



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs L Seager

**Respondent:** European Kitchens Ltd

**Heard at:** Southampton **On:** 17 July 2019

**Before:** Employment Judge Hargrove

**Representation**

**Claimant:** Mr A Jones, Solicitor

**Respondent:** Ms Hall, Consultant

## JUDGMENT

1. Further to the Employment Tribunal's Judgment sent out to the parties on 28 March 2019, it is adjudged that the claimant is entitled to, and the respondent is ordered to pay to the claimant, the following additional sums:
  - £1,301.20 as unpaid commission due as pay in lieu of notice for the month from 8 May – 5 June 2018.
  - A compensatory award pursuant to Section 123 of the Employment Rights Act amounting to £8,708.01.
  - Unpaid holiday pay due in the year from 1 January 2018 – 5 June 2018 amounting to £503.87.
  - Interest upon the Judgment sums amounting to £1,664.50 sent out on the 28 March under the Employment Tribunal Interest Order 1990 £38.28.

## REASONS

1. By a Judgment sent out to the parties on 28 March 2019, the Employment Tribunal found:
  - (1) That the claimant was unfairly dismissed but that there was a fifty percent chance that the claimant would have been fairly dismissed within two months in any event; and that the compensatory award should

additionally be reduced by ten percent for contributory fault. The Employment Tribunal ordered the respondent to pay a basic award of £914.50 which included the ten percent deduction and the sum of £750 as an unlawful deduction from the claimant's wages in respect of commission earned on two specific contracts in May 2018 as unpaid wages due under Sections 13 and 24 of the Employment Rights Act. The two sums have not yet been paid.

- (2) The Employment Tribunal ordered the claimant to provide payslips for her new employment from June 2018 up to 16 March 2019. The claimant complied with that order and provided further payslips for the period April – June 2019 to the respondent and to the tribunal during this hearing. In addition, the Employment Tribunal left open a separate issue whether the claimant was out of time in respect of her claim for holiday pay including the element of commission in addition to basic pay, in respect of the holiday years ending 31 December 2016 and 31 December 2017. The respondent was ordered to notify the claimant and the Employment Tribunal if it intended to argue the point and if so the factual and legal basis for it. The respondent did not comply with that order.
- (3) As to the compensatory award the following points have been raised by the respondent in response to the claimant's updated schedule of loss.

First it is argued that the claimant did not mitigate her loss because she did not seek employment at a greater level of remuneration or the same level of remuneration including commission that she earned with the respondent and also because she chose to work further away from home thus incurring extra travel costs claimed at 45p per mile and/or that the costs were unreasonable since the claimant could travel cheaper, for example, by public transport.

Secondly, it is argued that the two month Polkey period should start from the date of the notice of termination – 8 May 2018 and not from the date of termination 5 June 2018.

Thirdly, the respondent argued that the claimant had failed to deduct the 10% from the net compensatory award.

Fourthly, that in the event that travel expenses should also be reduced by 50% under the Polkey principle.

2. As to these points, the respondent has failed to establish that the claimant has failed to mitigate her loss. The document at page 112 of the last trial bundle indicates that the claimant did apply for a series of other jobs both during and after the conclusion of her notice period had expired (between May 2018 and January 2019). I accept that the claimant accepted the first job offer made to her and went to work for Frome Valley Kitchens from 7 July 2018 – 11 April 2019. This was the first and only job which she was offered during this period and the net difference in pay is not substantial. She then worked for another employer from 23 April 2019 to the first anniversary of her effective date of termination.

3. I also find that the extra travelling cost of fifty miles return per day for five days per week at Frome and twelve miles per day at Fabco were expenses reasonably incurred in mitigation of her loss. The argument that that expense is to be reduced by fifty percent is not well founded. The fifty percent only applies to the loss of pay. The net loss of earnings figure is £3,715.50 including the ten percent reduction and in this respect the respondent's submission is correct. The additional travel costs to be added as the expense of earning that sum amounts to £5,013.90 at the appropriate rate of 45p per mile.
4. I reject the respondent's argument that the two months for the Polkey adjustment should run from the date of the notice of termination and not from the effective date of termination. In the normal course of events a time limited Polkey adjustment runs from the effective date of termination and not from the giving of the notice and I see no reason for not applying the usual practice. That period of two months was intended to include a period when the claimant was to be tested as to her ability to convert "into successful sales" and also included a period during which a fair disciplinary process would have had to have taken place.
5. As to the claim for unpaid holiday pay including commission, I accept that the respondent is at fault for not complying with the Employment Tribunal's order requiring the respondent to specify a case that part of the claim was out of time, but the claimant had notice of what the argument was from the Employment Tribunal's first Judgment and Reasons. In fact, the claimant gave relevant information to the Employment Tribunal at the last hearing as to the dates upon which she took holidays in 2017 and 2018. I note that the last holiday which she took in 2017 was on 5 and 6 December and that the payment that ought to have been made for that holiday would have been the end of December 2017. In the year 2018, the claimant only in fact took two days holiday from 5 – 7 May 2018.
6. I read the decision in *Bear Scotland v Fulton* [2015] ICR 221 as in this respect stating that where there is a gap between deductions of more than three months a time limit is triggered. The time limit was triggered three months after 31 December 2018 and the claimant did not commence her claim until July 2018. Accordingly, the only period of holiday pay to which she is entitled is the period from the first holiday entitlement accruing from 1 January 2018 – 6 June 2018 and the figure for that is agreed at £503.87.

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Employment Judge Hargrove  
31 July 2019