THE EMPLOYMENT TRIBUNAL

SITTING AT: **SOUTHAMPTON**

BEFORE: **EMPLOYMENT JUDGE EMERTON (sitting alone)**

BETWEEN:

Ms B Aggar

Claimant

AND

Bugle Yarmouth (IOW) Limited

Respondent

ON: **19 March 2019**

APPEARANCES:

For the Claimant: **In person**
For the Respondent: **[*Response not presented*]**
Mr D Williams (Financial Controller)

REASONS

JUDGMENT having been sent to the parties on 21 March 2019 and written reasons having been requested by the respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

Background to the hearing

1. On 1 August 2018, having been through ACAS early conciliation, the claimant presented an in-time claim for wrongful dismissal, unfair dismissal, failure to pay a statutory redundancy payment and failure to provide written particulars of employment. In a nutshell, the claimant was employed by the the Bugle Coaching Inn, Yarmouth, Isle of Wight for some years. She was promoted to the role of Assistant Manager. She complained that she was told that her post had been made redundant,

that no suitable alternative role was offered, and she was dismissed without any proper process, and without being paid notice or a statutory redundancy payment.

2. The claim was served on the respondent Company's registered address (which had been correctly specified in the claim form) on 6 August 2018, giving the respondent until 3 September 2018 to present a response. Standard directions were given, and the notice also listed the case for a two-day hearing commencing 19 March 2019. Because there had been an error in the description of the respondent (naming a Director of the Company as well as the Company itself), the claim was re-served (correctly describing the respondent Company) on 11 September 2018, with an extended deadline for presenting a response, of 9 October 2018.

3. No response was received. There has been no application to extend time for presenting a response.

4. On 2 November 2018 the tribunal wrote to the respondent to inform them that as no response had been presented, under 21 of the rules a judgment may now be issued. The respondent was informed that they were entitled to receive notice of any hearing but may only participate in any hearing to the extent permitted by the Employment Judge who hears the case. The same day, the parties were also informed that the case had been re-listed for 1 hour at 10:00am on 19 March 2019.

5. The tribunal could have produced a rule 21 judgment (or in any event a rule 21 liability judgment) at any stage after 9 October 2018, but in fact the hearing date was left in the list. There would be factual issues relating to remedy to resolve at that hearing.

6. The claimant provided various documents to the tribunal in advance of the hearing.

Conduct of the hearing of 19 March 2019

7. The claimant attended in person. The respondent was represented at the hearing by Mr D Williams (Financial Controller). The claimant provided a bundle and witness statement to the tribunal. Mr Williams did not provide documents.

8. Mr Williams did not bring a draft response either to liability or remedy, and made no application to present a late response. It should be noted that there was no suggestion that the respondent had missed any correspondence, and nor was any explanation offered as to the respondent's failure to presented a response, or to engage in the litigation process until a very late stage.

9. The judge announced that he had noted that the claimant could have been issued with a rule 21 judgment at any time after the deadline for

presenting a response expired, but understood that because of outstanding remedy issues a decision appeared to have been taken to leave matters to be determined at the 1-hour hearing, which in view of the very short length of the listed hearing, had plainly been listed on the basis that the only limited factual issues would fall to be resolved, and these only relating to remedy.

10. The judge confirmed the correct identity of the respondent and announced that in view of the background to the hearing, he would accept, pursuant to rule 21, that the claims were well-founded, subject to clarification of the heads of claim. Both parties would then be permitted to provide evidence and make submissions as to remedy, and the tribunal did not intent to limit Mr Williams's ability to participate in the hearing with respect to remedy.

11. The claimant confirmed (uncontentiously) the contents of her claim form and subsequent schedule of loss and other documentary clarification, in respect of the heads of claim. The claimant confirmed that she had had assistance in drafting the schedule of loss from the Isle of Wight CAB, and they believed that the figures were correct. The judge confirmed that he found the following claims to be well founded, pursuant to rule 21:

    a. Unfair dismissal;
    b. Wrongful dismissal (failure to pay notice);
    c. Failure to pay a redundancy payment; and
    d. Failure to provide written particulars of employment.

12. The figures in the claimant's schedule of loss relating to his wages, calculation of notice pay, basic award etc, were not disputed by Mr Williams.

13. The following remedy issues were identified.

14. In respect of the unfair dismissal, it was not disputed that the correct calculation of the basic award was £3,173.10. What was (potentially) in dispute was the amount of the compensatory award, including the loss of earnings and the extent that the claimant had mitigated her loss. The tribunal would need to determine the latter points, with any evidence or submissions made by the parties.

15. In respect of wrongful dismissal, it was not in dispute that although outstanding holiday was correctly paid, the claimant was not paid notice, and not in dispute that the contractual notice she was entitled to was 5 weeks, with net pay of £333.08 per week – the notice pay would therefore amount to £1,665.40. There was a potential complication relating to the fact that the claimant had been on sick leave prior to dismissal, in receipt of statutory sick pay, although Mr Williams did not take any point on this.

16. The tribunal had accepted the claimant's liability case, that she had been told that her role was redundant, and that an alternative role offered to her was not suitable, that there had not been adequate consultation or a proper redundancy process, and that she would therefore be entitled to a statutory redundancy payment. The redundancy payment would be calculated in the same way as the basic award for unfair dismissal, and as the claimant would receive that award, she was not entitled to additional compensation for the failure to make a redundancy payment.

17. In respect of the failure to provide written particulars under sections 1-4 of the Employment Rights Act 1996, the judge pointed out that he would need to determine whether it would be just and equitable to award an amount equivalent to two or four weeks' pay.

18. Once it had been confirmed what matters remained in dispute, the parties were given the opportunity to present further evidence and submissions (the claimant having already served documentary evidence and a witness statement, which she adopted as her primary evidence in the case).

19. The parties were given the usual explanation that they would be provided with a judgment, and as to the timescales for requesting written reasons. Mr Williams was reminded that if the respondent was to request written reasons, this would become a public document which would be accessible to any person with access to the internet. The respondent Company might wish to reflect upon that point before deciding whether it wished to give let potential customers read what the judge had had to say about the case, especially if there was no obvious basis for an appeal. The judge also explained that there were limited judicial resources available at Southampton Employment tribunal and that producing unnecessary written reasons was a significant burden upon the system, when the judge had taken steps to explain all his decisions orally, in straightforward terms.

20. Mr Williams, wisely, did not request written reasons at the hearing.

21. The judgment was sent to the parties on 21 March 2019. The respondent requested written reasons by email on 2 April 2019. They have therefore been produced.

The tribunal's conclusions on (potentially) disputed matters

22. In respect of both types of dismissal (and the redundancy payment), the claimant's evidence was that the alternative role offered to her was not a suitable alternative, and that it was not reasonable for her to accept what was effectively a demotion, with no eligibility for a bonus, and would involve to an inconvenient location which would be hard for her to travel to. This was effectively part of the claimant's case as to liability, which the tribunal had plainly accepted (and which was unchallenged by the

respondent), albeit it also had relevance to remedy. It was evident to the tribunal that there were no adequate procedures or consultation. Although the respondent was being permitted to present a case at the hearing in respect of remedy, Mr Williams did not have any documents for the tribunal, challenged very little and had few submissions to make. Although the claimant had provided copies of some contemporaneous correspondence from the respondent, the tribunal attached very little weight to any assertions in correspondence which conflicted with the claimant's account. Mr Williams had very little personal knowledge of the events in question, and had clearly not been involved in the redundancy decision-making process. The tribunal agreed with the claimant's analysis of what had happened, and the lack of any suitable alternative role being offered.

23. As for the claimant's sickness absence and the eligibility for notice pay, it is not in dispute that the claimant was dismissed with an effective date of termination of 13 June 2018, the date that she notified her employer that the alternative role would not be suitable. There was no suggestion of the claimant being invited to work her notice (in which case the issue of ongoing sickness absence *might* have been relevant). The claimant was entitled to her full wages as notice pay, and it was clearly intended that the dismissal take effect immediately and that any contractual sums due would be paid to the claimant, evidently as pay in lieu of notice, albeit it would appear that the only outstanding sums paid were for wages and holiday pay. Mr Williams did not seek to submit that the claimant was not entitled to the notice pay set out in her schedule of loss.

24. In respect of the unfair dismissal compensatory award, the judge announced that the sum of £350 for statutory rights, appeared to be an appropriate the correct figure, notwithstanding the schedule of loss had asked for £500. Neither party sought to argue otherwise. In respect of compensation for loss of earnings, the position was more nuanced. Mr Williams might have argued, but did not argue, that the claimant could have been dismissed for redundancy anyway. The tribunal noted that there had been no response from the respondent, and that there was no reliable evidence suggesting that it was necessary to dismiss the claimant, and why the respondent's restructure could not have been conducted in such a way as to leave her in post (especially as the claimant believed that there may have been an ulterior motive to oust her). Whilst it was clear that the respondent had decided to make the claimant's post redundant, there was no adequate explanation as to why that was necessary, or why after proper consultation the dismissal could not have been avoided. Indeed, the respondent has failed to present a response (having had also had ample time to seek to present a late response) or indeed to try to give the tribunal any explanation for its apparent failures. There is no evidential basis for the tribunal to conclude that there was any likelihood of the respondent needing to dismiss the claimant for redundancy, had a fair procedure been followed, and in any

event Mr Williams did not advance such an argument. There was no basis for a *Polkey* reduction.

25. As for loss of earnings and mitigation of loss, the claimant explained how the jobs market on the Isle of Wight is not buoyant, and in the circumstances, she had decided that the most sensible option for her would be to apply for a Hackney Carriage Driver's licence and operate as a taxi driver through Alpha Cars. Mr Williams did not seek to argue that this was not a reasonable approach. The claimant was unwell at first, and could not start work immediately. She passed her taxi-driver test first time, and hired the cab from Alpha Cars, operating on a self-employed basis. Initially profits were very small, but her earnings were increasing and she expected his earning potential to increase. She set out her losses and earnings to date in the schedule of loss, the contents of which were not disputed, and Mr Williams did not dispute the claimant's analysis of loss of earnings generally. The claimant, very fairly, indicated that she hoped to have equalled her previous earnings (when working for the respondent) within a month or so of the hearing, and would not seek any compensation for ongoing loss of earnings after that point. The tribunal accepted the claimant's case as to compensation for loss of earnings, and accepted that she had reasonably mitigated his loss.

26. The calculation for loss of earnings of £4,793.69 is made up as follows. The first period is accounted for by the notice pay already awarded by the tribunal. The claimant was signed off by her GP as fit to work from 3 October 2018. The compensation for that initial period is limited to what she was eligible to receive in statutory sick pay, namely 11 weeks at £92.05 = £1,012.50. Following that, there was 28 weeks' worth of loss of earnings a5 £333.08 net per week. There is no need to go beyond that period, as after that period the claimant accepts that he would have no ongoing loss of earnings. The theoretical loss of earnings was therefore £10,338.79. But the claimant must give credit for her self-employed taxi-driver earnings (and projected earnings) of some £5,545.10. The net loss of earnings is therefore £4,793.69, for which the claimant falls to be compensated (with an additional £350 for loss of statutory rights).

27. As for the failure to provide written particulars, the claimant's case (supported by her evidence) was that she was originally given a copy of written particulars, which was not only incorrect but was missing some of the required information. She returned it to the respondent, for the specific purpose of it being correctly completed, so that she could ensure that she had a compliant and correct version, which clearly set out her contractual rights as specified in the legislation. Whether or not anyone took steps to produce a corrected version, it was never given to her, which reflects poorly on the senior management of the Company. She was upset and felt let down. She believed that in the circumstances she should be awarded four weeks' pay.

28. This was the only area where Mr Williams was able to provide evidence from his own experience, and he explained to me that the Company head office *did* take steps to ensure that correct written particulars were produced for each employee, and he believed that they had been produced for the claimant (although he did not provide a copy of the correct particulars to me, and was unable to confirm exactly what had been done). He explained that the system was that the manager of the pub would be given these documents, and would be expected, in turn, to supply the written particulars to the employee. He had no information as to whether the claimant's manager did in fact pass them on to the claimant, but that is what senior management would expect him to do.

29. I found the claimant and Mr Williams both to be credible in their accounts. My finding was that the situation was exactly as described by the claimant. Mr Williams' account was not inconsistent with this finding.

30. Furthermore, if Mr Williams' team at head office had taken steps to try to ensure that the paperwork was correct, this makes the management's omission the more serious, as it would not have been in the slightest bit difficult to give the claimant the written particulars she had requested. It follows that management had neglected to carry out their duties diligently, despite knowing that the claimant was waiting for written particulars, and being on notice as to significant omissions in the first draft. Having accepted that the claimant had specifically requested complete and correct particulars to be given to her, and that no steps were taken to comply with his request, and that this upset the claimant, and noting that I have also accepted that the respondent failed to pay the claimant her statutory and contractual entitlements upon dismissal, I consider that this omission is sufficiently serious that it would be just and equitable to award four rather than two weeks' pay. It was not in dispute that the claimant's gross weekly pay was £423.08. The claimant is therefore entitled to an additional award of £1,692.32

31. The Recoupment Regulations do not apply.

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Employment Judge Emerton
Date: 28 April 2019