**Case Number: 3334953/2018**

# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **Claimant** | **and** | **Respondents** |
|---|---|---|
| **Ms E El-Bashir** | | **John Lewis Plc** |

## REASONS FOR THE JUDGMENT SENT TO THE PARTIES ON 20 JULY 2020

1 By a judgment sent to the parties on 20 July this year following a face-to-face hearing, I dismissed the Claimant's claims. These are my reasons for doing so, supplied pursuant to a written request on behalf of the Claimant.

2 Having been employed continuously by the Co-operative Group Ltd from 2001, the Claimant entered the employment of the Respondents in their Waitrose supermarket business on 1 May 2014, under a TUPE transfer. She remained with the Respondents until 15 September 2018, when she was dismissed on the ground of redundancy. By her claim form presented on 23 November 2018 she brought a number of claims including a complaint of wrongful dismissal (through being given short notice) and what was interpreted as a claim for an award or enhancement under the Employment Act 2002 ('the s38 claim'). All claims were resisted.

3 Following regrettable delays the case was listed before me for a two-day final hearing on 14-15 July this year. Ms S Sevenso of the Free Representation Unit appeared on behalf of the Claimant and Mr C Ludlow, counsel, appeared for the Respondents.

4 By the start of the hearing much of the Claimant's case had been withdrawn. There were two remaining claims: the complaint of wrongful dismissal and the s38 claim.

5 Although I doubted whether any evidence was necessary, the Claimant and one of the three witnesses fielded on behalf of the Respondents were briefly called. The evidence presented did not assist me. A vast bundle was handed up. I also had the benefit of written submissions from both advocates.

*Relevant legislation*

6 The wrongful dismissal claim was brought under the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994, Article 3, which provides:

> **Proceedings may be brought before an [employment] tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—**
>
> **(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;**
> **(b) the claim is not one to which article 5 applies; and**
> **(c) the claim arises or is outstanding on the termination of the employee's employment.**

7 The '1978 Act' is the Employment Protection (Consolidation) Act 1978. It included, in s131, the power under which the 1994 Order was made. The scope of the section was defined by this provision:

> **(2) Subject to subsection (3), this section applies to any of the following claims, that is to say—**
>
> **(a) a claim for damages for breach of a contract of employment or any other contract connected with employment ;**
> **(b) a claim for a sum due under such a contract;**
> **(c) a claim for the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract;**
>
> **being in each case a claim such that a court in England and Wales or Scotland, as the case may be, would under the law for the time being in force have jurisdiction to hear and determine an action in respect of the claim.**

8 The s38(2) claim is brought under this provision of the Employment Act 2002:

> **(1) This section applies to proceedings before an employment tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5.**
>
> **(2) If in the case of proceedings to which this section applies—**
>
> **(a) the employment tribunal finds in favour of the worker, but makes no award to him in respect of the claim to which the proceedings relate, and**
> **(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 (duty to give a written statement of initial employment particulars or of particulars of change or (in the case of a claim by a worker) under section 41B or 41C of that Act (duty to give a written statement in relation to rights not to work on Sunday),**
>
> **the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the worker and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.**

*Wrongful dismissal*

9 The parties were agreed that the Claimant was not given the notice to which she was entitled but that she did receive full payment in lieu of notice. Ms Sevenso explained that the claim was maintained on the ground that there was no PILON

clause (or at least it was not shown that such a clause applied to the Claimant)[1] and the dismissal was accordingly wrongful, despite the fact that payment in lieu of notice had been made. She appeared to accept that damages for wrongful dismissal (at least as ordinarily understood) were not payable but argued that in some way the proposed award under the 2002 Act, s38(2) (see below) could in effect stand, or be treated as, a separate head or category of damages. In other words, she submitted that the wrongful dismissal claim could be upheld despite the payment in lieu of notice, provided that the Tribunal found that the claim for a s38 award was made out.

10 In his very full submissions, Mr Ludlow made four main points. First, the wrongful dismissal claim as put did not correspond with the pleaded case and, absent any amendment (for which no application was made), the Tribunal had no jurisdiction to consider it. Second, the Respondents were entitled to rely on a contract given by them to the Claimant in March 2016, which contained a PILON clause. Accordingly, the new wrongful dismissal claim did not get off the ground. Third, the Respondents joined issue with the Claimant on the question whether her pre-transfer terms had included a PILON clause. Fourth, even if the dismissal was technically wrongful the claim for wrongful dismissal had been fully satisfied.

11 Dealing with Mr Ludlow's first point, I preferred to eschew technicalities. A wrongful dismissal claim was pleaded and the case as put before me was understood by the Respondents and they could answer it. Subject to the second and third points, I would hear argument on the case which Ms Sevenso had come to the Tribunal to argue. Turning to Mr Ludlow's second point, it seemed to me that it was at least strongly arguable that if the 2016 contract purported to give the employer a right (subject to making payment in lieu) to dismiss without notice which did not exist under the terms between the Co-operative Group Ltd and the Claimant, it was void as incompatible with the TUPE Regulations 2006, reg 4(2)(a). On Mr Ludlow's third point, I considered that it was for the Respondents to make out a positive case and not for the Claimant to prove a negative. I based my analysis on the assumption that there was no PILON clause in the Co-operative Group Ltd terms.

12 That brought me to the substance of the wrongful dismissal dispute. Here, I was satisfied that the Claimant's position was unsustainable. The claim as put before me was not a claim within the scope of the 1994 Order, Art 3. In the first place, it was not a claim "for the recovery of damages". On the Claimant's own case, damages for wrongful dismissal (at least as ordinarily understood) were not recoverable because there had been a full payment in lieu of notice. Not surprisingly, there was no suggestion of a claim for further damages based on the manner of dismissal, no invocation of the '*Johnson* exclusion area', no hint of a *Malik* claim for reputational damage. Nor (rightly, I have no doubt) did Ms Sevenso seek to pursue a claim for nominal damages. Rather, she candidly stated that the claim was pursued as a vehicle to facilitate recovery of a s38(2) award. But such an award plainly cannot constitute "damages" and, although it might be seen as "any other sum" the wrongful dismissal claim is plainly not a claim "for" recovery of

[1] Neither party was in a position to produce the Co-operative Group Ltd documentation, which would have resolved the question whether the Claimant's original contract had contained a PILON clause.

it. The only remedy for wrongful dismissal (at least in the Employment Tribunal) is damages. And if more were needed, the claim for a s38(2) award did not "arise" and was not "outstanding" on termination (it could only arise once the Tribunal had upheld the wrongful dismissal claim) and in any event was manifestly not a claim within the jurisdiction of the courts. For all these reasons, I was satisfied that the wrongful dismissal claim as put before me was not within the scope of the 1994 Order and must be dismissed.

13 On that reasoning it inevitably followed that, if and in so far as the Claimant must be treated as implicitly applying to amend the claim form to change the way in which the wrongful dismissal claim was put, permission must be refused since it would obviously be idle to allow her to add a claim already held to be unfounded.

*The claim under the 2002 Act, s38(2)*

14 The conclusion on wrongful dismissal was fatal to the s38(2) claim. Awards under s38(2) (or (3)) can be made only where a relevant substantive claim has been upheld.

15 Even if I had somehow found that a good claim for wrongful dismissal was made out, I would have made no s38(2) award. As Mr Ludlow pointed out, s38(2)(b) requires that a breach of the relevant obligation (here, to serve a notice of change of terms of employment pursuant to the Employment Rights Act 1996, s4) must be extant at the date when the proceedings were issued (see s38(2)(b)). Here, there was no dispute that the (admitted) breach, which occurred on 1 June 2014 (one month after the TUPE transfer) had been remedied by delivery of the March 2016 contract. The statutory language struck me as perfectly clear, but for good measure, Mr Ludlow produced authority supporting his argument in the form of *Govdata Ltd v Denton* UKEAT/0237/18/BA, a decision of the EAT (HH David Richardson sitting alone), in which an award under s38(3)[2] was set aside because the breach had been remedied before the proceedings were issued. There was clearly nothing in Ms Sevenso's spirited attempt to distinguish the case on the ground that it concerned a breach of the obligation under the Employment Rights Act 1996, s1 (duty to provide a statement of particulars) rather than s4.

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EMPLOYMENT JUDGE - Snelson

**Reasons entered in the Register and copies sent to the parties on 23/07/2020……**

**For Office of the Tribunals**

[2] The provision covering cases where a remedy on a substantive claim has been granted and is enhanced for breach of a relevant obligation; for present purposes it is not materially different from s38(2).