



EMPLOYMENT TRIBUNALS

Claimant: Ms P Cunha

Respondent: Leather Un Limited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL ON REMEDY

HELD REMOTELY: LONDON CENTRAL

On: 17 March 2021

Employment Judge: Employment Judge Henderson (sitting alone)

Appearances

For the claimant: Ms M Mathur (Pupil Barrister)

For the respondent: Mr J Laddie QC

JUDGMENT

The Tribunal orders the respondent to pay to the claimant:

Basic Award (gross weekly pay of £525 x 4 years (claimant aged 41) -	£2100
Compensatory Award (as detailed below)	£12,062.91
Pension Loss (£77.63 per month x12)	£931.56
Job hunting expenses	£30
Loss of Statutory Rights	£500
<u>Total Award</u>	<u>£15,624.47</u>

REASONS

1. This was a hearing on remedy following the Tribunal's Judgment on Liability (the Liability Judgment) sent to the parties on 19 February 2021, which found that the claimant had been constructively unfairly dismissed by the respondent with effect from 12 September 2019.

Conduct of the Hearing

2. As agreed with the parties at the substantive hearing on 8, 9 and 10 February 2021 (at which the respondent was represented by Peninsula), this hearing was held remotely using the Cloud Video Platform (CVP).
3. The Tribunal heard evidence from the claimant who adopted (on oath) her written witness statement on remedy as her evidence in chief. The Tribunal was also presented with a Remedy Bundle (in electronic form) (**RB**); two further pages marked 69I and 69J were added to this bundle on the morning of the hearing. It was agreed by both parties that these pages had been produced by the claimant in February 2021 and should have appeared in the original Trial Bundle (**TB**) but the respondent's representative had omitted them accidentally. In fact, these were the only two pages in the RB which were referred to by the parties (other than the updated Schedule of Loss at pages 1 and 2 of that Bundle).
4. Mr Laddie referred regularly to the original Trial Bundle (also in electronic form) and to the statements of the respondent's witnesses presented at the Liability Hearing, namely: Alex Clapcott; Stacey Morris; Phoebe Ugowe and Nonde Kashita.
5. During the course of the remote hearing connection problems were experienced by Ms Mathur, which were resolved by her reconnecting to the hearing. During the latter section of her cross-examination and during Tribunal questions, the claimant also had considerable problems with her connection and had to change location within her premises to address these. The claimant was able to reconnect to join the CVP hearing.
6. I heard oral submissions from both parties' counsel and I reserved my decision.

The Issues

7. Mr Laddie stressed throughout the remedy hearing that the respondent did not seek in any way to overturn or undermine the Tribunal's Liability Judgment. Further, when his repeated references to the original Trial Bundle and the witnesses' statements for the respondent were questioned, he insisted that he was not attempting to re-hear the case on liability. This reassurance is noted.
8. Mr Laddie said that the respondent did not make any challenge on the claimant's attempts to mitigate her loss. Further, the respondent did not

challenge the calculations contained in the claimant updated schedule of loss, other than the Loss of Statutory Rights, which Mr Laddie said should be reduced to £250 on the principles set out below which he deduced from the **Wright** case.

9. Accordingly, Mr Laddie raised two points for determination by the Tribunal:

- he relied on the case of **Wright v North Ayrshire Council [2014] ICR 77** of the Scottish EAT, which he said showed that where there were multiple reasons put forward for constructive dismissal, and the claimant fails with regard to some of those reasons, then the compensation should be accordingly reduced to reflect the failed breaches. He noted that in the Tribunal's Judgment the claimant had raised 10 allegations of repudiatory breaches; 5 of which had been found in the claimant's favour. He, therefore, sought a reduction of 50% in any compensatory award made to the claimant. Ms Mathur said that the relevant paragraph relied on by Mr Laddie (paragraph 32) in **Wright** was obiter (which Mr Laddie accepted in his closing submissions) and was, therefore, not relevant to the current situation and also that the case could be distinguished;
- he said that the claimant's employment would have ended shortly after her resignation (citing constructive dismissal) in any event. Therefore, the Tribunal should assess when that employment would have ended and award compensation accordingly. Mr Laddie stressed that this was not a **Polkey** argument, which he acknowledged had been dismissed by the Tribunal in the Liability Judgment. Ms Mathur said that the Tribunal had clearly found that the claimant had been constructively dismissed; having resigned in response to the "last straw" of the respondent's conduct at the grievance meeting on 4 September 2019. There was no evidence to show that she would have left employment in any event and that the respondent was effectively attempting to undermine the Liability Judgment.

10. I note that Mr Laddie's points had not been raised earlier by the respondent and were first communicated to Ms Mathur and the Tribunal at the commencement of the remedy hearing. This is demonstrated by the fact that the bulk of the Remedy Bundle; the content of the claimant's remedy witness statement and the legal authorities produced by Ms Mathur all related to the claimant's attempts to mitigate her loss.

11. Mr Laddie asked that I note in my Remedy Judgment and Reasons two objections which he raised during the hearing. The first objection related to my questioning why he needed to take the claimant to the statements of the respondent's witnesses as heard at the liability hearing. Mr Laddie said he felt that I was "shutting down" his argument on this issue of when the claimant's employment would have ended. I assured him that I was not doing so, but wished to ensure that we adhered to the relevant issues. As a compromise, Mr Laddie put the relevant paragraphs in the witness statement of Ms Kashita to the claimant in cross-examination and referred to the other relevant paragraphs in his submissions. I have noted the content of those paragraphs below.

12. Mr Laddie's second objection was to my refusal to allow him additional cross-examination of the claimant. Mr Laddie commenced cross-examination of the claimant at 10:55 (estimating that this should take 20-25 minutes). Mr Laddie concluded his cross-examination at 12:55. Even allowing for problems with the claimant's Internet connection, he was given the opportunity of a full cross-examination (which substantially exceeded his original estimate). Mr Laddie then asked for further cross-examination following my questions to the claimant. When I refused, Mr Laddie said that he should be allowed to do so, as new evidence was given by the claimant in response to my questions. However, as I explained, my questions followed on from those asked by Mr Laddie in the concluding part of his cross-examination, namely relating to the pages at 69I and 69J and did not relate to any new matters. I explained that given Mr Laddie's considerable experience, I was not minded to allow him a "second bite of the cherry" at cross-examination which I might have allowed a litigant in person. However, in the interests of fairness to both parties I have set out his objections as he requested.

Evidence and Findings of Fact

13. The Tribunal will only make such findings of fact as are necessary to determine the relevant issues set out above. Mr Laddie clearly stated that he was not attempting to subvert the findings of fact in the Tribunal's Liability Judgment and accordingly the findings of fact therein remain unchanged.

The claimant's financial situation

14. The claimant was asked in cross-examination about her financial situation and about the personal interest-free loan made to her by Ms Weldon and her inability to repay that loan. The claimant acknowledged the fact of the loan which was a finding of fact made in the Liability Judgment (paragraph 15). She accepted that she had on occasion struggled to repay the agreed instalments (of £200 per calendar month) to Ms Weldon, but insisted that she was in the process of repaying the debt. The claimant also said that she had on occasions worked overtime and her payments for that, had been set off against her loan rather than paid to her as salary. As mentioned in the Liability Judgment (paragraphs 91-96), this raises some irregularities with regard to the way in which the respondent's business was run: blurring the line between Ms Weldon's personal situation and her position as an employer.

15. It was put to the claimant by Mr Laddie on numerous occasions that her financial situation was perilous and that she had herself described it as "desperate" (page 101 TB) in a text/WhatsApp exchange with Ms Morris on 30/31 July 2019. The claimant did not accept that this was the case. She agreed that she had significant historic debts; however, she said that the personal loan of £5000 made to her by Ms Weldon, had helped to settle those debts and that going forwards, although as a single parent with a young child, money was often "tight", she did not accept that she had serious financial difficulties.

16. The claimant said that her “conversation” with Ms Morris in July 2019 had been about needing “extra” money. She said that she had to send her son to summer school during the holidays so that she could continue working. That was the context of the exchange with Ms Morris about needing extra money. That situation had led her to struggle to repay the loan instalments over that period. The claimant also noted in that conversation Ms Morris had agreed with many of the claimant’s criticisms concerning Ms Weldon and how she handled matters in the workplace.
17. The claimant noted that she was not alone in complaining about Ms Weldon and the employment situation at the respondent. I accept that the text/WhatsApp exchange does record Ms Morris criticising Ms Weldon and the way she ran the company.
18. I accept the claimant’s evidence that, around this time Ms Weldon had suggested that the claimant look for another job and she was therefore understandably concerned about her employment situation. I refer to paragraphs 20 and 70-74 of the Liability Judgment, which found that Ms Weldon had told the claimant that there should be a “parting of the ways” and that Ms Weldon provided the claimant with an unsolicited reference letter.

The respondent’s witnesses’ statements

19. Mr Laddie specifically referred to the following extracts from the witness statements.

N Kashita – paragraphs 7 – 10

“I was at the Respondent when the Claimant joined, in April 2015. I had been there for a year. When she started we got on really well – we shared a lot in common, our children got together and we met outside of work frequently.

I noticed that the Claimant over time became more belligerent, and would constantly be moaning about the business, Claire Weldon the owner and how little she was being paid.

The Claimant seemed to be constantly short of money. She was very vocal in public about the salary, how the business should be run and her problems with money.

I was so concerned with the constant moaning that it might start affecting the morale of the employees, especially the new ones. I tried to speak with the Claimant to ask her to modify her tone and language, it had gone on for many weeks. “

20. The claimant commented on these paragraphs in her oral evidence. She accepted that she had initially got on well with Ms Kashita. She said that Ms Weldon discussed her personal business with everyone and this encouraged others to do so and this included mutually sharing financial problems. The claimant said that as a single mother she frequently had money problems, but she did not agree that this meant that she was in in desperate financial straits,

as suggested by Mr Laddie. The claimant said that all the employees complained about Ms Weldon and how she ran the company. I accept this evidence and it reflects the evidence which I heard from the respondent's witnesses at the Liability Hearing.

Stacey Morris – paragraphs 10 to 15

“Perla’s behaviour became erratic at this time clearly because she appeared unhappy in her job. Perla was very vocal to everyone in the office about this, she wanted to find a job that paid more money with better prospects. This was a fair comment, she was ambitious. Perla had a lot to offer but unfortunately Leather Unlimited is a small company, so there is only so far you can go. Nonde was also looking for work so that she could spend less time commuting. Nonde had been going for interviews but had not been unsuccessful.

When Nonde went to Zambia in October of 2018. Perla felt the need to tell Claire about Nonde going for interviews. This is something that I would not have told Claire. Nonde had not been offered any positions and there was no need to worry Claire. We are a small company so when a member of staff leaves it has a big impact and this upsets Claire. I felt this was unnecessary and disloyal to Nonde. Claire called me into the office and asked me if what Perla had said was true, I reluctantly agreed and said it was the truth.

I could not understand why Perla needed to tell Claire. Perla explained to me that she felt Nonde should give Claire more than one month’s notice, Perla felt that Claire deserved that much. I pointed out that a months’ notice was correct, that this would be in our Contract of Employment. You are only requested to give longer if Associate or a Partner in the business

Perla’s actions and behaviour in the office started to become draining, she was so negative. Perla was continually putting Claire down, no matter how much Claire had helped her financially this was not enough. Perla was very rude to Claire on many occasions. Perla would shout at Claire in front of all members of staff, this made the working environment very tense.

Perla did not like to be criticised and would blame her errors on Claire. Perla would continually say that Claire was becoming forgetful and suggested to me that Claire had the onset of Dementia. I personally disagreed with this. I think she has an amazing memory; Claire often remembers things that I had forgotten so this statement from Perla was not right.

Perla’s behaviour towards Claire was not professional, it was embarrassing for other members to hear Claire being spoken to so rudely. I was shocked that at no time Claire reprimanded Perla. In any of my other positions in previous employment you would automatically be given a warning, but this never happened. “

21. I do not find that these extracts from Ms Morris’ statements affect any of the relevant evidence on the issue of remedy. They demonstrate what has already

been said about the general atmosphere in the respondent's workplace, which was not discouraged by Ms Weldon as the Managing Director and owner of the business. As mentioned above, Ms Morris was herself critical of Ms Weldon's behaviour in running the company. Ms Morris had also had discussions with Ms Weldon about her own confidential conversations with the claimant (paragraphs 40-44 of the Liability Judgment), which contradicts the opinions she expresses in the extracts above.

Alex Clapcott – paragraphs 10 -12

“During the course of my engagement (which continued for about one year until I left Shirlaws) I would meet and talk with Claire, Nonde and Perla every month. Undoubtedly during conversations with Nonde and Perla during my engagement I would have “sounded them out” by indicating there may be an opportunity for them to “succeed” Claire if they were prepared to step up and demonstrate significant value and worth to Leather Unlimited. No guarantee of any such succession was ever made as this was not my place.

Over the period of engagement my opinion of Nonde remained fixed. She appeared diligent and committed. At the same time I began to sense and see glimpses of another side of Perla. She could be very opinionated, dogmatic and openly dismissive (rude) in conversation with and about Claire. Perla was clearly ambitious and more of everything (money/responsibility-mainly money). However, Claire suggested to me that this ambition was not matched with either commitment hard work.

The impression I had was that Perla wanted more, but wasn't prepared to do more give more to the business. As a consultant I often encounter people who want the results they had done shown anything. When I learnt of the claim by Perla I cannot say that I was altogether surprised. Perla is a person who is exceptionally self-centred on the highly opinionated and driven by the wrong motivations.”

Phoebe Ugowe paragraphs 7-9

“From the time that I began working at the Respondent the Claimant has been very vocal about things at work and in public. She felt that she did a lot of work and never got any credit, complained about Claire Weldon a lot, everything seemed to be against her.

I used to listen and to sympathise with her, when I started. But then I began to notice that the other team members tried to avoid her. She clearly had her own issues going on. I didn't want to know and I couldn't help her with them.

I can't say if the Claimant at the trade show meant what she said about leaving the Respondent – she could have been bluffing, or she really meant it. It seemed to me that the Claimant was unhappy working for the Respondent but this was of her own making.”

22. These extracts were referred to in order to demonstrate that the claimant had been consistently unhappy about her employment at the respondent; she had been open about her own financial problems and had complained about the level of her salary. Mr Laddie said these showed her state of mind and indicated that she would in any event, have left the respondent's employment even if she had not been constructively dismissed on 12 September 2019.
23. I do not find that these extracts affect any of the relevant evidence on the issue of remedy. They show the claimant's dissatisfaction with how the business was run, which the claimant has not denied. However, as was found in the Liability Judgment (at paragraph 17) the claimant had indicated in March 2019 that she was thinking of leaving (without giving formal notice) but had confirmed (following questions from Ms Weldon) in June 2019 that she intended to stay for "the foreseeable future".
24. It was Ms Weldon who in late July 2019 told the claimant that she should seek other employment (paragraphs 63-74 of the Liability Judgment).

The "Doncaster" document

25. This was produced by the claimant (pages 69I and 69J) but had been omitted from TB due to the mistake of the respondent's representative. Therefore, there is no suggestion that this document was withheld or concealed by the claimant. If the document had been included, it may be that the claimant would have been cross-examined about it at the Liability Hearing, but this was not the case.
26. The document showed an application form dated 28 August 2019 completed by the claimant for a place for her son at a school in Doncaster. The form gave the intended moving date as 7 September 2019. The address given in Doncaster was that of the claimant's brother and she said that if she had lost her job, she could not have afforded to stay in London and so would have had to relocate to live with her brother.
27. The claimant eventually accepted (after some prevarication) that the information given in the form was incorrect and the certification statement was untrue. She said that as at the end of August, Ms Weldon had told her to find another job; the claimant had raised a grievance; she was on sick leave (with stress related illness) and only receiving SSP and a grievance hearing had been scheduled for 4 September. The claimant said that she hoped for (but was not optimistic about) a positive outcome from the grievance meeting. In fact, her son had started at his chosen school in London on 5 September 2019 (page 41A TB). However, following the grievance meeting, she waited for the notes of the meeting to come in; then took stock and realised she could not return to the workplace and so resigned on 12 September.
28. The claimant said that as at the end of August she could not have known exactly what was going to happen after the grievance meeting. In summary, the claimant was covering her options when she completed the application form for Doncaster schools; albeit untruthfully. If things had worked out with the

respondent, the claimant said she would not have pursued the Doncaster application and her son would have continued at his school in London.

29. I accept the claimant's evidence on this point as plausible, given the precarious nature of her employment situation as at 28 August 2019, as per the claimant's oral evidence and the findings of fact in the Liability Judgment regarding the respondent's breaches of contract in July 2019 leading up to that time.
30. I refer also to paragraph 95 of the Liability Judgment, which found that Ms Weldon had more or less decided that the claimant was leaving in August 2019 and had told Ms Ugowe as much, when she discussed the claimant's grievance with her. Given that finding, it is not appropriate for the respondent to now attempt to turn that situation against the claimant and seek to reduce her compensation on that basis.

Conclusions

31. In his submissions, Mr Laddie referred to paragraph 32 of the **Wright** decision, which stated that as regards compensation, where in a constructive dismissal case, there was a variety of reasons for a resignation but only one of them was a response to the repudiatory conduct, the compensation to which a claimant will be entitled will be "necessarily" limited, to the extent that the response is not the principal reason. He accepted that the paragraph was obiter and so was not binding on this Tribunal and accordingly I do not choose to follow it.
32. However, even if this were not the case, I find that on a strict reading of the paragraph it is simply not relevant to the current situation. As per the Liability Judgment, there was no "variety of reasons" for the resignation: the reason was found to be the last straw of the grievance meeting. The fact that there were 10 original allegations of potential repudiatory breaches; only 5 of which the Tribunal found in favour of the claimant, does not alter the reason for the resignation. To suggest otherwise is simply incorrect and misleading from the respondent.
33. I also accept Ms Mathur's submissions that the **Wright** case related to a situation where there were other external factors for the resignation which did not relate to breaches of contract by the employer – again that is simply not the case here.
34. Accordingly, there will be no reduction of the compensatory award on this basis; nor will there be a reduction to the loss of statutory rights as sought by Mr Laddie.
35. Mr Laddie also submitted that the compensatory award should only reflect a 3-month period of loss as he maintained that the evidence showed that the claimant would (in any event) have left her employment by then. The claimant accepted that she had been dissatisfied with her employment conditions and treatment at the respondent. She had thought about leaving in March 2019 and had changed her mind in June 2019. She then raised a full and detailed grievance of her various complaints in early August 2019, which she was

entitled to do. It was the way in which this grievance was handled that led to the the “last straw” which entitled her to resign and claim constructive dismissal. I do not accept that the evidence, supports Mr Laddie’s assertion – see findings of fact above.

36. Further, when I asked for legal authority to support Mr Laddie’s argument on this point, he cited the case of **Dunnachie (No 3) [2004] ICR 227** in the EAT. Mr Laddie said that this supported his assertion that the burden of proof was on the claimant to show that she would have remained in employment for a further 12 months if she sought to claim future loss for that period; he gave no specific references from the judgment. He did not have a copy of that authority available for the Tribunal. Having read and considered that authority, I note that (as with **Wright**) it does not appear to be relevant to the current case as it refers to the use of the Odgen Tables to assess future loss where appropriate.
37. I revert, therefore to the statutory authority of section 123 ERA which says that: *“... the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to the action taken by the employer”*
38. The constructive dismissal flowed from the respondent’s conduct, which entitled the claimant to terminate her contract. Based on the findings of fact above and on the relevant facts in the Liability Judgment, I find that the claimant has demonstrated her loss (and shown mitigation) which was not challenged by the respondent. It is the Tribunal’s judgment that the amount shown in the claimant’s Schedule of Loss is such amount as the Tribunal considers just and equitable in the circumstances. As mentioned above, it would not be just and equitable for the respondent to attempt to reduce the claimant’s compensation, by saying that Ms Weldon’s behaviour meant that the claimant would have left the respondent’s employment in any event.
39. I make a compensatory award to the claimant of £12,062.91 as sought by her updated Schedule of Loss being net loss of earnings from 12 September 2019 to 11 September 2020, taking into account mitigation from 11 May 2020 and (unspecified) benefits claimed by her of £4635 from 30 September 2019 to 29 May 2020. The figures given in the Schedule of Loss were accepted by Mr Laddie/the respondent.
40. The issue of uplift of the award to reflect the respondent’s failure to follow the “ACAS Code” was raised by Ms Mathur only at the commencement of her closing submissions and she was unable to give me “chapter and verse” as to which breaches of the ACAS Code (or even citing the Code) on which she relied. Accordingly, I make no uplift award.
41. For the reasons set out above, the Tribunal makes the following award to the claimant:
- Basic Award (gross weekly pay of £525 x 4 years (claimant aged 41) - £2100
 - Compensatory Award (as set out above) £12,062.91
 - Pension Loss (£77.63 per month x12) £931.56

-Job hunting expenses	£30
-Loss of Statutory Rights	£500
<u>Total Award to claimant</u>	<u>£15,624.47</u>

Employment Judge Henderson

JUDGMENT SIGNED ON: 24 March 2021

**JUDGMENT SENT TO THE PARTIES ON
24th March 2021**

AND ENTERED IN THE REGISTER

FOR THE SECRETARY OF THE TRIBUNALS