



EMPLOYMENT TRIBUNALS

Claimant Respondent
Miss L Eaton & Others v The Sheffield Bath Company

PRELIMINARY HEARING

Heard at: Sheffield by CVP On: 03 & 04 September 2020
In Chambers 8 & 09 September 2020

Before: Employment Judge T R Smith

Members: Ms A Brown
Mr M Firkin

Appearance:

For the Claimant: Mr Kenealy (Solicitor)

For the Respondent: Mr Wilkinson (Director of the Respondent)

RESERVED JUDGMENT

1. **Protective award**

The judgment of the Tribunal is that the Claimants, as set out in schedule one, complaints under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 of a failure by the Respondent to comply with the requirements of section 188 of the 1992 Act is well-founded. The Tribunal awards those Claimants named in that schedule a protective award as set out therein next to their respective names.

The protective period is from 04 September 2019 and is for a period of 90 days

2. **Breach of contract (notice pay)**

The Tribunal awards the Claimants, as set out in schedule two, the sums next to their respective names as damages for breach of contract

3. **Holiday pay.**

The complain of Ms Whiffin is well founded and she is awarded £195.05 as unpaid holiday pay due on termination.

4. **Unfair dismissal.**

The Claimants as set out in schedule three were unfairly dismissed and they are awarded compensation for unfair dismissal as set out against their respective names.

The said schedule indicates whether the Employment Protection (Recoupment of Jobseekers Allowance and Income Support) Regulations 1996 apply, and if so to what extent.

The Tribunal found that a deduction of 50% was appropriate in respect of those successful complaints of unfair dismissal, to take account of the chance they may have been fairly dismissed at a later date by this Respondent.

REASONS

1. **Evidence.**

- 1.1. The Tribunal had before it, two bundles, a liability bundle marked C1, which consisted of 103 pages, and a remedy bundle, C2, which consisted of 134 pages. The latter was, on day two, supplemented by a missing schedule of loss for one of the Claimants, Mrs Mansell.
- 1.2. The Tribunal heard oral evidence from all the Claimants save for Ms Mansell. Given her eventual claim was limited to a protective award, and the subsequent admissions made by Mr Wilkinson on behalf of the Respondent, her lack of attendance did not cause any prejudice to the Respondent or cause any difficulties for the Tribunal in the assessment of her claim.
- 1.3. The Tribunal heard oral evidence from Mr Wilkinson on behalf of the Respondent.
- 1.4. The mere fact that the Tribunal has not referred to each and every piece of evidence presented to it does not mean that it did not consider such evidence, even if it has not expressly mentioned it, in the judgment.

2. **Preliminary issue.**

- 2.1. At the start of the hearing Mr Wilkinson indicated he had not received C1 or C2. This was despite the fact that the documents had been sent to his email address.
- 2.2. C1 consisted of pleadings and emails that Mr Wilkinson was well acquainted with, although C2 consisted of documents that he may not have had direct knowledge of, as it consisted of schedules of losses and supporting documentation.

- 2.3. Mr Lenealy indicated that he could photocopy the bundles and deliver them personally to Mr Wilkinson within approximately 30 minutes.
- 2.4. In the circumstances the Tribunal concluded it was appropriate to adjourn the hearing on the Thursday 03 September until 2pm to allow Mr Wilkinson time to assimilate any documentation he was unfamiliar with and then to proceed.
- 2.5. In reaching this decision the Tribunal took into account the relative prejudice to both parties. There was greater prejudice to the Claimants if the case was adjourned given that an adjournment would likely result in a delay of some months. The prejudice to the Respondent was limited, given Mr Wilkinson was already familiar with the liability bundle, C1 and the remedy bundle, C2 simply set out a mathematical calculation supported by, in some cases, relevant documentation. Any prejudice there was, was addressed by giving further time to Mr Wilkinson to review the bundles. The Tribunal also applied the overriding objective. A short adjournment would still allow the Respondent to be fully prepared whilst at the same time ensuring there was a realistic prospect of all the evidence being heard over two days and a fair trial being concluded.

3. The Issues

- 3.1. The following issues and concessions were agreed between the parties at the start of the hearing and are recorded below.
- 3.2. It was agreed that the reason or principal reason for the dismissal of the Claimants was established by the Respondent, namely redundancy.
- 3.3. Did the Respondent act fairly and reasonably in all the circumstances in treating that reason as sufficient reason for dismissal?
- 3.4. To what extent, if at all was the principle in **Polkey -v- AE Dayton Services Ltd 1988 ICR 142** ("Polkey") engaged.
- 3.5. Was the statutory criteria for a protective award satisfied as set out in section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992?
- 3.6. Could the Respondent show a special circumstances defence in respect of any protective award?
- 3.7. What protective award, if any should be awarded?
- 3.8. All the Claimants, save for Ms Mansell pursued a claim of unfair dismissal.
- 3.9. Initially all the Claimants pursued a complaint of breach of contract {non-payment of notice pay}.
- 3.10. However, the Claimants conceded they had received four weeks' pay in lieu of notice from the Respondent.
- 3.11. As a result, having regard to the length of service of each Claimant, it was agreed that the following Claimants no longer pursued a complaint of breach of contract namely: –
 - Mrs Allott

- Mrs Mansell
 - Ms Whiffin.
 - Mrs Myers.
 - Miss Eaton.
 - Mrs Miles
- 3.12. Some of the claim forms made reference to holiday pay. It was conceded that, save for Mrs Whiffin, there were no such outstanding complaints.
- 3.13. Some of the schedules of loss made reference to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992. (adjustment for failure to comply with ACAS code of practice). Mr Kenealy, quite properly, conceded that this was no longer pursued.
- 3.14. He further conceded that, to the extent there was a reference in any of the schedules of loss, to section 38 of the Employment Act 2002 (failure to provide written particulars of employment) that was no longer pursued by any of the Claimants.

Findings of fact

4. General findings

- 4.1. The Respondent, the Sheffield Bath Co Ltd, trading as Spa 1877, is recorded as active on the records maintained at Companies House. However, in practice, it is no longer trading.
- 4.2. It operated from impressive buildings in the heart of Sheffield and incorporated a Turkish bath complex. The business provided spa and beauty services.
- 4.3. The Respondent owns a long lease on the premises.
- 4.4. The controlling directors were Mr Stephen Wilkinson and his wife Mrs Katherine Wilkinson. In reality it was Mr Wilkinson who had a greater involvement in the business in terms of day-to-day presence.
- 4.5. The Claimants were provided with contracts or employment. Not all the contracts were before the Tribunal but the Tribunal was satisfied that the period of notice required to be given by the Respondent to each member of staff after the completion of a probationary period was the equivalent to one-week notice for each complete year of service (C2 page 12). It was true that the contracts appeared to seek to limit notice to a maximum of six weeks after six years' service. The provisions of section 86 of the Employment Rights Act provide a statutory minimum which supersedes any contractual provision under which every employee is entitled to one year's notice to each full year of service, subject to a maximum of 12 weeks' notice.
- 4.6. Since approximately 2016 Mr Wilkinson considered that the actions of the local council in creating what were known as bus gates impacted upon the profitability of the business.

- 4.7. In essence bus gates resulted in roads been closed for part of the day. Penalty cameras were erected by the council. This in turn, Mr Wilkinson believed, probably rightly, impacted upon the business. He had been pursuing the matter with the local authority directly and via other avenues for a number of years. He had even appeared in the local newspaper raising the issue of the bus gates and contended it had cost the Respondent approaching £300,000.
- 4.8. About once a week Mr Wilkinson, over a coffee, would have a morning meeting with what were considered to be the management team. It was an ad hoc meeting with no agenda and no notes. The management team consisted of Miss Linda Eaton, Mrs Kay Geary, Mrs Lisa Price, Mrs Lindsay Carus, and Mrs Julie Rodley.
- 4.9. The management team may have had, in theory, access to monthly accounts of the Respondent but on the evidence presented to the Tribunal did not appear to know how, in practice to access that documentation. It was not suggested in evidence that the accounts were discussed in detail between Mr Wilkinson and the management team.
- 4.10. In August 2019 two therapists were recruited for the business, Ms Zara Ahmed and Ms Erica Collins. Recruitment could only be undertaken with the approval of Mr and Mrs Wilkinson. It was given. The Tribunal accepted the evidence of Mr Wilkinson that this recruitment may have been to replace therapists who had left.
- 4.11. There was evidence from Ms Eaton that the treatment side of the business was particularly busy in the summer/autumn of 2019. In fact, she was regularly having to work overtime up to the termination of her employment.
- 4.12. The Tribunal also found that the Respondent had an excellent reputation and presence in the marketplace.
- 4.13. One of its sources of income was selling spa vouchers. The Tribunal found the period up to and just after Christmas was usually the busiest time for the business.
- 4.14. Overtime was available to staff though it was not contractual. Its availability continued up until dismissal.
- 4.15. On or about 04 September 2019 the business closed on the instructions of Mr Wilkinson.
- 4.16. There was brief announcement by Mr Wilkinson with madams Eaton Geary and Price that day and a typed statement was presented, dated the previous day, (79/80).
- 4.17. The pre-prepared statement referred to the fact that the principal causes for the business closing were the bus gates and also therapist sickness. The statement went on to record the Wilkinson family had injected approximately £205,000 into the business. The statement recorded that Mr Wilkinson had been looking at different business models including increasing therapists but considered that would equate to more sickness - related issues. He considered the business model was wrong with high levels of sickness in a litigious society. The notice also stated, *"To this end*

I am regrettably closing the business from today's date". All the staff knew that day either directly or indirectly from colleagues that they were sacked even though some were not working that day.

- 4.18. There was no forewarning to staff.
- 4.19. There were no discussions with the staff prior to the decision to close the business having been taken. Whilst Mr Wilkinson argued he had told staff about the difficulty with the bus gates and that he was concerned about sickness the Tribunal did not regard that as any form of warning of redundancy. The bus gates had been a festering sore for Mr Wilkinson for a number of years as had the issue of staff sickness.
- 4.20. There were no group or individual consultation meetings with the staff.
- 4.21. No discussions took place with any of the employees as to possible ways of mitigating redundancies.
- 4.22. No system of appeal was offered to any of the employees.
- 4.23. At the time of closure there were approximately 29 employees.
- 4.24. There was no recognised independent trade union.
- 4.25. There was no employee representative body.
- 4.26. The Respondent did not issue any form of invitation to employees to elect representatives.
- 4.27. No disclosure was made comply with section 188 (4) of the Trade Union and Labour Relations (Consolidation) Act 1992 directed to individual members of staff
- 4.28. Employees were dismissed forthwith on 04 September 2019 but each employee received four weeks money in lieu of notice.
- 4.29. On or about 21 February 2020 Employment Judge Little gave interim judgment for redundancy payments to the Claimants.
- 4.30. This Tribunal adopted the learned judge's findings. In summary he found all the Claimants were summarily dismissed on 04 September 2019 because the Respondent's business had either ceased or was immediately about to cease operation.

5. **Discussion and conclusions on unfair dismissal.**

- 5.1. The Tribunal is satisfied the Respondent established a potentially fair reason for dismissal namely redundancy as a previous Tribunal has already made a finding of fact on that point. None of the Claimants sought to challenge that the principal reason for their dismissal was redundancy.
- 5.2. The Tribunal then had to consider whether dismissal was fair or unfair applying the principles set out in section 98 (4) of the Employment Rights Act 1996 and the raft of case law which the Tribunal does not consider it is necessary to review in this judgement. The Tribunal applied the principles those cases established.

- 5.3. Having done so the Tribunal concluded that all the Claimants were unfairly dismissed.
- 5.4. It reached this conclusion for the following reasons.
- 5.5. Firstly, the Tribunal is not satisfied that there was any clear form of warning to staff of redundancy. At its very highest the management team knew there were issues with footfall due to the bus gates but that had been going on for some years. The Tribunal accepted the unchallenged evidence that the treatment rooms were doing well and authorisation been given by the Respondent only a month earlier to recruit new staff to replace staff who had left. Coupled with this Tribunal found that the lead up to Christmas and just after Christmas was the busiest time for the spa particularly as some vouchers were bought as presents. Staff had no specific reason to consider the business was in imminent danger of closure.
- 5.6. Secondly there was no consultation whatsoever with staff with a view to seeking to avoid or mitigate redundancies. Whilst the Respondent contended consultation would have been useless, due to the parlous state of the Respondent's finances, the Tribunal was far from so convinced. There may have been a possibility, for example that staff would have been prepared to take a wage cut on a temporary or permanent basis or to reduce hours. Some staff may have voluntarily left to reduce overheads. If these steps were explored in the Tribunal's judgment there was at least a chance, given the approach of the busiest time of the year, the closure of the business may have been delayed.
- 5.7. Thirdly there was a complete failure to follow the ACAS guidance. Staff were not forewarned of dismissal, there was no individual consultation meetings and no members of staff were given a right of appeal.
- 5.8. Fourthly, the fact was that no process whatsoever was followed. The Tribunal found compelling evidence that some staff were in tears when the announcement was made. None of the employees had reason to believe on the basis of the communications given to them that their employment was in imminent danger.
- 5.9. Had Mr Wilkinson clearly set out his concerns prior to dismissal he may well have found staff somewhat more receptive. With respect to him his view that as he ran the business only, he could realistically think of solutions was somewhat arrogant. He may well have been right that staff could not come up with viable solutions or that they were not prepared to be as flexible as required. However, that would have only have been known if a proper and fair procedure had been undertaken.
- 5.10. Whilst Mr Wilkinson stated that he feared that if he had consulted some staff would have gone absent due to sickness that is always a danger for any business and should be managed via the employer's disciplinary procedure if that sickness is feigned. In the Tribunal's judgment Mr Wilkinson was probably over estimating this fear given there was no provision in the contracts for contractual sick pay and staff would have appreciated that a future employer would want a reference from their last employer.

- 5.11. Mr Wilkinson further contended he did not consult because he feared what would occur on social media. If staff used social media inappropriately then once again the Respondent had a right to deal with matters via its own disciplinary procedure. The Tribunal did accept that sales of gift vouchers, for example, could fall off if it was known that the business was making redundancies. However not every business that makes redundancies ceases to trade.
- 5.12. None of the various reasons advanced by Mr Wilkinson, and the Tribunal considered all of them very carefully, was sufficient to justify a failure to consult or follow any proper process with staff.
- 5.13. Whilst the Tribunal had some sympathy with the Respondent as it appeared to be in financial difficulty it is the responsibility of a good employer, if it hits financial difficulties, to take steps to manage the closure of the business in an orderly manner. The Respondent did not do so.

6. **Discussion and conclusions re protective award**

- 6.1. The legal position in respect of a protective award is summarised below so the parties can understand the principles the Tribunal has applied in reaching its judgment.
- 6.2. The Trade Union and Labour Relations (Consolidation) Act 1992 imposes an obligation on an employer who is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less to consult.
- 6.3. Where the number involved that the employer proposed dismiss is under 100 consultation must begin in good time and in any event at least 30 days before the first of the dismissals takes effect.
- 6.4. Section 188 sets out a mechanism for an employer to consult. Where, as here, there was no recognised trade union or an employee representative body then the obligation is on the Respondent to organise an election.
- 6.5. The purpose of consultation is to seek to avoid dismissals, reduce the number of employees to be dismissed and mitigate the consequences of those dismissals. Subsection 3 sets out details of the statutory minimum information that must be supplied in writing.
- 6.6. If the employer fails to comply with section 188 a Tribunal shall make a declaration to that effect and may award a protective award. The Tribunal must take into account the seriousness of the employer's default though any award cannot exceed 90 days' pay. In ***Newage Transmission Ltd v TGWU and ors EAT 0131/05*** the EAT expressly rejected the contention that the maximum award in a 30-day consultation case should be 30 days.
- 6.7. An award is based upon the concept of employee's weeks' pay. There is no upper limit on a week's pay.
- 6.8. It is based on gross pay and a day is equated to one seventh of a week's pay.
- 6.9. The Tribunal is required to focus upon the seriousness of the Respondent's default but where there is no consultation at all the Tribunal

should start with the maximum period and reduce it only if there are mitigating circumstances to justify a reduction, **GMB-v-Susie Radin Ltd [2004] IRLR 400**.

- 6.10. There is a potential defence open to the Respondent. If the Respondent can establish there were special circumstances which rendered it not reasonably practicable to comply with the statutory requirements and the Respondent took all such steps as were reasonably practicable then liability may be wholly or partly avoided. The threshold to satisfy the special circumstances defence is very high; insolvency on its own has been held not to be a special circumstance, **Clarks of Hove Ltd -v- Bakers Union [1978] IRLR 366**. The fact that, as here, the Respondent considered consultation would achieve nothing is not a special circumstance, **Sovereign Distribution Services Ltd -v- TGWU [1990] ICR 31**.
- 6.11. The Tribunal has already dealt, in some detail with the reasons advanced by the Respondent for the total failure to follow any form of process in respect of the dismissal of the Claimants by reason of redundancy. Those findings in respect of consultation are equally applicable to the Tribunal's assessment of the issue of the protective award.
- 6.12. The Tribunal noted that Mr Wilkinson told staff in an email dated 07 September 2019 (just after dismissal) *"because we employ over 20 people there is a recommended procedure for this process"*. The reference to the process was the closure of the business. Certainly, therefore from 07 September 2019 the Respondent was aware of its obligation to collectively consult. It was open to the Respondent to seek to rescind the notices of dismissal and then to start collective consultation. The Respondent contended it would not have had the funds to pay the Claimants. The consultation would have lasted 30 days and all employees were paid four weeks' notice in any event. There were funds therefore to allow consultation to take place. Granted the employees might then be deprived of notice pay but it would still have meant that the statutory consultation process would have been adhered to.
- 6.13. There was on the Respondents own admission no attempt to consult the workforce whatsoever. This was not a case where there was a sudden intervening emergency. On the evidence of Mr Wilkinson there been a gradual decline in business and therefore the Respondent should have anticipated the difficulties encountered and made attempts to orderly wind down the business.
- 6.14. There was no attempt for employee representatives to be elected.
- 6.15. None of the information anticipated by the legislation was provided to the employees even directly.
- 6.16. The decision to dismiss the employees was taken before there was any announcement to the Claimants.
- 6.17. Given that the Tribunal must start from the maximum award then consider what deductions to make, which in turn is dependent upon the level of consultation and the seriousness of the default, here, given there was no consultation whatsoever the Tribunal is driven to the conclusion that the award must be for a maximum 90 days.

(see Schedule)

- 6.18. The burden of the special circumstances defence is on the Respondent. It was not discharged. In reality what was being said was that it was believed the consultation would not have been fruitful and the business could not afford to delay. Given how narrowly the special circumstances defence is construed and that even insolvency does not amount to a special circumstance the Tribunal was not satisfied the Respondent had discharged the burden upon it.
- 6.19. It was contended that the Claimants would receive a double benefit because the Respondent was effectively facing a claim for unfair redundancy dismissal and a protective award and there would be an element of double compensation. The Tribunal rejected that argument because the legislation is clear that the purpose of a protective award is punitive and not compensatory. The effect of the legislation is that some employees may in certain circumstances receive a windfall.

7. **Discussions and conclusions re-notice/breach of contract.**

- 7.1. Each Claimant was entitled under Section 86 of the Employments Rights Act 1996 to one week's notice for each complete year of service.
- 7.2. The Tribunal has already noted the Claimants conceded they received four weeks' notice from the Respondent.
- 7.3. Some Claimants, however due to their length of service, were entitled to longer notice.
- 7.4. It was conceded by the Respondent longer notice was not given.
- 7.5. The Claimants are only entitled to damages for breach of what they were contractually entitled to under their contracts during the notice period and not to any noncontractual benefits such as voluntary overtime. The Claimants are entitled to be put in the position they would have been had they been given proper notice and therefore notice pay is net.
- 7.6. The Tribunal ordered damages for breach of contract commensurate with the notice that had not been given to each Claimant as set out below.
8. **Mrs K. Geary**, 14 complete years of service as at the effective date of termination. Mrs Geary is limited to a maximum of 12 weeks' notice under the Employment Rights Act 1996. She was paid for 4 weeks' notice. She is entitled to damages equivalent to 8 weeks' notice.
 $£ 361.79 \times 8 \text{ weeks} = £ 2894.37.$
9. **Mrs J. Rodley**, 11 complete years of service as at the effective date of termination. Mrs Rodley was paid for 4 weeks' notice. She is entitled to damages equivalent to 7 weeks' notice.
 $£264.32 \times 7 \text{ weeks} = £1850.24$
10. **Miss S. Sampson**. The Tribunal did have some concern as to the Sampson's length of service, given her age. Her evidence was that she started in employment with the Respondent in May 2007 and that was not challenged. In the circumstances the Tribunal is satisfied that as of the effective date of dismissal Ms Sampson had 12 complete years of service. Due to the level her

income, her net and gross pay was the same. Miss Sampson was paid four weeks' notice. She is entitled to damages equivalent to 8 weeks' notice.

£206.93 x 8 weeks = £ 1655.44

11. **Mrs A. North**, 9 years complete service as at the effective date of termination. Mrs North was paid for 4 weeks' notice. Due to the level of her income her net and gross pay was the same. She is entitled to damages equivalent to 5 weeks' notice.

£ 139.84 x 5 weeks = £699.20

12. **Mrs A. O'Connor**, 12 years complete service as at the effective date of termination. Mrs O'Connor was paid for 4 weeks' notice. She is entitled to damages equivalent to 8 weeks' notice.

13. £ 242.68 x 8 weeks = £ 1941.44

14. **Miss J. Storey**, 13 years complete service as at the effective date of termination. Ms Storey is limited to a maximum of 12 weeks' notice under the Employment Rights Act 1996. Miss Storey was paid four weeks' notice. Due to the level of her income her net and gross pay was the same. She is entitled to damages equivalent to 8 weeks' notice.

£128.65 x 8 weeks = £ 1029.20

15. **Miss K. Horner**, 14 years complete service as at the effective date of termination. Ms Horner is limited to a maximum of 12 weeks' notice under the Employment Rights Act 1996. Ms Horner was paid for 4 weeks. She is entitled to damages equivalent to 8 weeks' notice.

£292.00 x 8 weeks = £ 2336.00

16. **Mrs K. Stratford**, 14 years complete service as at the effective date of termination. Mrs Stratford is limited to a maximum of 12 weeks' notice under the Employment Rights Act 1996. Mrs Stratford was paid for 4 weeks. She is entitled to damages equivalent to 8 weeks' notice.

£220.10 x 8 weeks = £1760.80

17. **Mrs L. Price**, 8 years complete service as at the effective date of termination. Mrs Price was paid for 4 weeks. She is entitled to damages equivalent to 4 weeks' notice.

£171.40 x 4 weeks = £685.60

18. **Miss C. Askew**, six years complete service as at the effective date of termination. Ms Askew was paid for 4 weeks. She is entitled to damages equivalent to 2 weeks' notice. Ms Askew could not give the Tribunal her net income and nor could she produce any documents to assist the Tribunal in its calculation. The only figure she could provide was a gross of £196.52. The Tribunal therefore, doing the best it could, and without knowing full details of Ms Askew's tax position, estimated a net figure of £185.00

£185 x 2 weeks = £ 370.00

19. **Mrs L. Carus**, six years complete service as at the effective date of termination. Mrs Carus was paid for 4 weeks. She is entitled to damages equivalent to 2 weeks' notice.

£229.24 x 2 = £458.48.

Additional findings of fact and discussion in respect of unfair dismissal remedy.

20. **General principles**

- 20.1. In respect of compensation for unfair dismissal there are two distinct elements namely a basic and compensatory award. A compensatory award is broken down into two elements, the prescribed element that is up to the date of the Tribunal's judgement and then future loss.
- 20.2. As a redundancy payment has already been awarded to the Claimants, any entitlement to a basic award is extinguished, see Section 122 (4) (a) Employment Rights Act 1996
21. Turning to the compensatory award the Tribunal must consider whether it is appropriate to make such an award. Section 123 ERA 96 provides: –
- “...the amount of the compensatory award shall be such sum as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer”*
- 21.1. In particular the Tribunal must not lose sight of three key factors in assessing loss namely firstly the loss must be a consequence of the dismissal, secondly attributable to the Respondent and thirdly it must be just and equitable.
- 21.2. In assessing the compensatory award the principle of mitigation of loss is applicable.
- 21.3. The loss of earnings between dismissal and the date of the Tribunal's judgement, referred to the prescribed element, may be subject to deductions in respect of State benefits paid to a Claimant under the provisions of the Employment Protection (Recoupment of Jobseekers and Income Support) regulations 1996 SI 1996/2349 (as amended).
- 21.4. It is at this point that it is appropriate Tribunal deals with what the chances would have been of the claimants being fairly dismissed by this respondent at a future date. This is commonly known as a **Polkey** reduction from the case of case of **Polkey -v- AE Dayton Services Ltd 1988 ICR 142**.
- 21.5. The mere fact a Polkey reduction may involve a degree of speculation or is difficult does not mean it should not be undertaken by the Tribunal, see **Gover -v- Property Care Ltd 2006 ICR1073**
- 21.6. The burden of proving that an employee would have been dismissed in any event is on the Respondent.
- 21.7. The Tribunal looked carefully at the guidance given in **Software 2000 Ltd -v- Andrews 2007 ICR 825** on the application of **Polkey**.

22. There are a number of factors which in the Tribunal's judgement pointed to the possibility that the Respondent would have closed the business fairly and the Claimants would have been made redundant at a future date.
 - 22.1. Firstly, after dismissal the Respondent had sought advice from a competent firm of solicitors. They no doubt would have guided the Respondent on the correct procedure to follow.
 - 22.2. Secondly the Tribunal took into account that £50,000 had been injected into the business in July 2019 yet it remained unprofitable. There was a real risk that money would run out and the business close down.
 - 22.3. Thirdly the Tribunal took into account the fact that Mr Wilkinson had lost motivation in the business and may have closed the business in any event.
 - 22.4. Fourthly Mr Wilkinson faced health challenges which had been diagnosed in late August. This could have influenced him in discussions with his wife to close the business.
 - 22.5. Fifthly he continued to regard the position of the council in respect of bus gates as adversely affecting the business. He was making no progress in obtaining what he considered to be external redress and those avenues were virtually exhausted.
 - 22.6. Sixthly, he had been notified by a contractor that plumbing work needed to be undertaken urgently on the Respondents premises. Such work could well have been relatively expensive given the age and style of the premises, although no figures were placed before the Tribunal.
23. However, there are also factors which may point away from the Respondent fairly dismissing the Claimants at a future date.
 - 23.1. Firstly, Mr Wilkinson was a man of strong will. This was demonstrated by the fact that he excused the lack of consultation on the basis that he was a successful businessman and the claimants would have no useful input to make.
 - 23.2. Secondly in the Tribunal's judgment consultation could well have been meaningful. Some employees may have been willing to reduce their hours either temporarily or permanently on the basis that some form of job was better than no job.
 - 23.3. Some employees may well have chosen to voluntarily leave which in turn would have reduced the Respondent's costs.
 - 23.4. Other suggestions may have been put forward to reduce costs such as the removal of certain fringe benefits. Even temporary pay cuts would have assisted because the evidence before the Tribunal was the period approaching Christmas and just after Christmas were normally the busiest given the nature of the product and service provided by the Respondent
 - 23.5. Whilst the Respondent was concerned as regards sickness costs and general profitability there were ways staff could have been incentivised, for example reducing base pay but providing a commission on treatments delivered. They could have been incentivisation on the sale of gift

vouchers. In reality, in the Tribunal's judgement numerous possibilities could have arisen. Because of the total failure of consultation none of these possibilities were explored.

- 23.6. If consultation had taken place in the Tribunal's assessment there was a realistic possibility that some, if not perhaps all, jobs could have been saved.
- 23.7. Thirdly although the Respondent did seek advice after dismissing staff and became aware that he should have collectively consulted he did not follow that advice by rescinding the termination notices. The Tribunal therefore cannot be certain that the Respondent would have followed any professional advice he had been given in order to fairly dismiss the Claimants.
- 23.8. The Tribunal has sought to carefully weigh the above factors that help for and against the Respondent.
- 23.9. By the very nature of the exercise this involves a degree of speculation but the Tribunal is directed by case law that speculation may be required.
- 23.10. Doing the best, it can Tribunal concluded there was a 50% chance that the Claimants would have fairly lost their jobs in the future and therefore a 50% reduction is appropriate from the compensatory awards.

24. **Factors common to the Claimants.**

- 24.1. As the Tribunal has already recorded none of the Claimants are entitled to a basic award.
- 24.2. In relation to loss up to and including the date of the Tribunal hearing the Claimants cannot recover both for loss of earning and damages for breach of contract. An adjustment has therefore been made in respect of the periods of loss for each Claimant commensurate with their entitlement to statutory notice which has already been awarded.
- 24.3. A number of Claimants received ex-gratia payments from the Respondent. The Respondent is entitled to require that those sums are offset against losses see **Horizon Holiday Ltd -v- Gassi [1987] IRLR 371**.
- 24.4. Most Claimants sought a figure of £350 for loss of statutory rights. Whilst the Tribunal considered whether to make individual assessments, given some Claimants had obtained work, it resolved that a global figure of £350 was appropriate in all cases
- 24.5. Some of the Claimants started work during their notice period. The Claimants therefore obtained a double benefit, notice pay and earnings from their new employment. The Tribunal gave consideration as to whether there should be an adjustment given that compensation must be just and equitable. The Tribunal has not made an adjustment in the Respondent's regard as it is bound by the decision in **Burlo -v- Langley [2007] IRLR 145**.
- 24.6. Spas were required to close down under regulations made by the government in respect of Covid 19 from 21 March 2020 to 10 August 2020.

Any Claimant therefore who had an ongoing loss would in any event only been entitled to 80% of their pay under the furlough arrangements. This has been factored in in respect of the prescribed element.

Findings of fact relevant to each specific Claimant and award

25. **Ms A. Allott.**

25.1. Ms Allott was only entitled to 3 weeks contractual notice but was paid for four weeks. She was therefore overpaid by the Respondent one week's net pay which equated to £263.71. The Tribunal have addressed this point by starting her loss from 4 weeks after the effective date of

25.2. The Claimant obtained alternative employment on 02 January 2020.

25.3. The Claimant sought to limit her losses until she commenced alternative employment.

25.4. The Tribunal was satisfied the Claimant took reasonable steps to mitigate her loss.

25.5. She did not claim any state benefits. The recoupment provisions therefore do not apply

Loss

03 October 2019 to 02 January 2020

12.2 weeks x £263.71 per week = £3217.26

Plus

Loss of statutory rights £350.00

Total £3217.26 + £350.00 = £3567.26

Adjustment for Polkey, 50% = £ 1783.63

Award £1783.63

26. **Miss C. Askew**

26.1. The Claimant was entitled to 6 weeks contractual notice. She received four weeks money in lieu of notice. Given the Tribunal has awarded her, her full contractual notice, her loss of earnings does not commence until six weeks after the termination of her employment.

26.2. The Claimant could only indicate her gross pay of £196.52 per week and could not recall her net pay. For the reasons already given, the Tribunal estimated the Claimants net pay to be £185.00 per week.

26.3. The Claimant found alternative work on the 21 October 2019. The Claimant was not seeking to pursue any loss of earnings after that date.

26.4. The Tribunal was satisfied the Claimant took reasonable steps to mitigate her loss.

26.5. She did not claim any state benefits. The recoupment provisions therefore do not apply.

Loss

16 October to 21 October

0.4 x £185 = £74.00

Loss of statutory rights £350.00

Total £74 + £350 = £424

Adjustment for Polkey, 50% = £ 212

Award **£212.00**

27. **Mrs L. Carus.**

27.1. The Claimant was entitled to 6 weeks contractual notice. She received four weeks money in lieu of notice. Given the Tribunal has awarded her, her full contractual notice, her loss of earnings would not commence until six weeks after the termination of her employment and she secured alternative employment prior to that date.

27.2. Mrs Carus's position is somewhat complicated. She worked 17.5 hours per week for the Respondent. She started new employment on 02 October 2009 at Hellabey Hall Hotel. The hourly rate was lower, £3.10, per hour gross, however she worked more hours. She did not produce payslips in her new employment or her new contract of employment so the Tribunal could not verify her hours. Anything over an extra 5.0 hours would produce no loss. She said she now worked "over 20" but could not give the exact number. In her statement of loss the Tribunal noted she said there was a "substantial increase in working hours affecting childcare" (C2 page 6). She then went on maternity leave in March 2020.

27.3. It is for the Claimant to satisfy the Tribunal as to her losses. She has not done so in respect of loss of earnings. The Tribunal is only prepared to make an award up to the date the Claimant obtained alternative employment. The mere fact her hourly rate was less is irrelevant. The Tribunal is required to look at the actual total earnings.

27.4. The Claimant also sought to recover the costs of attending Tribunal on 03 January 2020. The Tribunal was not satisfied that this was a proper expense recoverable as compensation for unfair dismissal as expenses in attending Tribunal are akin to costs.

27.5. In the circumstances the Tribunal determined that other than loss of statutory rights there should be no further award.

27.6. The Tribunal was satisfied the Claimant took reasonable steps to mitigate her loss.

27.7. She did not claim any state benefits. The recoupment provisions therefore do not apply

Loss of statutory rights £350.00

Adjustment for Polkey, 50% = £175.00

Award **£175.00**

28. **Miss L. Eaton.**

- 28.1. The Claimant was paid by the Respondent 4 weeks' notice but only entitled to 3 weeks' notice. The Tribunal has therefore commenced the loss of earnings starting 4 weeks after the effective date of termination.
- 28.2. Looking at the Claimants payslips with the Respondent, and utilising the cumulative totals set out on the payslip for 31 August 2019 the Claimants gross was £11,692.01 with tax of £1301.80 and employees national insurance at £971.64 p. Her net pay therefore was £434.70 pw with the Respondent.
- 28.3. She obtained alternative employment on 02 October 2019 at Hellabey Hall hotel working until 23 December 2019 and then worked a short period, starting on 06 January 2020 at the Hotel van Dyck as the spa manager before moving to a hotel in Buxton on 27 January 2020
- 28.4. She earned, net, £4039 at Hellabey Hall hotel according to her P45. (C2 page 26)
- 28.5. She sought in her oral evidence to limit her losses to 12 weeks. The Tribunal considered that to be reasonable. The Tribunal was satisfied the Claimant took reasonable steps to mitigate her loss.
- 28.6. The Claimant also sought to recover the costs of attending Tribunal on 03 January 2020. The Tribunal was not satisfied that these were proper expenses recoverable as they were akin to costs.
- 28.7. She did not claim any state benefits. The recoupment provisions therefore do not apply

Loss

03 October 2019 to 26 December 2019 (12 weeks loss as limited by the Claimant)

12 weeks @ £434.70 = £5216.40

Less net earnings at Hellabey Hall £4039.00

Net loss £ 1177.40

Loss of statutory rights £350.00

Total £1170.40 + £350.00 = £1520.40

Adjustment for Polkey, 50% = £ 760.20

Award £ 760.20

29. **Mrs K. Geary.**

- 29.1. The Claimant was entitled to 12 weeks contractual notice. She received 4 weeks money in lieu of notice. Given the Tribunal has awarded her, her full contractual notice, her loss of earnings would not commence until 12 weeks after the termination of her employment and she secured employment prior to that date.

- 29.2. Prior to dismissal the Claimant's net pay was £377.53 week.
- 29.3. The Claimant obtained alternative employment on 16 October 2019 at a lower salary of £258.33. The difference in net pay was therefore £119.20pw
- 29.4. Although the Claimant would have been furloughed had she remained in employment she was also furloughed in her new job. For the period of the furlough the difference in salary was £95.36pw
- 29.5. The Tribunal concluded that the claims losses should cease 13 weeks after the Tribunal hearing, noting that spas had reopened and that some of her colleagues had obtained comparable employment.
- 29.6. It was agreed that the Claimant received an ex gratia payment from the Respondent of some £400 which had to be taken into account.
- 29.7. The Claimant was also seeking a payment of loss of statutory rights.
- 29.8. The tribunal accepted the claimant taken reasonable steps to mitigate her loss.
- 29.9. She did not claim any state benefits. The recoupment provisions therefore do not apply.

Loss

27 November 2019 to 21 March 2020 (16.2 weeks)

16.2 weeks x £119.20 = £1931.04

22 March to 10 August 2020 (20 weeks)

20 x £ 95.36 =£ 1907.20

10 August 2020 to 09 September 2020(4.4 weeks)

4.4 weeks x £119.20 = £524.48

Future loss

13 weeks x £ 119.20 =£ 1549.60

Total £1931.04 + £1907.20 + £524.48 + £1549.60 less £400 = £5512.32

Net loss £ 5512.32

Loss of statutory rights £350.00

Total £ 5512.32+ £350.00 = £5862.32

Adjustment for Polkey, 50% = £ 2931.16

Award **£2931.16**

30. **Miss K. Horner.**

30.1. The Claimant was entitled to 12 weeks contractual notice. She received 4 weeks money in lieu of notice. Given the Tribunal has awarded her, her full contractual notice, her loss of earnings would not commence until 12 weeks after the termination of her employment and she secured employment prior to that date.

30.2. Prior to dismissal the Claimant's net pay was £292.00 week.

(see Schedule)

- 30.3. The Claimant obtained alternative employment on 19 November 2019 and in her oral evidence made it clear she did not wish to pursue any losses after that date, other than loss of statutory rights.
- 30.4. The Tribunal was satisfied the Claimant took reasonable steps to mitigate her loss.
- 30.5. She did not claim any state benefits. The recoupment provisions therefore do not apply.
- 30.6. Given the Claimant was entitled to 12 weeks' notice which would not expire prior to 27 November 2019 and given the Claimant had limited her loss to 19 November 2019 the only award the Tribunal could make was for loss of statutory rights namely £350.00
- 30.7. This is subject to a 50% Polkey deduction.

Award **£175**

31. **Miss R. Miles**

- 31.1. The Claimant was entitled to 4 weeks contractual notice. She received 4 weeks money in lieu of notice. Her losses therefore commence four weeks from the effective date of termination.
- 31.2. Prior to termination the Claimant's net earnings were £187.70 per week
- 31.3. She also received a contractual benefit of the contribution to her pension equivalent to £6.09 per week. Her total weekly net loss was therefore £193.79
- 31.4. She obtained permanent new employment at a greater salary on 15 June 2020. She did not seek any loss of earnings after that date.
- 31.5. Prior to obtaining alternative employment she undertook some agency work for which she received £139.72 in total. It was not disputed that the Claimant had taken reasonable steps to mitigate her loss
- 31.6. The Claimant sought an award for loss of statutory rights
- 31.7. She also received jobseekers allowance of 26 weeks of £74.35.
- 31.8. The recoupment regulations will apply.

Loss

03 October 2019 to 15 June 2020

36.2 weeks x £ 193.79 = £7015.19

Less agency earnings of £139.72 = £6875.47

Loss of statutory rights £350.00

Total £ 6875.47 + £350.00 = £7225.47

Adjustment for Polkey, 50% = £ 3612.73

Deductible benefits, jobseekers allowance £74.35 x 26 weeks = £1933.10

The whole period of loss is subject to the recoupment regulations.

Jobseekers allowance is subject to a Polkey reduction of 50%, £966.55

The total monetary award is £3612.70.

The prescribed element is £3437.73 (loss of statutory rights excluded). The prescribed element is for the period of immediate loss.

The prescribed period is from 03 October 2019 until 09 September 2020 (or the date this judgement is sent to the parties later).

The balance payable immediately to Claimant **£175** (difference between total monetary award and prescribed element)

32. **Mrs K. Myers.**

32.1. The Claimant was entitled to 4 weeks contractual notice. She received 4 weeks money in lieu of notice. Her losses therefore commence 4 weeks from the effective date of termination.

32.2. Prior to termination the Claimant's net earnings were £217.44 per week.

32.3. The Claimant obtained alternative employment on 10 February 2020. Her salary in new employment exceeded her old net salary. Her loss therefore ended on 10 February 2020.

32.4. The Tribunal is satisfied the Claimant took reasonable steps to mitigate her loss.

32.5. The Claimant sought a sum for loss of statutory rights

32.6. She did not claim any state benefits. The recoupment provisions therefore do not apply.

Loss

03 October 2019 to 09 February 2020

18.2 weeks @ £ 217.44 = £3957.40

Loss of statutory rights £350.00

Total £3957.40 + £350 = £ 4307.40

Adjustment for Polkey, 50% = £ 2153.70

Award **£2153.70**

33. **Mrs A. North.**

33.1. The Claimant was entitled to 9 weeks contractual notice. She received 4 weeks money in lieu of notice. Given the Tribunal has awarded her, her full contractual notice, her loss of earnings would not commence until 9 weeks after the termination of her employment and she secured employment prior to that date.

33.2. Her net pay was £139.84.

33.3. She started trading as a self-employed Pilates instructor in the second week in November 2019.

33.4. The Tribunal accepted her evidence that whilst she was establishing the business it was not profitable. She was spending money on marketing and

various training courses that were required. Unfortunately, just as the business was starting to be established, due to Covid 19 she lost the classes she had just established at local gyms.

- 33.5. The Claimant was not challenged that seeking to work on a self-employed basis was a reasonable attempt to mitigate her losses.
- 33.6. The Tribunal accepted that the Claimant is seeking to establish herself on a self-employed basis was not acting unreasonably and she had taken reasonable steps to mitigate her loss.
- 33.7. She did not claim any state benefits. The recoupment provisions therefore do not apply.
- 33.8. The Claimant did not seek to pursue any claim for future loss beyond the date of this judgment.
- 33.9. The Tribunal has made an adjustment as had the Claimant not been unfairly dismissed and remained employed by the Respondent her pay would have been reduced under the furlough scheme during part of her period of loss.
- 33.10. Given the Claimant had not produced any books of account whatsoever, and bearing in mind that the Claimant would by now be generating some income, doing the best it could, the Tribunal determined that it was more appropriate to limit the Claimant's loss to the date of this judgment.
- 33.11. The Claimant also sought an award for loss of statutory rights

Loss

07 November 2019 to 21 March 2020

19.4 weeks @ £139.84. = £ 2712.89

22 March to 10 August 2020 (20 weeks)

20 x £111.87 = £2237.40

10 August 2020 to 09 September 2020(4.4 weeks)

4.4 x £139.84 = £615.29

£ 2712.89 +£2237.40 + £615.29 = £5565.58

Loss of statutory rights £350.00

Total £ 5565.58 + £350.00 = £ 5915.58

Adjustment for Polkey, 50% = £ 2957.79

Award **£2957.79**

34. **Mrs A. O'Connor.**

34.1. The Claimant was entitled to 12 weeks contractual notice. She received 4 weeks money in lieu of notice. Given the Tribunal has awarded her, her full contractual notice, her loss of earnings would not commence until 12 weeks after the termination of her employment and she secured employment prior to that date. However, there was an ongoing loss.

34.2. Her net pay was £242.68 per week. She worked 31 hours per week.

(see Schedule)

- 34.3. The Claimant obtained alternative employment on 18 November 2019 although only for 20 hours per week. Her net pay was £164.20. The difference in pay when not furloughed was £78.48.
- 34.4. When furloughed the difference in pay was £62.78.
- 34.5. The Tribunal determined the Claimant had taken reasonable steps to obtain alternative employment. It estimated her future loss at 13 weeks.
- 34.6. The Claimant also sought to recover the sum for loss of statutory rights
- 34.7. She was furloughed from her alternative employment as she would have been done had she remained employed by the Respondent.
- 34.8. She did not claim any state benefits. The recoupment provisions therefore do not apply.

Loss

27 November 2019 to 21 March 2020

16.4 weeks @ £78.48 = £1287.07

22 March to 10 August 2020 (20 weeks)

20 weeks x £62.78 = £1255.60

10 August 2020 to 09 September 2020 (4.4 weeks)

4.4 weeks x £78.48 = £345.31

Future loss 13 weeks

13 weeks x £78.48 = £1020.24

Loss of statutory rights £350

Total £ 1287.07 + £ 1255.60 + £345.31 + £1020.24 + £350.00 = £ 4258.22

Adjustment for Polkey, 50% = £ 2129.11

Award £ **2129.11**

35. **Mrs L. Price.**

- 35.1. The Claimant was entitled to 8 weeks contractual notice. She received 4 weeks money in lieu of notice. Given the Tribunal has awarded her, her full contractual notice, her loss of earnings would not commence until 8 weeks after the termination of her employment.
- 35.2. Her net weekly pay was £171.40. The Claimant also received a contribution to her pension of £1.70 per week. Her total remuneration package was therefore £173.10.
- 35.3. The Claimant obtained alternative employment on 27 January 2020.
- 35.4. There was a very small ongoing loss which totalled, up to the date of the Tribunal £141.48 net. However the Claimant would have been furloughed had she remained at the spa and her income reduced by 20%. The Tribunal therefore determined that the claimant's losses should cease on 27 January 2020.
- 35.5. The Claimant also claimed loss of statutory rights.

- 35.6. The Tribunal accept the Claimant took reasonable steps to mitigate her loss.
- 35.7. She did not claim any state benefits. The recoupment provisions therefore do not apply.

Loss

30 October 2019 to 27 January 2020

12.6 weeks @ £173.10 = £2181.06

Loss of statutory rights £350.00

Total £2181.06 + £350 = £ 2531.06

Adjustment for Polkey, 50% = £ 1265.53

Award **£1265.53**

36. **Mrs J. Rodley.**

- 36.1. The Claimant was entitled to 11 weeks contractual notice. She received 4 weeks money in lieu of notice. Given the Tribunal has awarded her, her full contractual notice, her loss of earnings would not commence until 11 weeks after the termination of her employment and she secured employment prior to that date.
- 36.2. Prior to dismissal the Claimant's net weekly pay was £264.32. She also received a contribution to her pension equivalent to £5.55 per week Her total remuneration per week was therefore £267.87. She worked 26 hours per week
- 36.3. Whilst the Claimant said she also received a contribution to health insurance she could not produce evidence of the loss and in the circumstances the Tribunal did not take any such loss into account.
- 36.4. The Claimant received an ex gratia payment of £400 from the Respondent and this must be deducted from the Claimant's losses.
- 36.5. The Claimant obtained alternative employment on 10 February 2020. Even though the Claimant was working initially 30 hours in this employment she was only paid £8.21 per hour equating to a net weekly sum of £243.04 (C2 page 113).
- 36.6. The Tribunal accept the Claimant took reasonable steps to mitigate her loss in terms of obtaining alternative employment.
- 36.7. Her evidence to the Tribunal was that she decided to drop her hours in her new employment from 30, firstly to 24.5 and then to 10 hours a week. The Tribunal concluded that the Respondent should not be responsible for any losses that flowed from her voluntary reduction in hours.
- 36.8. The appropriate difference in paying figure to utilise was £24.83 (£267.87 less £243.04). The calculation was complicated because in both jobs the Claimant was furloughed and for the period of furloughing the difference in pay was. £19.86.
- 36.9. The Tribunal considered the issue of future loss and took into account the claimant was now aged 62 and in the last 20 years and only had two jobs.

The Tribunal had regard to the difference in pay. The Tribunal awarded the Claimant a notional sum of 26 weeks loss of pay at the difference in pay that would have been incurred had the Claimant remained working 30 hours per week in her new employment, that is a weekly difference of £24.83.

36.10. The Claimant also claimed loss of statutory rights.

36.11. She did not claim any state benefits. The recoupment provisions therefore do not apply.

Loss

20 November 2019 to 10 February 2020

11.4 weeks @ £267.87 = £ 3053.71

11 February 2020 to 21 March 2020

5.8 weeks @ £24.83 = £144.01

22 March to 10 August 2020 (20 weeks)

20 weeks x £19.86 = £ 397.20

10 August 2020 to 09 September 2020(4.4 weeks)

4.4 weeks x £24.83= £109.52

26 weeks future loss

26 weeks x £24.83= £ 645.58

Loss of statutory rights £350.00

Total £3053.71 + £144.01 + £397.20+ £109.52+ £645.58 + £350 - £400 ex gratia
= £ 4300.02

Adjustment for Polkey, 50% = £ 2150.01

Award **£2150.01**

37. **Miss S. Sampson.**

37.1. The Claimant was entitled to 12 weeks contractual notice. She received 4 weeks money in lieu of notice. Given the Tribunal has awarded her, her full contractual notice, her loss of earnings would not commence until 12 weeks after the termination of her employment and she secured employment prior to that date.

37.2. The Claimant's net weekly income from the Respondent was £206.93.

37.3. The Claimant obtained alternative employment on 05 December 2019. Her salary exceeded that earned with the Respondent. The Claimant accepted she had no subsequent loss. Although the Claimant is now threatened with redundancy the Tribunal concluded that is not a factor that should weigh against the Respondent as regards the Claimant's losses.

37.4. The Tribunal accept the claimant took reasonable steps to mitigate her loss in terms of obtaining alternative employment.

37.5. The Claimant also claimed loss of statutory rights.

37.6. She did not claim any state benefits. The recoupment provisions therefore do not apply.

Loss

27 November 2019 to 05 December 2019

1.2 weeks x £ 206.93 = £248.31

Loss of statutory rights £350.00

Total £ 248.31+ £350.00 = £ 598.31

Adjustment for Polkey, 50% = £ 299.15

Award **£299.15**

38. Miss J. Storey.

38.1. The Claimant was entitled to 12 weeks contractual notice. She received 4 weeks money in lieu of notice. Given the Tribunal has awarded her, her full contractual notice, her loss of earnings would not commence until 12 weeks after the termination of her employment.

38.2. The Claimant's take home pay with the Respondent was £128.65 net. She worked between 13 to 14 hours per week

38.3. The Claimant still has not obtained alternative employment by the date this matter came before the Tribunal. There was unchallenged evidence that the Claimant had been taking steps to obtain alternative employment and attended five interviews.

38.4. Given the burden of proof is on the Respondent to establish a failure to mitigate the Tribunal was satisfied the Claimant took reasonable steps to obtain alternative employment.

38.5. The Tribunal determined the Claimant should receive her loss of earnings up to the date of the Tribunal and the future loss of 13 weeks thereafter.

38.6. The Claimant received universal credit of £306 per week. However, this was that the entire family. The recoupment regulations apply. Reg 8(2)(a) and (b)(ii) provides that the recoupable amount shall be the lesser of the amount of the prescribed element (less any tax or social security contributions which fall to be deducted by the employer); and "in the case of an employee entitled to an award of universal credit for any period ("the UC period") which coincides with any part of the period to which the prescribed element is attributable, any amount paid by way of or on account of universal credit for the UC period that would not have been paid if the person's earned income for that period was the same as immediately before the period to which the prescribed element is attributable".

38.7. The recoupment regulations do not apply to the entire benefit given it covered the Claimant's family and other matters such as rent. The authors of IDS recognised this caused Tribunal's difficulties when they said, "In particular, the fact that some of the benefits that Universal Credit is replacing are not otherwise recoupable under the Regulations and that —

(see Schedule)

unlike other benefits — Universal Credit payments are made jointly for couples, could give rise to complications”.

38.8. Doing the best, it can the Tribunal determined that an appropriate figure to take into account would be a sum equivalent to jobseekers allowance namely £74.35 pw.

38.9. Recoupment can only apply to losses up the date of Tribunal award and not future losses.

Loss

27 November 2019 to 21 March 2020

16.4 weeks @ £128.65 = £2109.86

22 March to 10 August 2020 (20 weeks)

20 weeks x £102.92 = £2058.40

10 August 2020 to 09 September 2020 (4.4 weeks)

4.4 weeks x £ £128.65 = £566.06

Loss of statutory rights £350.00

therefore loss £2109.86 + £2058.40 + £566.06 +£350.00 = £5084.32

less deduction for Polkey, 50% = £2542.16

Recoupable benefits, £74.35 x 41.6 weeks = £ 3092.96

Adjust recoupable benefits for Polkey, 50%= £ 1546.48

Future loss 13 weeks

13 weeks x £128.65 = £1672.45

Recoupment cannot apply to future loss.

Adjustment for Polkey, 50% = £836.22

the prescribed element, that is immediate loss amounts to £ 2322.16 (loss of statutory rights is deducted)

The future loss is (13 weeks' pay plus loss of statutory rights subject to a 50% Polkey reduction) is £1011.22. The recoupment regulations do not apply to future loss.

Total monetary award is £2322.16 + £1011.22 = £3333.38

The prescribed period is from the effective date of termination 04 September 2019 to the date of this judgment (or the date this judgment is sent to the parties later).

The balance payable immediately to Claimant (difference between total monetary award and prescribed element) is **£1011.22**

39. **Mrs K. Stratford.**

39.1. The Claimant was entitled to 12 weeks contractual notice. She received 4 weeks money in lieu of notice. Given the Tribunal has awarded her, her full contractual notice, her loss of earnings would not commence until 12 weeks after the termination of her employment.

- 39.2. The Claimant was also given an ex gratia payment by the Respondent of £400 for which credit must be given to the Respondent.
- 39.3. The Claimants take home pay with the Respondent was £220.10 per week net.
- 39.4. The Claimant accepted she had not started any form of job search until May 2020. She attributed this to depression from losing her job. It is true that she saw her GP on 20 November 2019 (C2 page 128) and complained of low mood. She reported to her GP that she considered that a possible trigger was that her mother had developed dementia and had gone into long term care which she described as feeling like “a bereavement”. She also made mention to losing her job.
- 39.5. When it was put to the Claimant it appeared the principal reason was her mother’s condition which she described as being “like a bereavement” she said the doctors notes were wrong and she was really referring to the loss of her job. The Tribunal considered that unlikely and the principal reason for her low mood was due to her mother’s condition. The Claimant was not issued with a fit note by her GP.
- 39.6. Whilst the Tribunal did not have a copy of the Claimant’s contract of employment it did have contracts of other Claimants and was told that they were similar. The Tribunal noted that the contract did not make reference to contractual sick pay merely SSP. Thus, if the Claimant had not been unfairly dismissed she would have only received SSP and that would have been for a limited period.
- 39.7. The Claimant did not claim any state benefits. The recoupment provisions therefore do not apply.
- 39.8. The Claimant also claimed loss of statutory rights.
- 39.9. The Tribunal accepted that when the Claimant started looking for work in May 2020 and thereafter she made reasonable attempts to obtain alternative employment but had not been successful. The Tribunal accepted that due to Covid 19 it was a very difficult time to secure work. Since then, however there have been gradual reductions in the lockdown although the Tribunal accepted there also been some redundancies and the job situation will remain difficult.
- 39.10. The Tribunal were not satisfied the Claimant sought to mitigate her loss from dismissal until May 2020 but was prepared to accept that she did thereafter. She is therefore entitled in the Tribunal’s judgment, taking into account that she would have been furloughed had she not been unfairly dismissed, to loss of earnings from 01 May 2020 until today and thereafter a future loss of 13 weeks.

Loss

01 May 2022 to 10 August 2020

14.2 weeks x £220.10 @ 80%= £2500.33

10 August 2020 to 09 September 2020 (4.4 weeks)

£220.10 x 4.4weeeks = £968.44

Future loss 13 weeks @ £220.10 = £2861.30

Therefore losses £2500.33 + £968.44 + £2861.30 - £400 = £ 5930.07

Loss of statutory rights £350.00

Total £5930.07 + £350.00 = £ 6280.07

Adjustment for Polkey, 50% = £ 3140.03

Award **£ 3140.03**

40. **Mrs G. Whiffin.**

40.1. The Claimant was entitled to 2 weeks contractual notice. She received 4 weeks money in lieu of notice. Her loss of earnings cannot commence until four weeks after the termination of her employment in order to ensure the Respondent is given credit for the over payment.

40.2. The Claimant's net earnings as at the effective date of termination was £144.32.

40.3. The Claimant obtained alternative employment within two weeks. She did not contend that in her new employment she earned less than in her old employment.

40.4. It follows that having regard to the overpayment of notice the Claimant suffered no loss.

40.5. The Claimant however should not be penalised for obtaining employment in her notice period for the reasons the Tribunal has already given.

40.6. The Claimant also claimed loss of statutory rights.

40.7. She did not claim any state benefits. The recoupment provisions therefore do not apply.

40.8. The Claimant's losses for unfair dismissal are limited to loss of statutory rights of £350 subject to a Polkey reduction and thus her net award is **£175.**

41. **Holiday pay and Mrs Whiffin**

41.1. The Claimant had a complaint before the Tribunal as regards holiday pay. This is not subject to any form of Polkey reduction.

41.2. The leave year was from 1 January to 31 December.

41.3. The Claimant had accrued 79.5 hours at the effective date of termination. She had taken 56 hours holiday.

41.4. She was therefore owed 23.5 hours at £8.30 per hour producing a total of **£195.05**

42. **Recoupment.**

42.1. The Tribunal considered it helpful, particularly to the Respondent, who was unrepresented, to explain the issue of recoupment. Under recoupment the Respondent must not pay the full amount of compensation for unfair dismissal direct to the claimants Mrs Storey and Miss Miles.

- 42.2. Under recoupment the prescribed element of a monetary award is treated as stayed and the Respondent should not pay it to the employee until Jobcentre Plus has served a recoupment notice or given written notification that it does not intend to serve a notice.
- 42.3. Jobcentre Plus should serve the notice or notification on the Respondent within 21 days of the Tribunal's announcement of its decision or within nine days of the written decision being sent to the parties, whichever is the later, or as soon as practicable thereafter.
- 42.4. A recoupment notice operates as an instruction to the Respondent to pay the 'recoupable amount' to Jobcentre Plus from out of the prescribed element of the monetary award. Payment to Jobcentre Plus completely discharges the Respondent's obligations to the Claimant to pay the amount equivalent to the recoupable amount by way of the monetary award. However, such payment does not affect the Respondent's obligation to pay any balance of the monetary award to the Claimant.

Schedule One. Protective Awards

Mrs K. Geary 1806675/2019	£5862.85
Mrs J. Rodley 1806677/2019	£3899.82
Miss S. Sampson 1806678/2019	£2660.52
Miss R. Miles 1806679/2019	£2614.50
Mrs A. North 1806680/2019	£1797.94
Mrs A. O'Connor 1806682/2019	£3308.14
Mrs G. Whiffin 1806683/2019	£2107.54
Miss J. Storey 1806684/2019	£1654.07
Miss K. Horner 1806685/2019	£4205.82
Mrs K. Stratford 1806686/2019	£2991.85
Mrs A. Allott 1806687/2019	£3831.42
Mrs L. Price 1806688/2019	£2246.40
Miss C. Askew 1806689/2019	£2526.68
Mrs E. Mansell 1806690/2019	£2533.37
Mrs K. Myers 1806691/2019	£2894.52

Mrs L. Carus 1806986/2019.	£3431.70
Miss L. Eaton. 1806640 /2019	£6652.92

Schedule Two. Damages for breach of contract

Mrs K. Geary 1806675/2019	£2894.37.
Mrs J. Rodley 1806677/2019	£1850.24
Miss S. Sampson 1806678/2019	£1655.44
Mrs A. North 1806680/2019	£699.20
Mrs A. O'Connor 1806682/2019	£1941.44
Miss J. Storey 1806684/2019	£1029.20
Miss K. Horner 1806685/2019	£2336.00
Mrs K. Stratford 1806686/2019	£1760.80
Mrs L. Price 1806688/2019	£685.60
Miss C. Askew 1806689/2019	£370.00
Mrs L. Carus 1806986/2019.	£458.48

Schedule Three. Unfair dismissal

Mrs K. Geary 1806675/2019	£2931.16
Mrs J. Rodley 1806677/2019	£2150.01
Miss S. Sampson 1806678/2019	£299.15
Miss R. Miles 1806679/2019	£175 (Note recoupment provisions. This is the immediate sum payable to this Claimant)
Mrs A. North 1806680/2019	£2957.79
Mrs A. O'Connor 1806682/2019	£2129.11
Mrs G. Whiffin 1806683/2019	£175

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(see Schedule)

Miss J. Storey 1806684/2019	£1011.22 (Note recoupment provisions. This is the immediate sum payable to this Claimant)
Miss K. Horner 1806685/2019	£175
Mrs K. Stratford 1806686/2019	£3140.03
Mrs A. Allott 1806687/2019	£1783.63
Mrs L. Price 1806688/2019	£1265.53
Miss C. Askew 1806689/2019	£212.00
Mrs K. Myers 1806691/2019	£2153.70
Mrs L. Carus 1806986/2019.	£175.00
Miss L. Eaton. 1806640 /2019	£760.20

Employment Judge T R Smith

Date: 7th October 2020