



# THE EMPLOYMENT TRIBUNALS

***Claimant***

Ms L Smailes

***Respondent***

Optica Eye Clinic (Doxford) Ltd

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NORTH SHIELDS  
EMPLOYMENT JUDGE GARNON (SITTING ALONE)

ON 19 NOVEMBER 2019

*Appearances*

For Claimant: Mr J Anderson of Counsel

For Respondent: No attendance

### JUDGMENT

1. On the reference relating to the right to a redundancy payment, the claimant is entitled to the sum of £1707.68 payable by the respondent .
2. The claim of breach of contract is well founded. I order the respondent to pay to the claimant damages of £1182.24
3. The claim of unfair dismissal is well founded. I award compensation of £631.36. The Recoupment Regulations apply. The prescribed period is 2 May 2019 to 8 May 2019. The prescribed element is £131.36 The difference between the total award and the prescribed element is £500.
4. The claim for compensation for untaken annual leave is well founded. I order the respondent to pay to the claimant compensation of £ 65.68.
5. I make an increase to the award under s 38 Employment Act 2002 of £525.44 which I order the respondent to pay to the claimant
6. I make a costs order that the respondent pay to the claimant £4686 plus VAT of £937.20

### REASONS

1. The claims are for a redundancy payment, wrongful dismissal (breach of contract), unfair dismissal, compensation for untaken annual leave, and an increase compensation under section 38 of the Employment Act 2002.

#### 2. Findings of Fact

2.1. The claimant was born on 1 April 1972. Her continuous employment began on 14 April 2009 as an optical adviser. Her pay was the National Minimum Wage ( latterly £8.21) for 16 hours per week worked on 2 days. Her pay was £131.36 per week gross.

2.2. The claimant says, and a Companies House search confirms, several companies exist which start with the words "Optica Eye Clinic" in and around Newcastle and Middlesbrough, most with the same registered office and a sole director Mr Tariq Amer. There are several shops where he works as an Optician. The claimant's understanding, which is probably right, is each was operated by a separate Limited Company.

2.3. The claimant originally worked mainly at a shop in Pennywell, Sunderland operated by Optica Eye Clinic (Pennywell) Ltd which was dissolved on 14 May 2019. She occasionally worked at a shop in Doxford Park, Sunderland operated by Optica Eye Clinic (Doxford) Ltd. There is a company called Optica Eye Clinic Ltd the registered office of which in Newcastle and is the contact address shown for Mr Amer. A company search shows its accounts, last made up to 31 March 2017, are well overdue.

2.4. In late 2018 bailiffs called at the Pennywell shop when the claimant was not there . On 3 November when she was at home on a non-working day she received a message from her manager Wendy Aspinall. It reads: *"Hi Lyn, there's been a few changes over the weekend. Tariq has decided to join PW and Doxy into one practice to operate from Doxy. Please go to Doxy on Monday and Tuesday from now on. I will come to speak to you at Doxy on Monday . Thanks"*

2.5. From Monday 5 November, the claimant worked with other members of staff at the Doxford Park shop. Ms Aspinall did visit that day for about half an hour and said the Pennywell store had closed as it had not been doing well, but their jobs were safe.

2.6. On or about 11 February the claimant was working with an optical assistant called Susan and Mr Amer as the qualified optician. He asked Susan to go to Morrisons next door for coffee. They were gone for around 10 minutes. When they returned Mr Amer left. Susan said he had asked her if she could work full-time but not to say anything to anyone about this . She had agreed as she needed the extra money. However the store was not particularly busy and the claimant became concerned there was a reduction in the requirement for staff. The shop is still operating.

2.7. At around 11:30 am on 28 February the claimant, at home, received a telephone call from Ms Aspinall saying "the company" had gone into liquidation, could not afford to pay her and she should get her redundancy and notice pay from the Redundancy Payments Office. Optica Eye Clinic (Pennywell) Ltd did not enter liquidation. On 12 February 2019 Mr Amer filed application for it to be struck off the Register.

2.8. There was no consultation or warning or any method of selection as to which staff were to be made redundant. The claimant received a letter dated 28 February from Optica Eye Clinic Limited saying she had been made redundant . She received 2 P60s for the tax year to 5 April 2019 one showing her employer as Optica Eye Clinic (Pennywell) Ltd , the other showing it as Optica Eye Clinic ( Doxford) Ltd . Her P45 shows the latter as the employer which accords with the claimant's own understanding after the closure of the Pennywell shop.

2.9. When this claim was served a response was received which showed Ms Aspinall as the contact name. It ticked the box saying it would defend the claim. It did not put forward a real defence but said the correct employer was Optica Eye Clinic Ltd. I

caused a letter to be sent asking the claimant if she agreed, which she did not. Standard directions were made for disclosure of documents which would have clarified the position but the respondent did not comply. By the time the claimant's representatives applied for a strike out or an unless order which Employment Judge Aspden was inclined to grant it was too late for this hearing. I caused a letter to be sent to the parties saying the trial judge would consider a strikeout application at the beginning of the hearing. As shown above no one from the respondent attended today. The claimant's solicitors had therefore instructed Mr Anderson to deal with the legal problems arising from the disputed identity of the correct respondent.

### **3. Relevant Law**

3.1. Redundancy is defined in s 139 of the Employment Rights Act 1996 ( the Act ) which says dismissal shall be taken to be by reason of redundancy if it is wholly or mainly attributable to the fact the employer has ceased to carry on the business for the purpose of which the employee was employed by him either generally or in a particular place or the fact the requirements of that business for employees to carry out work of a particular kind , again either generally or in the particular place , have ceased or diminished or are expected to cease or diminish, permanently or temporarily and for whatever reason .

3.2. Section 98 of the Act provides:

*“(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –*

*(a) the reason (or if more than one the principal reason) for dismissal*

*(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

*(2) A reason falls within this subsection if it is... that the employee is redundant.”*

3.3. Safeway Stores –v- Burrell, affirmed by the House of Lords in Murray-v-Foyle Meats explains how, if there was (a) a dismissal and (b) a “ redundancy situation” (shorthand for one of the sets of facts in s 139) the only remaining question under s 98(1) is whether (b) was the principal reason for the happening of (a).

3.4. Section 98(4) of the Act says:

*“Where an employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

*(a) depends on whether in all the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee*

*(b) shall be determined in accordance with equity and the substantial merits of the case.”*

3.5. Dismissal by reason of redundancy may be unfair if there was (a) inadequate warning /consultation (b) unfair selection and (c) insufficient effort to find alternatives.

3.6. R-v- British Coal Corporation ex parte defined fair consultation as (a) discussion while proposals are still at a formative stage (b) adequate information on which to

respond (c) adequate time in which to respond and (d) conscientious consideration of the response. British Aerospace –v- Green held that provided an employer sets up a selection method which can reasonably be described as fair and applies it without any overt sign of bias which would mar its fairness , it will have done what the law requires. In considering what, if any, alternative employment to offer , an employer should not assume an employee will not accept a reduction in status or pay or change of workplace (Avonmouth Construction –v- Shipway )

3.7. The Working Time Regulations 1998 say in Regulation 14 that where a worker's employment is terminated during the course of his leave year, and on the date on which the termination takes effect the proportion he has taken of the leave to which he is entitled in the leave year differs from the proportion of the leave year which has expired. his employer shall make him a payment in lieu in accordance with paragraph (3)

3.8. The common law provides a contract of employment may be brought to an end by reasonable notice. Unless the employee is guilty of gross misconduct dismissal without such notice is termed "wrongful". Damages for wrongful dismissal are pay due to the employee during the notice period (see Addis v The Gramophone Company). The period of notice may be expressly provided for in the contract The statutory minimum period of notice set out in section 86 of the Act in this case would be nine weeks.

3.9. Section 218 of the Act contains provisions about a change of employer including  
*(6) If an employee of an employer is taken into the employment of another employer who, at the time when the employee enters the second employer's employment, is an associated employer of the first employer—*  
*(a) the employee's period of employment at that time counts as a period of employment with the second employer, and*  
*(b) the change of employer does not break the continuity of the period of employment.*

3.10. Section 231 provides  
*For the purposes of this Act any two employers shall be treated as associated if—*  
*(a) one is a company of which the other (directly or indirectly) has control, or*  
*(b) both are companies of which a third person (directly or indirectly) has control;*  
*and "associated employer" shall be construed accordingly.*

3.11. If dismissal is wholly or mainly due to a redundancy situation the claimant is entitled to a payment of a weeks pay for every complete year of continuous employment during the whole of which she was under the age of 41 and one and a half week's pay for each such year during which she was over 41. For calculation purposes the actual date of termination, 28 February, is extended by the amount of statutory notice. In this case it becomes 2 May 2019.

3.12. Section 118 includes *(1) Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—*  
*(a) a basic award*  
*(b) a compensatory award*

If a redundancy payment was due, it extinguishes the basic award .

3.13. Section 123 includes

*(1) ... the amount of the compensatory 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 in so far as that loss is attributable to action taken by the employer.*

*(2) The loss referred to in subsection (1) shall be taken to include—*

*(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.*

This includes an award for loss of statutory rights

3.14. Section 38 of the Employment Act 2002 empowers me to increase awards if the employer has not when the proceedings commenced complied with s 1 of the Act, by two or four weeks pay

#### **4 Conclusions , Remedy and Costs**

4.1. Each limited liability company is a legal “person” in its own right. At the termination date on balance of probability the respondent was the claimant’s employer. If the claimant was employed by a separate limited company before 5 November 2018 then her employment transferred without a break in continuity to the respondent named in this case. Her continuous employment was 10 years during six of which she was over 41 . Her redundancy payment is £1707.68

4.2. She was entitled to 9 weeks notice = £1182.84. At termination her untaken leave entitlement was half a weeks pay = £65.68.

4.3. It may be the respondent thought that as a former worker at Pennywell, she should be selected for redundancy rather than any employee at Doxford Park That is not so . She had every right to be considered alongside others The total absence of warning or consultation also renders the dismissal unfair. One week after her notice period would have expired she found an equally well paid job Her loss is one week’s pay £131.36 plus £500 for loss of statutory rights.

4.4 As no statement of terms and conditions was ever given conditions was ever given , I award the higher sum under s 38 of the Employment Act 2002.

4.5. The Employment Tribunal Rules of Procedure 2013 include

*76. (1) A Tribunal may make a costs order .., and shall consider whether to do so, where it considers that—*

- (a) a party (or that party’s representative) has acted disruptively or otherwise unreasonably in **the way that the proceedings (or part) have been conducted**; or*
- (b) any response had **no reasonable prospect of success**.*

4.6. The Court of Appeal and EAT have said costs orders in the Employment Tribunal:

(a) are rare and exceptional.

(b) whether the Tribunal has the right to make a costs order is separate and distinct from whether it should exercise its discretion to do so

(c) the paying party's conduct as a whole needs to be considered, per Mummery LJ in Barnsley MBC v. Yerrakalva [2011] EWCA 1255 at para. 41:

*"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct .. in .. conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had."*

4.7. The response form accepts the claimant was entitled to a redundancy payment notice pay and compensation for untaken leave. Having regard to the complete absence of warning and consultation or any fair selection method I cannot see how it ever hoped successfully to defend the unfair dismissal claim. It is rare an argument stands 'no reasonable prospect of success' but that can be said, in this instance .

4.8. The respondent tried, in my view cynically, to divert the claim from the proper employer to Optica Eye Clinic Ltd which gives every sign of having no money. It compounded the problem by not complying with orders for disclosure which would have cast light on what was in effect the only issue . Had the respondent not entered a spurious defence it would have been possible under to issue a judgment without a hearing under Rule 21 for the same sums as the judgment above Thanks to the respondent's unreasonable conduct of proceedings that necessitated the instruction of Counsel to attend just in case , the respondent did and came up with some argument the employer named on the claim form was not the proper employer. I find the threshold for making a costs order is reached.

4.9. Mr Anderson's instructing solicitors had prepared a comprehensive schedule of costs incurred which are reasonable both as to the amount of work done and the rate charged .However I am not prepared to order all of it .Up to the point where the claimant submitted her claim to the tribunal , she should in my view bear her own costs.

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**T M Garnon    EMPLOYMENT JUDGE**

**JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 19 NOVEMBER 2019**