EMPLOYMENT TRIBUNALS

Claimants		Respondent
1. Mrs T Bedford **2. Mr R Bedford**	v	**Sweetings of Leeds Limited**

Heard at: **By CVP** **On:** **16 November 2020**

Before: **Employment Judge Davies**

Appearances:
For the Claimants: **In person**
For the Respondent: **Mr R Manning (solicitor)**

RESERVED REMEDY JUDGMENT

1. The Respondent shall pay the First Claimant:
   1.1 **£1972.04** damages for breach of contract (notice pay);
   1.2 **£1602** basic award for unfair dismissal;
   1.3 **£2590.55** compensatory award for unfair dismissal; and
   1.4 **£534** under s 38 Employment Act 2002 for failure to provide written statement of employment particulars.

2. The Respondent shall pay the Second Claimant:
   2.1 **£3984.66** damages for breach of contract (notice pay);
   2.2 **£3937.50** basic award for unfair dismissal; and
   2.3 **£44,116.80** compensatory award for unfair dismissal.

REASONS

Technology

1. This hearing was conducted by CVP (V - video). The parties did not object. A face to face hearing was not held because it was not practicable and all the issues could be dealt with by CVP.

Introduction and issues

2. This was the hearing to decide the remedy due to the claimants, Mr and Mrs Bedford, following my judgment dated 6 October 2020. The issues to be decided at the remedy hearing were set out in my case management order of the same date.

3. Mr Manning sought to rely on an additional document, in the form of an email from a Mr Lilley. That email was provided to the claimants and the Tribunal at approximately 10am today. Mr Lilley was not called to give evidence. I admitted the document in evidence, because Mr Bedford was able to deal with what it said so there was no prejudice to him. Obviously limited weight could be attached to the email, since it was not signed or accompanied by a statement of truth and Mr Lilley was not called to give evidence.

4. I heard evidence from both claimants.

Findings of fact

Mrs Bedford

5. Mrs Bedford had eight complete years' service with the respondent when she was summarily dismissed on 10 June 2019. She was 50 years of age at that date. Her gross weekly pay was £267 and her net weekly pay was £249.68. The respondent did not make any pension contributions for her.

6. Mrs Bedford told me that when she was dismissed she was not well enough to look for work for around three months. However, she did not provide medical evidence about that and she said that she registered with the Indeed website at the beginning of July 2019. I accept that she suffers from anxiety and poor mental health and takes medication for that. I made findings about that in my liability judgment as well. However, given the lack of medical evidence and the evidence about looking for a job I do not accept that Mrs Bedford was not well enough to look for a job at all for three months.

7. Mrs Bedford only made around eight job applications in total. She visited retail premises within walking distance of her home, including Asda, B&M, Matalan, New Look and a handful of convenience stores. In about August 2019 one of the convenience stores offered her a job working 16 hours per week starting on 24 January 2020. After that, apart from earning £100 doing a small amount of filing for a haulier, she lived off savings until starting the job in January. She has done that job ever since and earns £570 net per month.

8. Mrs Bedford said that when she started looking for a job she only looked for jobs in retail. She told me that she did not want to do an office job, as she had done for many years, because she wanted to be with people for her well-being. At one stage she suggested that she "needed" to be with people. Again, she did not provide any medical evidence about this. Of course, many office jobs will also involve being around people. In response to Mr Manning's questions, Mrs Bedford agreed that there were office jobs around but said again that she wanted to be around people and that she needed to be around people for her well-being. Mr Manning suggested to her that she could do better in terms of her income. She agreed, but said that her current job paid the bills and that was all she cared about at present.

9. In the absence of medical evidence, and given her answers to Mr Manning, I find that it was Mrs Bedford's personal preference to work in retail but that she could have applied for office jobs if she had wanted to.

10. Mrs Bedford also told me that she could only look for the jobs that were walking distance from her home. Mr Bedford needed to use her car and she was unable to travel by public transport because of her anxiety. She did not provide any medical evidence about that either, but Mr Manning did not ask her any questions about it or challenge her evidence. I have already accepted her evidence that she suffers from anxiety and takes medication for it and in those circumstances I am satisfied on the balance of probability that Mrs Bedford could not travel to work by public transport because of her anxiety. That limited her job search, at least to begin with after her dismissal, when she and her husband were suddenly left with only one car.

Mr Bedford

11. Mr Bedford had five complete years' service with the respondent when he was summarily dismissed on 10 June 2019. He was 53 years of age at that date. His gross weekly pay was £848.40 and his net weekly pay was £649.71. The respondent did not make any pension contributions for him.

12. Mr Bedford had the use of a company mobile phone but he also had his own personal mobile phone throughout his employment. On his personal mobile phone he had a contract that allowed him to make unlimited texts and calls. He accepted that when he lost the use of his company mobile phone it did not leave him out of pocket. He was paying for a personal mobile phone anyway.

13. Mr Bedford also had the use of a company vehicle. It was a Ford Ranger that cost about £17,000. He estimated that he drove around 8000 miles per year, of which around 3000 were personal use of the vehicle. His fuel was paid for by the respondent, including fuel for personal use. The company vehicle was returned to the respondent on 12 June 2019.

14. Following his summary dismissal, Mr Bedford made calls to people he knew. He spoke to Mr Lilley at RCL Express Ltd, another bulk tipper firm. Mr Lilley offered him work. Mr Bedford said Mr Lilley told him he would be paid £12 an hour for 40 hours per week. The email produced this morning was from Mr Lilley saying that Mr Bedford had started working for RCL Express Ltd on 24 June 2019 on a weekly wage of £650 after deductions. Mr Bedford's evidence was clear and consistent. All I had from Mr Lilley was an email apparently sent today. There was no signed statement supported by a statement of truth and Mr Lilley did not attend to be cross-examined. In those circumstances, on the balance of probabilities I prefer Mr Bedford's evidence. I find that the offer was for 40 hours' work per week at £12 per hour.

15. The job was in Ossett. That is 30 to 40 minutes' drive (25 miles) from Mr Bedford's home. He did not realise until he started that Mr Lilley intended him to be self-employed and not an employee. He had been self-employed before and was not prepared to do so again. He said that it was not possible to make money

being self-employed. His holidays would not be paid, he would have to pay the excess on any insurance claim, the expenses that could be deducted were minimal and he lacked stability and guaranteed work. When Mr Lilley asked him for a UTR and he realised this was a self-employed position, he left. He did not provide a UTR, so he was not paid for the 2 ½ days' work he did. Mr Bedford said that the long journey and early start time were part of his reasoning, but if the job had been an employed position he would have stuck with the long journey and early start time until he could find something closer to home. I note that in order to obtain a UTR it is necessary to register for self-assessment or set up a limited company.

16. In the event, Mr Bedford quickly found another role that was closer to home. He started on 1 August 2019. The job is fruit and vegetable delivery and is very close to where he lives. He takes home between £309 and £320 per week and calculates that he has earned £22,020 to date.

17. Mr Bedford continues to apply for jobs to try and increase his income to the level he was earning at the respondent. He has made around 150 applications, including for work as a road sweeper, driving a bin wagon or other driving work in Leeds, Bradford, Halifax, Huddersfield and the surrounding area. He has not applied for agency work or self-employed work. He says they do not provide stability or guaranteed work. Although he has worked in the past doing long haul driving work for many years, he is not prepared to go out on the roads sleeping in his vehicle any longer. He says that nobody in the bulk tipper industry will offer him work. As soon as he tells them he used to work for Mr Sweeting they will not talk to him.

Legal principles

18. As regards the remedy for unfair dismissal, a basic award is payable under s 122 and a compensatory award under s 123 of the Employment Rights Act. The basic award is calculated according to a statutory formula, based on age, length of service and a week's pay. There is a cap on the amount of a week's pay for these purposes. At the relevant time it was £525.

19. Section 124 says that the compensatory award is to be such amount 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 it is attributable to action taken by the employer. Under s 123(4), the principle that employees must take reasonable steps to mitigate their losses applies. Useful guidance is set out in the case of *Archbold Frieghtage Ltd v Wilson* [1974] IRLR 10, which suggests that the dismissed employee should act as a reasonable person would act if they had no hope of seeking compensation from their previous employer. The Tribunal should ask what steps should reasonably have been taken; and when, if those steps had been taken, the individual would have secured an equivalent alternative income: see e.g *Savage v Saxena* [1998] ICR 357. The burden of proving that the individual has not taken reasonable steps to mitigate his or her loss is on the employer.

20. There is also a cap on the compensatory award for unfair dismissal. Under s 124 Employment Rights Act 1996 it is the lower of a prescribed figure and 52 weeks' pay.

21. Section 38 of the Employment Act 2002 applies if, when relevant proceedings were begun, the employer was in breach of its duty to give the employee a written statement of employment particulars under s 1 of the Employment Rights Act 1996. In such cases, the Tribunal must make an award of two weeks' pay to the employee, unless there are exceptional circumstances that would make it unjust or inequitable to do so. The Tribunal may, if it considers it just and equitable to do so, make an award of four weeks' pay. Relevant proceedings include unfair dismissal claims.

Application of the law to the facts

Mrs Bedford

22. Applying those legal principles to the detailed findings of fact above, I deal with the issues in turn, starting with **Mrs Bedford's** claims.

23. As noted in my liability judgment, Mrs Bedford received a payment of £725 on 21 June 2019. £25.90 of that was not accounted for by wages or holiday pay, and I have deducted it from her notice pay. Mrs Bedford was entitled to 8 weeks' notice at £249.68 net per week. The damages due to her are therefore 8 x £249.68 = £1997.44, less £25.90 = **£1972.04**.

24. Mrs Bedford's basic award is based on 8 years' service with a multiplier of 1.5 per year. The basic award is calculated on the basis of gross pay. It is to be reduced by 50% because of contributory fault. The sum payable is therefore 8 x 1.5 x £267 x 0.5 = **£1602**.

25. That brings me to the compensatory award. I start with the issue of mitigation: has Mrs Bedford taken reasonable steps to replace her lost earnings? I find that she has not. She was well enough to start looking for work and did start looking by July 2019. I have accepted that her anxiety affected her ability to travel to work by public transport and I find that it was reasonable for her to look for work within walking distance of home at that stage, since she and her husband suddenly found themselves with only one car. It was also reasonable for her to focus on jobs in retail to begin with. However, once it became clear that the only available retail job did not start until January 2020, was only for 16 hours per week and was at a much lower salary, it was not reasonable to continue to limit her search in that way. She only applied for around 8 jobs in total. It was a preference to work in retail but not a necessity. Although the respondent did not produce evidence of specific suitable jobs that were available, Mrs Bedford accepted that there were office jobs she could have done. It seemed to me that once she had secured a retail position earning enough to cover her bills, she was content with that and chose not to try to increase her earnings to the level she earned at the respondent. That is, of course, a matter of personal choice, but it is not reasonable to expect the respondent to pay for it.

26. I find that if she had been taking reasonable steps to mitigate her losses Mrs Bedford would have widened her search to include office and admin jobs by the end of August 2019. In the absence of evidence about specific jobs I have to do the best I can based on my knowledge and experience of the regional position before the pandemic and taking into account the need for local work. I also take into account Mrs Bedford's agreement that there were office jobs she could have done. In those circumstances I find that if she had started looking for office jobs by the end of August 2019 Mrs Bedford would have secured new work matching her old earnings within three months. She should therefore receive compensation for lost earnings for the period from the end of her notice period (5 August 2019) to 30 November 2019. That is a period of 16 weeks. Mrs Bedford's lost income during that period was 16 x £249.68 = £3994.88, less £100 earnings in other work = £3894.88.

27. In addition, it is appropriate to award a sum for loss of statutory employment rights. Mrs Bedford had eight years' service and had accrued significant employment rights. I find that the appropriate award is £250, reflecting around a week's pay.

28. The total financial loss is therefore £3894.88 + £250 = £4144.88. This is to be increased by 25% (the ACAS uplift) and then decreased by 50% (for contributory fault). That gives a compensatory award of **£2590.55**.

29. Finally, the respondent was in breach of its obligation to provide Mrs Bedford with a written statement of employment particulars when she brought her claim. Mr Manning accepted that there were no exceptional circumstances and I must therefore make an award of two weeks' pay. Nothing specific was identified that would make it just and equitable to award four weeks' pay and I find that it would not be. This award is based on the gross amount of a week's pay and is therefore 2 x £267 = **£534**.

Mr Bedford

30. As noted in my liability judgment, Mr Bedford received a payment of £2225 on 21 June 2019. £405.82 of that was not accounted for by wages or holiday pay, and I have deducted it from his notice pay.

31. Mr Bedford was entitled to 5 weeks' notice. His damages must include not only his net weekly pay but also the value of his company car. Apart from suggesting that I should assign a weekly value to this loss, Mr Manning did not make any submissions about what the appropriate level of compensation should be. Mr Bedford had valued it at £100, on advice from the CAB. I consider that it is appropriate to value it on the basis of a weekly figure. The usual range for such awards is between about £50 and £150 per week. This was a Ford Ranger, which is a mid-ranged vehicle. Further, all Mr Bedford's fuel was paid for as well. In those circumstances, I find that the appropriate figure is £100 gross, which I have equated to £75 net per week. Mr Bedford had the vehicle for two days of his notice period. The damages for loss of the company vehicle are therefore 4.6 weeks x £75 = £345. The net weekly wages for 5 weeks is 5 x £649.71 = £3248.55. The damages for breach of contract (notice pay) are therefore

£3248.55 + £345 - £405.82 = £3187.73. This is to be increased by 25% (ACAS uplift) so the total payable is **£3984.66**.

32. Mr Bedford's basic award is based on 5 years' service with a multiplier of 1.5 per year. The basic award is calculated on the basis of gross pay, however there is a cap of £525 for these purposes. The sum payable is therefore 5 x 1.5 x £525 = **£3937.50**.

33. That again brings me to the compensatory award and the issue of mitigation: has Mr Bedford taken reasonable steps to replace his lost earnings? I find that he has. I have not accepted the respondent's evidence that his earnings with RCL would have been £650 net per week. I have found that his earnings would have been £480 gross or about £360-£380 net per week, but on a self-employed basis and travelling around 50 miles per day. In his current role, Mr Bedford earns £309 to £320 net per week, but on an employed basis and very close to home. The value of 5.6 weeks' paid holiday needs to be factored in, as does the cost in fuel and vehicle wear and tear. When that is done, it seems to me that there is little, if any, difference between the net income in the RCL role and Mr Bedford's net income in his current role.

34. In those circumstances, I find that Mr Bedford did not act unreasonably in leaving the RCL job when he discovered it was on a self-employed basis. He would have had to set up a limited company or register for self-assessment to be paid for the 2 ½ days' work he had done. That would be inconvenient and potentially disruptive if he did not intend to work on a self-employed basis. He was still in his notice period. He had worked as a Transport Manager on an employed basis close to home for 5 years. It was reasonable for him to seek to find similar work, and in particular to insist on the stability, security and convenience of employed work at that stage. He was not required to accept the first job that came along. Having made that decision, he found and started a job that paid broadly the same as the RCL job within a matter of weeks. His actions were reasonable and consistent with what somebody who had no expectation of receiving compensation in the Tribunal would have done.

35. Mr Bedford continues to try to find work that pays him the equivalent to what he earned at the respondent. He has made 150 or so applications but without success. He cannot find work in the bulk tipper field. He continues to look for employed work, not agency or self-employed work. Such work has a number of disadvantages compared with employed work, as identified by Mr Bedford. The respondent did not produce evidence of any specific agency or self-employed work that it says Mr Bedford could and should have applied for that would have paid him more than he currently earns. Nor has it identified any longer distance driving work that it says he could and should have applied for that would have paid him more than he currently earns. The burden of proving unreasonable failure to mitigate is on the respondent. The local and regional job situation is much more uncertain than usual because of the impact of the pandemic, and unemployment rates are rising. That makes it more reasonable to stick with a lower paid but stable job rather than taking on a more speculative self-employed or agency role. That has been the position for the last nine months or so. In all the circumstances and on the evidence before me I am not satisfied on the balance of probabilities that Mr Bedford has failed to take reasonable steps to

mitigate his losses by sticking with the role he obtained delivering fruit and vegetables, and limiting his search for a better paid job to employed work and work that does not involve long distance driving.

36. Mr Bedford continues to look for another job. He now has the benefit of a Tribunal judgment that makes clear that he was not at fault when he was dismissed by Mr Sweeting. There is still a need for delivery and driving jobs, and transport managers, despite the impact of the pandemic. The current situation with the pandemic suggests that things should start to improve in the spring when it is hoped that widespread vaccination will be underway. That should boost the economy and improve the employment situation. Doing the best I can, I find that Mr Bedford is likely to secure work that pays at a similar level to his job at the respondent after a further four months.

37. Mr Bedford should also be compensated for loss of statutory employment rights. He had been employed by the respondent for 5 years. In my view a figure of £525, which represents one week's (capped) pay is the appropriate level of compensation.

38. Mr Bedford's losses to date are calculated as follows. It is now 74 weeks since his dismissal. He would have earned 74 x (£649.71 + £75) = £53,628.54 net. He has actually earned £22,020. The difference is £31,608.54. With loss of statutory employment rights, his losses to date are £32,133,54.

39. His net weekly future loss is (£649.71 + £75) - £320 = £404.71. Four months' net losses are therefore 17 weeks x £404.71 = £6,880.07.

40. Mr Bedford's total losses are therefore £32,133.54 + £6,880.07 = £39,013.61. That has to be increased by 25% (ACAS Code), which gives a figure of £48,767,01.

41. There is a maximum cap on the amount of a compensatory award for unfair dismissal. The relevant figure in Mr Bedford's case is 52 weeks' pay. That is calculated in accordance with the Employment Rights Act 1996. It is based on gross pay, but it does not include benefits in kind like a company car. The cap is therefore 52 x £848.40 = **£44,116.80**. That is the maximum compensatory award that can be made to him and that is the amount I order. Given that the cap applies in any event, I have not done any calculations to gross up the award to take into account any tax Mr Bedford may have to pay on it.

Employment Judge Davies
20 November 2020