



EMPLOYMENT TRIBUNALS

Claimant: Ms Zoe Davies

Respondent: Argos Limited

Heard at: Cardiff **On:** 13 November 2019

Before: Employment Judge Harfield (sitting alone)

Representation:

Claimant: In person with assistance from her father, Mr M Davies

Respondent: Mr Zovidavi (Counsel)

The Judgment of 13 November 2019 was as follows:

1. The respondent not contesting the claim, judgment is entered for the claimant in her complaint of wrongful dismissal on the issue of liability.
2. Judgment was previously entered in favour of the claimant on the issue of liability in respect of the claimant's unfair dismissal claim on 27 September 2019.
3. The respondent is ordered to pay the claimant the following:
 - (a) Compensation for wrongful dismissal/ notice pay in the gross sum of £496.00
 - (b) An unfair dismissal basic award of £620.00
 - (c) An unfair dismissal compensatory award of £250.00 in respect of loss of statutory rights.
4. For the avoidance of doubt the total sum is £1366.00. The claimant is responsible for the payment of any tax and employee national insurance contributions due on the award of £496.00 for wrongful dismissal.

I now provide my written reasons.

Written Reasons

Introduction

1. This is a constructive unfair dismissal and wrongful dismissal claim arising out of the claimant's resignation on 17 September 2018. The claimant presented her claim on 18 January 2019 [1-16]. The respondent defended it in a response submitted on 10 April 2019 [20-33]. Initially the claim was fully defended and directions were made at a case management hearing on 15 July 2019 to list the matter for a preliminary hearing as to whether evidence relating to an alleged protective conversation was admissible [34-39]. Within that case management hearing Employment Judge Beard identified that the claimant's claims were of constructive unfair dismissal and wrongful dismissal and identified the key complaints the claimant made about why she said the respondent had breached the implied term of mutual trust and confidence.
2. On 30 July 2019 the claimant sent the respondent's solicitors an email [44] responding to a query about whether the claimant was in full time employment and its terms and conditions. The claimant, amongst other things, confirmed that on 1 May 2018 she had starting working in Aldi on a 25 hour contract, which she said was due to ongoing problems at the respondent's store that were not getting resolved. She earned £8.85 an hour at Aldi. She confirmed that she had continued working in Argos 1 day a week (at £8 an hour) whilst going through the grievance procedure which she said was in the hope of a resolution and the prospect of returning back to a management role with the respondent.
3. The claimant also explained she had entered full time employment with Admiral on the date she had resigned earning an annual salary of £17,250.00 with the potential to earn incentives although they were restricted of up to £100 a month until the end of April 2019.
4. On 19 August 2019 the claimant sent the respondent a list of documents she was requesting by way of disclosure [45d – 45g].
5. On 21 August 2019 the respondent's solicitors wrote to the tribunal [46-47] stating that on a commercial basis the respondent had decided to no longer contest liability and stating that the preliminary hearing was no longer needed and could be converted to a remedy hearing. The respondent set out its arguments that it still makes today that the claimant had suffered no financial loss as a result of her resignation/ constructive dismissal and no award should be made other than a basic award and possibly a sum for loss of statutory rights.
6. The claimant objected to the admission of liability being accepted [48-50]. Within her objections the claimant asserted that in admitting liability the

respondent was seeking to conceal evidence that supported her claims. She further asserted that she had sustained losses as due to the respondent's behaviours, prior to her resignation she had previously stepped down from a management role and had reduced her working to 1 day a week. She also submitted that the documents she had requested from the respondent held vital information about the case and should be disclosed. She objected to the fact that after the respondent had sent their letter to the tribunal admitting liability they had immediately emailed the claimant saying there was now no need to produce the documents or provide contact details for witnesses on the basis that the documents and witness evidence would no longer be required by the tribunal [61]. She again submitted she felt the respondent was trying to mislead the tribunal, pointing out that the store was open 7 days a week (which as I understand it was to make the point that she could potentially work both at Admiral and for the respondent).

7. On 4 September 2019 I directed that in light of the respondent's concession judgment would be entered with remedy to be assessed, commenting that if a party wishes to concede an issue in a case they may do so and it was not the tribunal's role to intervene [63]. I made some directions as to exchanging documents and witness statements on the issues of remedy and the preparation of a remedy bundle. The claimant was sent some information on sources of legal advice and was told "The Claimant should note that the Tribunal does not have the power to award compensation for injury to feelings or injury to health in an unfair dismissal claim. The compensatory award can only cover financial losses flowing from the Claimant's dismissal." A formal judgment on the issue of liability for the constructive unfair dismissal claim was issued on 27 September 2019.

Remedy Hearing

8. The matter then came back before me at the remedy hearing. At the remedy hearing I noted that the previous liability judgment omitted to deal with the claimant's notice pay claim. I stated that it followed that if the claimant were constructively unfairly dismissed in fundamental breach of contract by the respondent (as has been admitted by the respondent) that her notice pay claim should also succeed in terms of liability and in formal terms I therefore also entered judgment on liability for the claimant in respect of her notice pay claim. That was not opposed by the respondent.
9. At the hearing I received a bundle from the respondent. The numbers in brackets in these written reasons refer to page numbers in that bundle. I received a witness statement from the claimant together with oral evidence. The claimant also provided an updated schedule of loss. I received closing submissions from the claimant (with the assistance of her

father) and from the respondent's counsel. I took the evidence and the submissions into account. I adjourned for a time before delivering my oral judgment in which I set out in summary terms the reasons why I made the awards for each head of loss set out above. As these were oral reasons I did not orally recite at length the law that I applied but in these written reasons, so that the claimant can fully understand why I reached the decisions I did on remedy, I will set out the legal framework in more detail.

The relevant legal principles

Compensation for Wrongful Dismissal

10. Compensation for wrongful dismissal is compensation for the breach of contract that occurs when an employee is dismissed without being given their contractual notice. Compensation for breach of contract is aimed at putting the injured party back in the position they would have been in if the breach had not occurred i.e. what they would have been paid if the employer had honoured the contractual notice period.

11. Section 86 of the Employment Rights Act gives employees a statutory right to minimum periods of notice. It says:

“(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more –

(a) is not less than one week's notice if his period of continuous employment is less than two years,

(b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years;

(c) is not less than twelve weeks' notice if his period of continuous employment is twelve years or more...

(3) Any provision for shorter notice in any contract of employment with a person who has been continuously employed for one month or more has effect subject to subsections (1) and (2); but this does not prevent either party from waiving his right to notice on any occasion or from accepting payment in lieu of notice...”

Compensation for Unfair Dismissal

12. Section 118 of the Employment Rights Act provides:

“(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 (calculated in accordance with sections 119 to 122 and 126), and

(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126).”

13. Section 119 sets out the calculation of a basic award. It says:

“(1) Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by –

(a) determining the period ending with the effective date of termination, during which the employee has been continuously employed.

(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and

(c) allowing the appropriate amount for each of those years of employment.

(2) In subsection (1)(c) “the appropriate amount” means –

(a) one and a half weeks’ pay for a year of employment in which the employee was not below the age of forty-one,

(b) one week’s pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and

(c) half a week’s pay for a year of employment not within paragraph (a) or (b)...”

14. Sections 120, 121, and 122 address adjustments to the basic award in certain circumstances which are not relevant to this case.

15. It follows that one key factor that governs how to calculate a basic award is the effective date of termination. Section 97 deals with the effective date of termination and says:

“(1) Subject to the following provisions of this section, in this Part “the effective date of termination” –

(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect...”

16. Another key factor in assessing the amount of basic award is what amounts to a week’s pay. That is governed by Chapter II of the Employment Rights Act. Section 221 states:

“(1) This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.

(2) Subject to section 222, if the employee’s remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week’s pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week...”

17. Section 226 in turn defines what is meant by the calculation date. Where the notice given is less than the statutory period of notice laid down in section 86 of the Employment Rights Act it will be the employee’s last day of work. There is a cap on a week’s pay which at the time was £508.00.

18. Section 123 governs the calculation of a compensatory award. It states:

“(1) Subject to the provisions of this section and sections 124, 124A and 126, 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 the loss is attributable to action taken by the employer.

(2) The loss referred to in section (1) shall be taken to include –

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and

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

...(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rules concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.”

19. There is a limit on the amount that can be awarded by way of a compensatory award of the lower of 52 weeks pay or, at the time, £83,682.00.
20. In Dunnachie v Kingston upon Hull City Council [2004] IRLR 727 the House of Lords held that the compensatory award can only include economic/financial losses. There can be no award for injury to feelings, injury to health, humiliation or distress.
21. In GAB Robins (UK) Limited v Triggs [2008] EWCA Civ 17 the Court of Appeal held that losses sustained by a claimant, which are caused by a breach of contract which pre-dates the termination of the employment contract, are not recoverable under a constructive unfair dismissal claim. The claimant in that case had commenced a period of sick leave as a result of detrimental treatment by her employer and resigned sometime later claiming constructive dismissal. The court was concerned with whether the claimant could cover compensation in an unfair dismissal claim for losses caused by her pre-dismissal sickness incapacity. The Court of Appeal confirmed that it is the date which the employee resigns which constitutes the “dismissal” for the purposes of section 123(1). The Court of Appeal held that losses flowing from detrimental conduct by an employer which takes place before an actual or constructive dismissal may not be claimed as part of the compensatory award in unfair dismissal proceedings. Only losses which flow from the dismissal itself can form part of the compensatory award. Loss flowing from detrimental conduct by an employer which takes place before the dismissal would have to be pursued in a separate action in the civil courts.
22. In particular the Court of Appeal said:

“To the question whether Mrs Triggs's reduced earning capacity by reason of her illness was a loss suffered by her 'in consequence of the dismissal' (s.123), the answer is no. It is correct that the dismissal was a constructive one, that is that it was the result of, and followed upon, her acceptance of the employer's antecedent breaches of the implied term of trust and confidence that had caused her illness and, in turn, her reduced earning capacity. But it is fallacious to regard those antecedent breaches as constituting the dismissal. The dismissal was effected purely and simply by her decision in February 2005 that she wished to discontinue her employment. On a claim for unfair dismissal, that entitled her to compensation for whatever loss flowed from that dismissal. But that loss did not include loss (including future loss) flowing from wrongs *already* inflicted upon her by the employer's prior conduct: those losses (including any future lost income) were not caused by the dismissal. They were caused by the antecedent breaches of the implied term as to trust and confidence and Mrs Triggs had an already accrued right to sue for

damages in respect of them before the dismissal. The ET's error in concluding that it was suffered in consequence of the dismissal was to treat the unfair dismissal claim as, in effect, a claim for damages for the employer's fundamental breach and repudiation of the employment contract that Mrs Triggs had accepted by her decision to leave. But her claim was not such a claim. It was simply a statutory claim for unfair dismissal.”

23. A similar decision was reached in the case of Countrywide Estate Agents and others v Turner [2014] UKEAT 0208/13. That case had some factual similarities with that of the claimant's here. It concerned a claimant who had worked as an area manager but before his resignation moved to a less well paid role of branch manager. He argued it would be just and equitable for his compensatory award to be based on his previous area manager pay, not his branch manager pay that he was receiving at the time of his resignation. The Employment Appeal Tribunal found, applying the principle in GAB Robins (UK) Limited v Triggs that was incorrect, and the compensatory award had to be based on his final, lower salary.
24. These decisions of the Employment Appeal Tribunal, the Court of Appeal and the (then) House of Lords are binding upon me in terms of the relevant legal principles that I have to apply.

Relevant findings of fact relating to remedy

25. It was not in dispute in this case that the claimant's employment commenced, in terms of continuous service, on 8 September 2008 and her effective date of termination was 17 September 2018. It was also not in dispute that on 8 August 2017 the claimant stepped down from being a customer fulfilment manager to a team leader role [13] and that on 1 May 2018 the claimant reduced her hours working for the respondent down to 1 day a week working as a customer adviser (7.75 hours at £8 an hour which is the gross sum of £62 a week)) whilst also starting work in Aldi on a contract for 25 hours a week [44 and the claimant's remedy witness statement].
25. On 16 August 2018 the claimant was successful in obtaining full time employment with Admiral. On 8 September 2018 the claimant resigned from Aldi so that she could start her job with Admiral. On 17 September 2018 the claimant resigned from employment with the respondent in circumstances it is conceded were an unfair constructive dismissal.
26. The claimant said in evidence that her contractual notice period with the respondent was 1 week. Neither party had produced a copy of any contractual documents.

27. Also on 17 September 2018 the claimant started her employment with Admiral earning £17,250.00 gross a year and with the ability to earn additional restricted incentives of up to £100 a month until the end of April 2019.. She claimant said in evidence that she had two months since then where that was exceeded slightly but she is back in a role currently where she is again limited to £100 a month. She received a £500 pay rise in September 2019. She states that she would have intended to carry on working 1 day a week for the respondent alongside her Admiral job and as she could choose the day she worked at her discretion and that she could have done so at the weekends to supplement her Admiral job. The claimant said that her earnings at Admiral are about £3000 to £4000 less than her previous management role with the respondent
28. The claimant said in evidence that she could have continued to work both for the respondent and for Admiral as she had told Admiral she had a second job. She said that when working for the respondent she told the operations manager what shift she wanted to work and therefore her work for the respondent could be fitted in around her Admiral role; for example at weekend. She said in evidence that if she had not resigned she thought she would have stayed in the customer advisor role with the respondent.

The Parties' Submissions

29. The claimant told me she felt that her basic award and compensatory award should be based on her old higher rate of pay at Argos as she stepped down from her management roles and cut down her hours (working at Aldi) because of the respondent's continued actions towards her which ultimately led to her resigning in circumstances which were a constructive unfair dismissal claim. She set out her sums claimed for her basic award, compensatory award including past and future loss of earnings in her amended schedule of loss dated 30 July 2019. It also included a sum claimed for loss of statutory rights at £500.
30. The claimant said that she still considered that the respondent should have been ordered to disclose the documents that she requested as they would be likely to aid an increase to her compensation and that she considers the respondent had deliberately conceded liability not for a commercial reason but to conceal the documents. At the hearing I asked the claimant how she thought disclosure of additional documents would help me decide the value of her case, given that the concession of liability and judgment in her favour meant her case on liability as presented in her ET1 stood. The claimant was not able to identify how she thought additional documents would make a difference to my assessment of the value of the claim. I also pointed out that the claimant had made no fresh application in the run up to the remedy hearing for disclosure of additional

documents that she considered relevant to the question of remedy, which she would have been at liberty to do so if she considered the respondent held undisclosed documents relevant to remedy issues.

31. The claimant stated she considered she should be awarded costs to take account of the considerable time spent pursuing this matter through the grievance process, which should have been correctly handled so that she could have returned to her job and not have made these proceedings necessary and which remained unrectified by the respondent.
32. The claimant said she was also seeking aggravated damages again bearing in mind everything that she had been through its impact on her mental health and career which still had not been put right and in respect of which the perpetrator had been allowed to remain in store unchecked. The claimant also said she was relying upon a “protected conversation” on 26 July 2018 which she said was inappropriate and was not protected [15]. She said she had been given an email in which she had been threatened with costs which was unnecessary and bullying and part of the respondent concealing documents. The claimant said the respondent’s actions in fighting the case at every stage and seeking to conceal their own actions should found a claim for aggravated damages and they should not now be able to offer the claimant less than they had offered before.
33. I asked the respondent if there was a dispute whether the “protected conversation” could be before me given it was part of the claimant’s pleaded case. I observed that if the respondent had conceded liability then the claimant’s statement of case should stand, including the reference to the “protected conversation.” Mr Zovidavi did not disagree but said he did not consider the issue to be a relevant one.
34. The respondent’s case was that the basic award should be £620 and there should be no compensatory award on the basis that the claimant is now in a better job and there was no mitigation evidence that the claimant had made efforts to find a job elsewhere to replace her 1 day a week job with the respondent. The respondent said that any award for loss of statutory rights should be modest; around £200. The respondent said there should be no award for the wrongful dismissal claim. The respondent said there was no justification for an award of aggravated damages.

Discussion and Conclusions

Unfair dismissal

Basic award

35. The claimant had 10 years continuous employment. The legislation requires me, as set out above, to calculate the claimant's basic award by reference to the value of a week's pay as at the effective date of termination. This means I am duty bound to assess a week's pay as at the claimant's earnings at the time that she resigned, and not at her earlier higher rate of pay before she reduced her duties at work and cut her hours.
36. I therefore accepted the respondent's figure of **£620** for a basic award which is 10 weeks at £62 a week and I awarded the claimant that sum.

Compensatory award

Loss of statutory rights

37. I accepted the claimant is entitled to an award of loss of statutory rights. The claimant claims £500. The respondent says if anything it should be £200. I awarded the sum of **£250** on the basis that the claimant did lose the protection of her statutory rights that she has to rebuild but I factored in that it was from a job where she was working by the end 1 day a week.

Financial losses

38. Under section 124 of the employment rights act the amount of the compensatory award is the amount that 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.
39. As explained to the claimant at the hearing, I can only make a compensatory award for losses that are in consequence of the claimant's dismissal i.e. the claimant's resignation. I cannot make an award for any losses that flow from events before the claimant's dismissal such as her decision to downgrade her role or reduce her hours in work no matter how unfairly she may have been treated pre-dismissal. I have to apply the legislation and also the case law principles I have referred to (such as Countrywide Estate Agents and others v Turner and GAB Robins (UK) Limited v Triggs.)

40. When the claimant reduced her hours of work at the respondent she started working part time also in Aldi. She then applied to work in Admiral and resigned from her Aldi job to do so. She then also resigned from her job with the respondent in circumstances which it is admitted were a constructive unfair dismissal. At the time of resigning she was working for the respondent 1 day a week. I am satisfied that in consequence of the dismissal the claimant did lose her part time earnings with the respondent and I am satisfied that she otherwise would have continued to work 1 day a week for the respondent for a period of time whilst working alongside her Admiral work.
41. I am also satisfied that after a period of time the claimant, by mitigating her losses, would have been able to secure weekend employment elsewhere to make good that loss. I consider that the claimant would have been able to secure replacement employment of 1 day a week at the weekend within 8 weeks.
42. That period overlaps with the notice pay claim so I therefore addressed that next.

Notice pay

43. The claimant stated she had a notice period of 1 week; however the law implies a statutory minimum which in the claimant's case would be 10 weeks notice. The same duty to mitigate also applies here.
44. I therefore decided to award 8 weeks' pay, notice pay at the full rate of £62 a week gross. I did not make an award for the last 2 weeks notice pay on the basis of a failure to mitigate loss as I considered the claimant should have been able to find replacement employment of 1 day a week by that time.
45. Reverting back to the unfair dismissal compensatory award I did not make an additional compensatory award for the same loss of earnings as it covered the same period of time as the notice pay claim and it is not possible to be awarded two different compensation sums for the same period and type of loss.
46. Notice pay claims are now taxable under the rules relating to post-employment notice pay and I therefore made the award gross at £496. The claimant will be responsible for any sums due for tax and employee national insurance contributions due.

Aggravated damages

47. That leaves the claim for aggravated damages. At the time of the remedy hearing, and with the limited deliberation time allowing within the listing I could find no legal authority as to whether aggravated damages could be awarded in an unfair dismissal claim without a discrimination element. Neither party addressed me on the law relating to aggravated damages and I said at the time I could see there was a question whether an award for aggravated damages could fall within the limits of a compensatory award. Since the hearing and whilst preparing these written reasons I have become aware that the decision in Dunnachie v Kingston upon Hull City Council [2004] IRLR 727 which I refer to above as authority for the principle that there can be no award for injury to feelings in an unfair dismissal compensatory award, was also predicated on the basis that there could also be no aggravated damages award.
48. That would dispose of the point but in my oral judgment I went on to assess the aggravated damages claim in any event and I will therefore repeat this within these written reasons. Aggravated damages may be awarded where the respondent has behaved in a high-handed, malicious, insulting or oppressive manner. There is not sufficient within the claimant's pleaded case (including the conduct of the meeting on 26 July 2018) or the respondent's conduct in conceding liability and attempting to settle the claim that I consider would entitle the claimant to an award of aggravated damages. Any case of constructive unfair dismissal involves some wrongdoing on the part of a respondent but I do not consider there is sufficient evidence of high handed, malicious insulting or oppressive conduct on the part of the respondent to merit an award or that there has been conduct in the currency of the events in question or the subsequent litigation that is spiteful or vindictive or intended to wound.

Concluding comments

49. I therefore awarded the claimant a basic award of £620.00, a compensatory award of £250.00 for loss of statutory rights (neither of which should be taxable) a notice pay award of £496.00 awarded gross and subject to tax and employee national insurance contributions.
50. I told the parties that any application for costs would be dealt with separately.
51. I would like to again repeat to the claimant that the limitation on the amounts that I could award her were not a reflection of her case or about the conduct she was complaining about. They do not compensate her for financial losses flowing from stepping down from managerial roles and

reducing her hours because those things happened before she resigned and the law as I have set out (and I would refer the claimant in particular to Countrywide Estate Agents and others v Turner (which has some key similarities to the claimant's own situation) and GAB Robins (UK) Limited v Triggs) do not allow me to compensate her for those things in a constructive unfair dismissal claim or a wrongful dismissal claim. I can only compensate for financial losses flowing from the resignation/dismissal onwards. Likewise, the law does not allow compensation in this type of claim for injury to feelings or injury to health or aggravated damages. If the claimant does indeed have a further remedy available to her (which I have not assessed) I do not consider it lies within the ambit of the employment tribunal but rather, if anywhere, the civil courts.

Employment Judge Harfield
Dated: 10 February 2020

JUDGMENT SENT TO THE PARTIES ON 11 February 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS