



# EMPLOYMENT TRIBUNALS

## BETWEEN

Claimant

MS REBECCA DAVENPORT  
(C1)  
MR STEPHEN DAVENPORT  
(C2)

AND

Respondent

BOWLEAZE LTD T/A RIVIERA  
HOTEL

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL      ON:    20TH FEBRUARY 2020

EMPLOYMENT JUDGE MR P CADNEY

MEMBERS:    MS Y RAMSARAN  
                 MR H PATEL

APPEARANCES:-

FOR THE CLAIMANTS:-    MR S DAVENPORT (C2)

FOR THE RESPONDENT:-    MS K ZAKRZEWSKA

## JUDGMENT

The unanimous judgment of the tribunal is that:-

The first claimant's claims of:

1.    Unfair Dismissal;
2.    Wrongful Dismissal (notice pay)

Are well founded and are upheld.

The first claimant's claims of:

3. Sex discrimination and/or marital status discrimination are not well founded and are dismissed.

The second claimant's claims of :

4. Unlawful deduction of wages;
5. Unpaid Holiday pay

Are well founded and are upheld.

### **Remedy**

The Respondent is ordered to pay the first claimant:

6. Unfair Dismissal: Basic award £1938.44 / Compensatory award £3876.88
7. Wrongful Dismissal (Notice Pay) £1384.60
8. Total - £7,199.92.

The respondent is ordered to pay the second claimant:

9. Unlawful deduction from wages - £486.00.
10. Unpaid Holiday pay £1260.00
11. Total - £1746.00

### **Reasons**

1. By this claim the claimants bring the following claims. The first claimant brings claims of unfair dismissal, wrongful dismissal (the failure to pay notice), and discrimination on the grounds of sex and/or marital status. The second claimant brings claims of unlawful deduction from pay and unpaid holiday pay.
2. The claims were all submitted out of time. The case came before EJ Rayner on 11<sup>th</sup> October 2019 and she determined that time should be extended for all the claims of both claimants, for the reasons set out in her Judgment. There are therefore no time issues left for us to decide. In addition, she identified the discrimination claims as claims for direct sex and/or marital status discrimination.

## First Claimant

### Unfair Dismissal

3. The first claim is that of unfair dismissal. It is not in dispute that the claimant was dismissed on 23<sup>rd</sup> October 2018. The respondent contends that that the claimant was dismissed for conduct, which is a potentially fair reason for dismissal. The statutory structure is that the respondent bears the burden of proving the potentially fair reason for dismissal, following which (if it does) the tribunal must consider the fairness of the dismissal in accordance with ERA 1996 s 98(4).
4. The respondent has not called any oral evidence. However, it relies on the witness statement of Mr Mehdi Sayyou and invites us to place such weight on it as is appropriate given that the claimants have had no opportunity to cross examine him. However, in Mr Sayyou's statement he sets out (paragraph 7) that the respondent appointed Mr M'hamed M'hamed Suleiman as its representative between October 2018 and January 2019 and that it was Mr Suleiman who dismissed the claimant. There is therefore no direct evidence from the individual who dismissed the claimant, nor any explanation from Mr Sayyou in the witness statement as to how he comes to know of Mr Suleiman's reasons for dismissal or what information Mr Suleiman was relying on. In the witness statement he sets out (at paragraph 12i) -vi)) misconduct allegations made against the claimant but there is no evidence as to where these allegations come from, who made them (other than in respect of the documentary evidence set out below) or the extent to which Mr Suleiman did or did not rely on any or all them in deciding to dismiss. The documentary evidence consists of two complaints against the claimant from February and March 2017, some eighteen months before her dismissal; and an undated document headed Petition for Testimony whose provenance is entirely unexplained.
5. The claimants' evidence is that Mr Davenport (the second claimant) was the first claimant's line manager. He was called to a meeting by Mr Suleiman and informed that the respondent had decided that it would no longer permit employees who were related to each other to remain in employment. Accordingly, he was instructed to dismiss both the first claimant, who was then his fiancée (the couple have subsequently married), and her daughter. Similarly, Ms Laura McNeil and Mr Jamie McNeil who were the wife and son of another employee were dismissed at or about the same time for the same reason. He was handed a letter setting out the new policy dated the same day which he handed to the first claimant when he dismissed her in accordance with Mr Suleiman's instructions. This account is supported by the first claimant.
6. Thus, if the claimants' evidence is correct the first claimant was not dismissed for her conduct but because of the nature of her relationship with Mr Davenport, to whom she was engaged at the time. This directly contradicts the respondent's account. We have decided that on the balance of probabilities we accept this evidence. It follows that the respondent has not satisfied the burden of demonstrating a potentially fair reason for dismissal and the first claimant's claim for unfair dismissal succeeds.
7. For the avoidance of doubt, even had we accepted the respondent's evidence the claimant would still have succeeded. There is no evidence that she was ever shown any

evidence of misconduct, nor given the opportunity to explain or challenge it, nor of her being given any right of appeal; and no evidence as to why the misconduct, if it occurred, required dismissal rather than some lesser sanction. There is complete and wholesale procedural failure; and a total absence of evidence as to the reasoning behind the dismissal from the individual who apparently took the decision to dismiss, so as to allow us to judge the reasoning and its fairness.

#### Wrongful Dismissal/Notice Pay

8. The task before us in respect of wrongful dismissal is different. We have to determine whether as a matter of fact the first claimant had committed a fundamental/repudiatory breach of contract entitling the respondent to dismiss without notice. Although Mr Sayyou's statement sets out allegations of misconduct there is no direct evidence before us that the claimant did behave in any of the ways alleged and in evidence before us she denies them. In those circumstances, there is simply no evidence that would allow us to make any such finding and the claimant's claim necessarily succeeds.

#### Sex/Marital Status Discrimination

9. The claimant alleges not only that her dismissal was unfair, but that it was discriminatory on the grounds of sex and/or marital status. For the reasons set out above she asserts that she was dismissed because she was in a relationship with and engaged to be married to the second claimant, and of the two of them he was retained and she was dismissed.
10. The first claimant faces a difficulty in respect of the sex discrimination claim. In order for her to succeed we would need to make primary findings of fact from which we could draw the inference, in the absence of an explanation from the respondent, that the reason for her dismissal was her gender (stage 1 of the Igen v Wong test). If we did so then the claimant would succeed as the respondent's explanation for the dismissal is one that we have already rejected. However, the evidence of both claimants is that the reason for her dismissal is not her gender but that she was in a relationship with the second claimant, and the evidence is that this was a general policy applicable irrespective of sex. Moreover, the evidence of both is that there is a male comparator Jamie McNeil who was also dismissed for the same reason. There is therefore a male comparator who was treated in an identical fashion and for the same reason. In our judgement this is fatal to a claim for direct sex discrimination, as there is no evidence from which we could draw any inference in the absence of an explanation from the respondent that the less favourable treatment was "because of" sex.
11. In respect of marital status the authorities state that the discrimination must be on the grounds of marital status itself and not based on the identity of the person to whom the claimant is married. It is apparent that in this case she is not alleging that she was dismissed because she was shortly to marry, but because the person that she was shortly to marry was the second claimant. It is therefore her own evidence that the

dismissal was on the grounds of the identity of the person to whom she was engaged to be married. The law is encapsulated in the following extract from the IDS Handbook:

“In effect, the EAT is saying that the question in these cases is not whether the claimant suffered the treatment in question because he or she is married to a particular spouse but whether the claimant suffered it because he or she is married. Tribunals must therefore distinguish between cases where the close relationship between the employee and his or her spouse is the reason for the treatment, and those where the fact of the relationship being one of marriage (or civil partnership) is the true reason – a point expanded upon by the EAT in *Gould v Trustees of St John’s Downshire Hill EAT 0115/17* (below). In the former case, if it can be said that the employer would have treated the claimant in the same way even if he or she were not married to the person in question but was merely a ‘common law spouse’, then this cannot comprise marital discrimination, since the treatment in question is not ‘marriage-specific’.”

In our judgement for the reasons set out above on the evidence before us the reason is self-evidently not marriage specific, not only on the basis of the fact that it related to the identity of the individual to whom the first claimant was to be married; but in addition as two people, the first claimant’s daughter and Jamie McNeil were dismissed who were not married or engaged to be married in pursuance of the same policy. In those circumstances the claim for marital status discrimination must also be dismissed.

### Second Claimant

12. The second claimant claims unpaid wages unpaid holiday pay. The respondent has not called any evidence to contradict his evidence (Mr Sayyou states that he does not know of any agreement in relation to work or holiday pay) and he was not challenged as to either element of his claims nor their quantification when he gave evidence. We accept his evidence and accordingly both his claims are made out.

### Remedy

13. At the conclusion of our deliberations as to liability we, in order to assist the parties, gave our provisional views as the likely sums by way of compensation in particular in respect of the first claimant’s unfair dismissal claims. In respect of the second claimant the sums claimed were not disputed. Both the first claimant and the respondent indicated that they were content for us to award compensation in those sums and did not seek to address us in respect of them. As the parties agreed compensation in the sums proposed the tribunal has made the awards set out above.

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**EMPLOYMENT JUDGE CADNEY**

**Dated: 3<sup>rd</sup> March 2020**