissal.

3.3 Change does not have to be crucial to survival of business

There is no need for the employer to prove that the reorganisation was crucial to the survival of the business (Catamaran Cruisers Ltd v Williams and others [1994] IRLR 386) or even that there was a particular "quantum of improvement" achieved (Kerry Foods Ltd v Lynch [2005] IRLR 680).

3.4 Employer must adduce evidence as to business reasons for change

3.4.1 However, the employer must provide evidence to demonstrate the business reasons for the change and must show that they were not trivial.

3.4.2 In Banerjee v City and East London Area Health Authority [1979] IRLR 147, the employer decided to make certain jobs full-time only. A part-time employee who had previously job-shared was dismissed. The employer produced no evidence at all as to why there was any benefit in making the job full-time and failed to demonstrate any advantages created by such change. The EAT found that in that case there could be no finding of SOSR and the dismissal was unfair at the first stage.

3.5 Factors relevant to reasonableness of dismissal

3.5.1 When considering the fairness of a dismissal, tribunals are required to look at the full context of the business reorganisation or proposed change. No one relevant factor will be looked at to the exclusion of all others (St John of God (Care Services) Ltd v Brooks and others [1992] ICR 715).

3.5.2 In the context of business reorganisation and consequent changes to terms and conditions, the assessment of reasonableness usually entails a balancing act in

which the tribunal considers the reasonableness of the employer in dismissing the employee with the reasonableness of the employee in refusing to accept the change (see Catamaran Cruisers Ltd v Williams).

3.5.3 While dismissing an employee for refusing to accept a change to his or her terms and conditions may be reasonable in the circumstances, it does not follow that the employee's refusal to accept them is unreasonable (see Chubb Fire Security Ltd v Harper [1983] IRLR 311).

3.5.4 The interests of the employer and employee may conflict and be irreconcilable, such that a tribunal may accept that an employee was reasonable in their refusal to accept certain changes, but then go on to find that those changes were nonetheless reasonably imposed by the employer and that the dismissal was fair in all the circumstances (see St John of God (Care Services) Ltd v Brooks and others [1992] IRLR 546).

3.5.5 The tribunal failed to make this distinction, focusing on the reasonableness of the employee's refusal rather than the reasonableness of the employer's decision in Garside and Laycock Ltd v Booth [2011] IRLR 735 (EAT).

3.5.6 The tribunal should not substitute its own view of what was reasonable. The over-arching question is whether the decision to dismiss was within the range of decisions which a reasonable employer, acting reasonably, could reach.

3.6 Factors commonly taken into account where employee does not agree to change in terms

The factors which are commonly taken into consideration by the tribunal in assessing the reasonableness of an employer's decision to dismiss where it has failed to obtain an employee's agreement to proposed changes are:

3.6.1 The employer's motives for introducing the changes.

3.6.2 The employees' reasons for rejecting the changes.

3.6.3 Whether the employees were given reasonable warning of the proposed changes.

3.6.4 Whether the changes and full effect of those changes have been sufficiently and clearly explained to the employees.

3.6.5 Whether the employer has undertaken an assessment of the impact of the changes on employees and whether it has considered alternatives to any changes.

3.6.6 Whether the employer has attempted to obtain the employees' voluntary agreement to any of the changes.

3.6.7 Whether a reasonable and genuine consultation process with the affected employees has taken place. This will include listening to their reasons for rejecting the changes, responding reasonably to objections and making concessions, where reasonable to do so.

3.6.8 Whether a majority of the employees affected have accepted the changes.

3.6.9 Whether any recognised trade union recommended or objected to the changes.

4. CONCLUSIONS

4.1 Dismissal

4.1.1 The first question was whether the employees were dismissed actually or constructively.

4.1.2 In this case, I had no evidence before me from the respondent. I did however consider such evidence as was available.

4.2 No notice actually served

In the first instance, I do not find that the employer had served valid notice of dismissal as at the date the employment ended. The employer had merely threatened to do so. I distinguish Kerry Foods in this case. There was no lawful service of notice here. There was on the contrary the suggestion (albeit the letters were confusing and contradictory) that notice would not be lawfully served but the changes would take effect on 6 March 2018 (or 11 March 2018) with no further payment. This was not a case of actual dismissal by the employer.

4.3 Constructive dismissal

4.3.1 Turning to the issue of constructive dismissal, I note that the threat of dismissal was made first in a letter dated 5 February 2018 stating the changes would take effect from 6 March 2018.

4.3.2 This first letter made no reference to the need to give notice or to the need to pay the employee during notice. That letter was not giving of notice itself, so it wrongly suggested the changes would take effect from 6 March 2018. This was a misleading description of the contractual position. Not only was no notice given in this letter, but the contract made no mention of the rights of each claimant to be given 10 weeks' notice under s86 ERA 1996. The letter implied that the respondent did not need to give any notice to effect the change on 6 March 2018 and/or did not make reference to the 10 weeks' notice due under each contract.

4.3.3 The letter from the respondent of 7 February 2018 also stated the main explanation as "there is no requirement to continue to offer enhanced pay rates for working weekends", with no cogent or further explanation whatsoever, why the contractual position needed to be changed.

4.3.4 The letter of 27 February 2018 was accompanied by a clear statement that payment in lieu of notice would not be made although it did refer to giving notice. Again, this letter did not set out the actual notice entitlement that each claimant was due of 10 weeks. This letter was also misleading.

4.3.5 The letters in combination led the claimants to believe, on their evidence, that there would be no payment or notice period given if they refused to accept the change and/or that the changes were going to take effect on or about 7 March 2018 (and not after 10 weeks' notice). They therefore resigned on that date in response to the employer's breach.

4.4 Express term as to notice

In the first instance, I find that the letters from the respondent, read together, amount to a threat that the employer would not observe the express terms of the contract as to notice and/or the need to give 10 weeks' notice. Such threats amounted to a breach/an anticipatory breach of the express terms of the contract as the employer was threatening to avoid the full notice process and not serve notice properly if the employee did not accept. This was because the changes could not take effect on 6 March 2018 where notice had not even been served and where no pay in lieu (or a 10

week notice period) was offered either. This conduct was an anticipatory repudiatory breach by the employer of the express terms (the notice provision) in the contract. The employees resigned without notice in response to that breach. The employee did not delay unreasonably before resigning.

4.5 Trust and confidence term

4.5.1 In any event, I also went on to consider, in the alternative, constructive dismissal in relation to the implied obligation of trust and confidence. The claimants gave clear evidence about their serious concerns over the letters sent to them; the lack of explanation given and the closed approach of the employer. I note their length of service and the fact these rates of pay had prevailed for many years. I note the lack of explanation for why the changes were being made. I note the employer's frankly misleading letter of 5 February 2018, the brusque approach to the letters/grievance raised, the fact there was very little, if any, meaningful consultation and the letter of 27 February 2018 rather bizarrely suggesting there was an increase in pay, despite the same roster applying such that this was an effective pay reduction of around 15% and making no reference to the 10 week contractual notice period. There was no evidence the employer had undertaken a proper assessment of the impact of the changes on employees and whether it had genuinely considered alternatives to any changes. The employer's motives for introducing the changes were left unclear. There was little or no evidence of consideration being given to the employees' reasons for rejecting the changes. The employees did not appear to have been given much reasonable warning of the proposed changes (after around ten years of these terms applying). There was also no evidence the changes and full effect of those changes had been sufficiently and clearly explained to the employees.

4.5.2 I find the employer's conduct as a whole in the way it went about seeking to impose the changes in terms and conditions (before actually giving notice) also fundamentally breached the implied term of trust and confidence.

4.5.3 I therefore conclude, in the alternative, that the employer's conduct in the run up to 7 March 2018 amounted to a fundamental breach of the implied term of trust and confidence.

4.5.4 I find there was a repudiatory anticipatory breach by the employer of the express terms of employment (the notice provision) and/or of the implied term of trust and confidence in the contract. The employees resigned without notice in response to that breach. The employees did not delay unreasonably before resigning.

4.5.5 In the circumstances, the events leading up to the resignation also constituted a fundamental breach of the express/implied term of trust and confidence and therefore amount to a repudiatory breach of contract on that basis.

4.5.6 The claimants were each dismissed (constructively) on 7 March 2018.

4.6 Was dismissal in breach of contract?

The claimants were each constructively dismissed without notice. Each was entitled to 10 weeks' notice of termination of employment under s86 ERA 1996, as each had 10 years' complete service. As no notice was given, the respondent breached the contracts of employment of each claimant by paying no notice pay.

4.7 Was dismissal unfair?

4.7.1 For a unilateral change to amount to SOSR, the employer must demonstrate that the changes were not imposed for arbitrary or capricious reasons but were in pursuit of a "sound business reason" that a reasonable employer could reach (Hollister v National Farmers' Union [1979] ICR 542).

4.7.2 Firstly, I had no cogent evidence to demonstrate the changes were for sound business reasons.

4.7.3 Further, and in any event, the assessment of reasonableness entailed a balancing act in which the tribunal had to consider the reasonableness of the employer in dismissing the employee with the reasonableness of the employee in refusing to accept the change (see Catamaran Cruisers Ltd v Williams). The claimants each explained that the level of pay reduction was very substantial and would cause them hardship. They gave evidence that such a reduction would make the role effectively uneconomic to perform and that they did not agree to the changes. The employer did not appear to balance these matters at all.

4.7.4 I also note the following five points relevant to fairness:

(a) There was little or no evidence of a meaningful or genuine consultation process.

(b) There was no evidence the employer had undertaken an assessment of the impact of the changes on employees and whether it had genuinely considered alternatives to any changes.

(c) The employer's motives for introducing the changes were unclear.

(d) There was little or no evidence of consideration being given to the employees' reasons for rejecting the changes. The employees did not appear to have been given much reasonable warning of the proposed changes.

(e) There was no evidence the changes and full effect of those changes had been sufficiently and clearly explained to the employees.

4.7.5 I also rely on the other points made above in respect of my finding of constructive dismissal.

4.7.6 The facts in this case were rather similar to those in Banerjee v City and East London Area Health Authority [1979] IRLR 147.

4.7.7 In all the facts and circumstances before the Tribunal, and balancing the facts on both sides, the decision to dismiss fell well outside the range of decisions which a reasonable employer, acting reasonably, could reach.

4.7.8 Therefore, dismissal was unfair in breach of s98 (4) ERA 1996.

5. REMEDY

5.1 Legal provisions relevant to remedy

5.1.1 Basic award

The basic award is a statutory award calculated in accordance with the provisions of section 119 of the ERA 1996 and in a similar way to a redundancy payment. The calculation involves multiplying the relevant factors of length of continuous service, age and a week's pay (as at the effective date of termination (EDT)). Counting backwards from the effective date of termination, allow the appropriate amount for each of the employee's complete years of continuous employment as follows:

(a) One and a half weeks' pay for each year of employment in which the employee was aged 41 or over at the beginning of the year*.

(b) One week's pay for each year of employment in which the employee was aged 22-40 at the beginning of the year*.

(c) Half a week's pay for each year of employment in which the employee was under the age of 22 for any part of the year*.

5.1.2 A week's pay

The normal statutory rules for calculating a week's pay apply (sections 220-229, ERA 1996).

5.1.3 Compensatory award

(a) Having addressed the basic award, the tribunal must go on to consider whether it is appropriate to make a compensatory award (section 118, ERA 1996). The objective of a compensatory award is "to compensate, and compensate fully, but not to award a bonus" (Norton Tool v Tewson [1972] ICR 501).

(b) Unlike the basic award, calculation of the compensatory award does not rely on any prescribed formula. Section 123 of the ERA 1996 provides that the 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 insofar as that loss is attributable to action taken by the employer".

(c) When considering heads of loss, it is essential not to lose sight of the key factors identified in section 123 of the ERA 1996, namely, is the loss:

(i) A consequence of the unfair dismissal?

(ii) Attributable to the employer?

(iii) Just and equitable?

5.2 Temporary employment will not break the chain of causation

5.2.1 It is well established that, while the claimant must normally account for their earnings, taking up temporary employment does not prevent their pre-existing and ongoing losses from being deemed losses "in consequence of the dismissal" and "attributable to action taken by the employer" for the purposes of section 123 of the ERA 1996, provided that is just and equitable in the circumstances.

5.2.2 Therefore, taking up temporary employment will not generally constitute an intervening event that would end the former employer's liability for losses arising after the original unfair dismissal (Whelan v Richardson [1998] ICR 318).

5.3 Permanent employment is likely to break the chain of causation

A permanent position with equivalent or higher wages is likely to mean that a claimant has no substantial loss beyond the date the new job starts and will not be in a position to recover further compensation. Accordingly, on securing permanent employment, the original employer's ongoing liability to the claimant will be likely to cease and the causal link between future loss and the dismissal will be broken. This may also be the case where that new employment does not prove to be as "permanent" as was at first thought and the claimant is shortly dismissed for a second time. The original employer is not, however, automatically "off the hook".

5.4 Burden of proof

5.4.1 Whereas the burden of proof as to the fairness of a dismissal tends to fall on the employer, it is generally for the claimant to establish their loss in the context of the compensatory award. The claimant will accordingly need to provide evidence of their losses and steps they have undertaken by way of mitigation, for example, by producing pay slips, evidence of job applications and so on. The employer must bring any additional supporting evidence or evidence likely to counter the claimant's claims.

5.4.2 Loss of earnings will be calculated on the basis of net take home pay (that is, after deduction of tax and national insurance). However, this sum reflecting loss of earnings may need to be "grossed up" for tax purposes to ensure that the claimant is properly compensated after payment of any tax due on the award.

5.4.3 A claimant's losses will be calculated according to sums they reasonably expected to receive, had they remained in employment. This can include bonuses (even where discretionary) and commission. The sums do not need to be contractual, provided that reasonable expectation can be established (York Trailer Co Ltd v Sparkes [1973] ICR 518).

5.4.4 Section 123(2)(b) of the ERA 1996 makes clear that the loss of any benefit, which a claimant might reasonably be expected to have received but for their dismissal, should be considered in the context of compensation.

5.5 State benefits: recoupment

If a claimant has received Job Seekers' Allowance, Income-related Employment and Support Allowance, Universal Credit or Income Support following dismissal, the Government (through Job Centre Plus) is able to recover the cost of those benefits pursuant to the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 (SI 1996/2349) (the Recoupment Regulations).

5.6 Payments from the employer

The general principle is that the employer must be given credit for sums it has paid to the claimant.

5.7 Sums earned by the claimant

5.7.1 The tribunal should take into account and give credit for sums the claimant has earned elsewhere following dismissal, subject to the Norton Tool principle (see Norton Tool guidelines). Where a claimant finds alternative work their income may be more, less or the same as that received from their previous employment. When it is less or the same, then it is easy for an employment tribunal to work out the precise amount of the loss.

5.7.2 New employment that turns out to be temporary, even where the new salary is greater than the old, may well not break causation and the original employer's liability for future loss. In each case, the tribunal must assess whether the unfair dismissal can be regarded as a continuing cause of loss and the extent of that

ongoing loss (see Cowen v Rentokil Initial Facility Services (UK) Ltd (2008) UKEAT/0473/07;).

5.8 Failure to mitigate

5.8.1 Section 123(4) of the ERA 1996 requires a claimant to mitigate their loss and the claimant will be expected to explain to the tribunal what actions they have taken by way of mitigation. This includes looking for another job and applying for available state benefits.

5.8.2 The tribunal is obliged to consider the question of mitigation in all cases. What steps it is reasonable for the claimant to take will then be a question of fact for its determination. The courts have made clear, however, that the standard to be imposed on a claimant, who has suffered unfair dismissal, should not be overly stringent. The burden of proof is on the respondent, and it is not enough for the respondent to show that there were other reasonable steps that the claimant could have taken but did not take. It must show that the claimant acted unreasonably in not taking them. This distinction reflects the fact that there is usually more than one reasonable course of action open to the claimant (Wilding v British Telecommunications Plc [2002] IRLR 524).

5.8.3 Failure to mitigate is likely to arise in several different circumstances. The most common argument raised by employers is that the employee had not made sufficient effort to look for new work or had confined their search to too narrow a range of jobs.

5.8.4 The duty to mitigate only arises after the dismissal. Therefore, where an employee rejects an offer of new terms before the dismissal has taken effect, this cannot be a failure to mitigate, as no duty to mitigate yet exists (see F & G Cleaners Ltd v Saddington and others [2012] IRLR 892 (EAT).

5.8.5 In Cooper Contracting Ltd v Lindsey UKEAT/0184/15 Mr Justice Langstaff, President of the EAT, set out the following key principles derived from case law that tribunals should take into account when considering the issue of mitigation of loss:

(a) The test may be summarised by saying that it is for the wrongdoer to show that the claimant acted unreasonably in failing to mitigate.

(b) The burden of proof is on the respondent, as the wrongdoer. The claimant does not have to prove that they have mitigated their loss.

(c) It is not some broad assessment on which the burden of proof is neutral. If the respondent does not put forward evidence to the tribunal that the claimant has failed to mitigate, the tribunal has no obligation to make that finding (Tandem Bars Ltd v Pilloni UKEAT/0050/12).

(d) What has to be proved is that the claimant acted unreasonably; they do not have to show that what they did was reasonable.

(e) There is a difference between acting reasonably and not acting unreasonably.

(f) What is reasonable or unreasonable is a matter of fact.

(g) The claimant's views and wishes are one of the circumstances that the tribunal should take into account when determining whether the claimant's actions have been reasonable. However, it is the tribunal's assessment of reasonableness, not the claimant's, that counts.

(h) The tribunal should not apply too demanding a standard on the claimant who is, after all, a victim of a wrong. The claimant is not to be put on trial as if the losses were their fault, when the central cause is the act of the respondent as wrongdoer (Waterlow, Fyfe v Scientific Furnishings Ltd [1989] ICR 648 and Wilding).

(i) In a case in which it may be perfectly reasonable for a claimant to have taken on a better paid job, that fact does not necessarily satisfy the test. It will be important evidence that may assist the tribunal to conclude that the employee has acted unreasonably, but it is not in itself sufficient.

5.9 Unreasonable refusal of an offer of work

5.9.1 If a claimant refuses an offer of work, whether in the form of an offer of reinstatement or re-engagement by the former employer, or an offer of new employment by a third party, that refusal must be reasonable in the circumstances. If it is not, the claimant will have failed to mitigate their loss and any compensation that might have been due to them will be adversely affected. Their compensation may cease at the point of offer (or soon afterwards).

5.9.2 The question is not whether it would have been reasonable for the claimant to accept the offer, but whether the claimant has acted unreasonably in refusing it. There may be more than one reasonable course of action for the claimant in the circumstances (Wilding v British Telecommunications Plc [2002] IRLR 524 (CA)).

5.9.3 The tribunal will consider both the reasonableness of the offer and the claimant's reasons for refusal. In the case of an offer by the old employer, the historical relationship between the parties is relevant to the question of reasonableness.

5.9.4 In Wilding (above), the Court of Appeal confirmed that it is appropriate for the tribunal to consider:

(a) The circumstances in which the offer was made and refused.

(b) The attitude of the employer.

(c) The way in which the claimant had been treated.

(d) All the surrounding circumstances.

5.10 Interest on unpaid tribunal awards

The tribunal has no power to award interest as a remedy for unfair dismissal in its own right. However, for claims issued on or after 29 July 2013, interest on a tribunal award is payable, at the rate of 8% per annum, from the day after the relevant decision day, unless the full amount is paid within 14 days after the decision day (Employment Tribunals (Interest) Order 1990 (SI 1990/749), as amended by the Employment Tribunals (Interest) Order (Amendment) Order 2013 (SI 2013/1671):

6. REMEDY CONCLUSIONS

6.1 First Claimant (Judyta Marzec); Remedy award

6.1.1 The claimant's employment was from 8 July 2007 until 7 March 2018. She was 31 years old at dismissal. Her weekly gross earnings in the 12 weeks before dismissal were £4693.47. Weekly gross pay was £391.12.

6.1.2 The first claimant is entitled to 10 weeks' notice pay (damages for breach of contract) in the sum of £3911.20 (prior to deductions to be made at source by the respondent for tax and NI (if any)).

6.1.3 The basic award for unfair dismissal is entitled is the sum of £3911.20.

6.1.4 The claimant had not found work as at the hearing. She gave evidence about her extensive steps to find new work. I do not find that she has failed to mitigate her losses. I find that, unless she acted unreasonably in looking for new work, she should within 12 weeks of the hearing have found new employment such that her losses would end within 12 weeks of 6 December 2018. However, she had full losses until then.

6.1.5 The compensatory award for unfair dismissal is therefore as follows:

(a) Loss of statutory rights; £350

(b) Loss of earnings 16 May 2018 (when notice pay expired) to 29 October 2018 £7675.68;

(c) Loss from 29 October 2018 to 6 December 2018 £449.10; and

(d) Future loss of earnings: (12 weeks): £1077.84.

6.1.6 The total compensatory award for unfair dismissal (to be made without deductions) is £9552.62.

6.1.7 The Recoupment Regulations do not apply.

6.2 Second Claimant (Edyta Sabat)

6.2.1 The second claimant's employment was from 8 July 2007 until 7 March 2018. She was 36 years old at dismissal. Her weekly gross earnings in the 12 weeks before dismissal were £4056.57. Weekly gross pay was £338.04.

6.2.2 The second claimant is entitled to 10 weeks' notice pay (damages for breach of contract) in the sum of £3380.04 (prior to deductions to be made at source by the respondent for tax and NI (if any)).

6.2.3 The basic award for unfair dismissal to which she is entitled is the sum of £3,380.04.

6.2.4 The second claimant found new work on 8 June 2018. She gave evidence about her extensive steps to find new work. I do not find that she has failed to mitigate her losses. The compensatory award for unfair dismissal is therefore as follows:

(a) Loss of statutory rights; £350

(b) Loss of earnings 16 May 2018 (when notice pay (covered above) expired) to 8 June 2018 (when she found new work at the same or higher pay rate); £861.74

6.2.5 The total compensatory award for unfair dismissal (to be made without deduction is £1211.74.

6.2.6 The Recoupment Regulations do not apply.

6.3 Third Claimant (Tomasz Dziedzic)

6.3.1 The third claimant's employment was from 8 July 2007 until 7 March 2018. He was 35 years old at dismissal. His weekly gross earnings in the 12 weeks before dismissal were £4518.24. Weekly gross pay was £376.52.

6.3.2 The claimant is entitled to 10 weeks' notice pay (damages for breach of contract) in the sum of £3765.20 (prior to deductions to be made at source by the respondent for tax and NI (if any)).

6.3.3 The basic award for unfair dismissal to which he is entitled is the sum of £3765.20.

6.3.4 The claimant found new work on 6 July 2018. He gave evidence about his extensive steps to find new work. I do not find that he has failed to mitigate his losses. The claimant started self-employment on 6 July 2018 from which date he mitigated his losses in full.

6.3.5 The compensatory award for unfair dismissal is therefore as follows:

(a) Loss of statutory rights; 50

(b) Loss of earnings 16 May 2018 (when notice pay (covered above) expired) to 6 July 2018 (when he found new work at the same or higher pay rate); he had four weeks net loss of earnings at £112.50 per week. £449.

6.3.6 The total compensatory award for the third claimant for unfair dismissal (to be made without deduction) is £799.

6.3.7 The Recoupment Regulations do not apply.

27.03.2019

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Employment Judge Daniels

Sent to the parties on:

16 April 2019

For the

Tribunal:

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