EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
Mr B Brealy	**A M Clarke Limited**

HELD AT: **Croydon (by CVP)** **ON:** **8-10 March 2021 and 7 April 2021**

BEFORE: **Employment Judge K Bryant QC**

Appearances:

For the Claimant: **Mr A Bate (McKenzie Friend)**
For the Respondent: **Ms Y Montaz (Consultant)**

WRITTEN REASONS ON REMEDY

Introduction

1. The final hearing of this case, limited to liability issues, took place by CVP on 8-10 March 2021. Time did not allow the tribunal to give its liability judgment and reasons orally, and so they were reserved. The tribunal then produced its written judgment and reasons on 15 March 2021 and they were sent to the parties shortly thereafter.

2. The tribunal dismissed the Claimant's claim for holiday pay on withdrawal, but found that his claim for unfair constructive dismissal was well-founded.

3. A further hearing to decide the appropriate remedy for unfair dismissal took place, again by CVP, on 7 April 2021.

4. The tribunal announced its judgment on remedy and its reasons for that judgment orally at the remedy hearing. It ordered that the Respondent pay to the Claimant the total sum of £5,306.07 as an award for unfair dismissal, made up as follows:

4.1 A basic award in the sum of £2,445.00.
4.2 A compensatory award in the sum of £2,378.70.
4.3 An uplift of 10% pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ('**TULR(C)A**') in the sum of £482.37.

5. Neither party asked the tribunal for written reasons for its remedy judgment at the remedy hearing, and so the tribunal produced its remedy judgment (but not reasons) in writing on 7 April 2021 to be sent to the parties in due course.

6. Subsequently, and before the remedy judgment had in fact been sent to the parties, the Respondent requested written reasons for the remedy judgment by email on 21 April 2021.

7. The following are those written reasons.

Remedy issues

8. As noted above, the remedy hearing was to decide the appropriate remedy for unfair dismissal.

9. The tribunal had already found that the effective date of termination of the Claimant's employment with the Respondent was 30 October 2017 (see ¶38 of the liability reasons).

10. It was confirmed at the start of the remedy hearing that the Claimant was claiming losses only up to May 2018 (which was clarified in closing submissions as up to 3 May 2018), after which he accepted that he had no ongoing losses.

11. It was also accepted by the Claimant that reinstatement or re-engagement by the Respondent were not practicable and that he did not, therefore, wish the tribunal to make either of those orders.

12. That being so, the tribunal had to decide what, if any, award of compensation should be made: see section 112(4) of the Employment Rights Act 1996 ('**ERA**').

13. The Respondent indicated at the start of the hearing that it did not dispute the compensation period claimed by the Claimant (although see the different position adopted in submissions as outlined below) and also that it accepted that a 10% uplift under section 207A of TULR(C)A would be appropriate to reflect its failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures. That was the same percentage uplift suggested in the Claimant's schedule of loss.

Evidence

14. The tribunal had retained the evidence provided to it for the liability hearing. In addition, the tribunal was provided with a new statement with exhibit from the Respondent, a new schedule of loss from the Claimant and a counter-schedule from the Respondent.

15. The tribunal heard evidence from the Claimant by reference to a remedy statement provided before the liability hearing, and also by reference to the latest version of his schedule of loss.

16. The tribunal also heard evidence from Alan Clarke (co-owner and director of the Respondent) who had provided a statement with exhibit concerning remedy.

Applicable law

17. The tribunal reminded itself of the applicable statutory provisions, in particular those of sections 118-124 of the ERA and section 207A of TULR(C)A. It is not necessary to set out the content of those provisions here.

Submissions

18. The parties each gave oral submissions after the conclusion of evidence, which may be summarised as follows:

Basic award

18.1 The elements of the calculation of the basic award dependent on length of service and age were agreed, such that the appropriate multiplier was 5.

18.2 There was a dispute as to the Claimant's pre-dismissal gross weekly pay: the Claimant gave a figure of £546.04 and the Respondent £483.48.

18.3 The multiplicand for the calculation of the basic award was therefore not agreed.

Compensatory award

18.4 There was no dispute that an award for loss of statutory rights was appropriate, but there was a slight dispute as to the appropriate amount: the Claimant said £500 and the Respondent £400.

18.5 As for loss of earnings, the Respondent said that:

18.5.1 the tribunal has to order a compensatory award that is just and equitable.

18.5.2 the tribunal has evidence that the Claimant was receiving wages of £350 per week from immediately after his dismissal and throughout the period of claimed loss up to 3 May 2018.

18.5.3 the tribunal also has evidence that from January 2018 the Claimant had submitted invoices for separate amounts to a building firm, which the Respondent said should also be taken into account in full.

18.5.4 the Claimant has provided no evidence that he has paid tax or NI contributions on any of his mitigation earnings, and so the gross sum should be deducted from any losses (although it was accepted in response to a question from the tribunal that the Respondent had not make an application for disclosure of the Claimant's tax returns).

18.5.5 the Claimant made no real effort to find alternative employment as a head chef; he was young and experienced but had only tried a couple of places with people that he knows.

18.5.6 in so far as he was in dispute with the Respondent and may have felt that he could not ask them for a reference, he could have obtained a reference from his pre-TUPE employer, ie his mother, for whom he had worked for more than 5 years.

18.5.7 had he made reasonable efforts fully to mitigate his losses he would have been able to find a job as a head chef within 2 months of his dismissal on at least the same wage as he was paid by the Respondent, and he should therefore have fully mitigated his loss of earnings by the end of 2017; it is in this respect that the Respondent's submissions were different from its acceptance at the start of the remedy hearing as to the period of loss only ending in May 2018.

18.5.8 the hourly rate of pay for the purpose of calculating any loss of earnings should be £9 and not £10.50 because any agreement as to the higher rate was void under TUPE.

18.6 The Claimant said that:

18.6.1 the sums of £350 per week received by him from the date of his dismissal to the end of 2017 were not mitigation earnings; rather, they were a subsistence loan from his father and should not be deducted from his loss of earnings (although it was accepted in answer to a question from the tribunal that there is no evidence that any of these sums was ever paid back).

18.6.2 in so far as spreadsheets disclosed by the Claimant may suggest otherwise, these were produced by the Claimant's representative rather than the Claimant, who struggles with communicating so requires someone to help him.

18.6.3 any business with a head chef vacancy would have filled that vacancy long before Christmas 2017 and, even if the Claimant had made greater efforts to look for a head chef post, he would not have found any in the run-up to Christmas.

18.6.4 he could have asked his mother for a reference but any prospective employer would not have given a reference from a family member much weight, and would also expect to see a reference from his last employer.

18.6.5 it was accepted that the appropriate net figure corresponding to a gross weekly wage of £350 was £308.52.

18.7 In response to a question from the tribunal concerning this last point, the Respondent said that although it had given exactly the same net

figure in its counter-schedule, that had simply been copied from the Claimant's figures.

Findings of fact

19. In addition to the findings of fact made in its liability reasons, the tribunal made the following findings of fact:

19.1 The tribunal has been provided with pay slips for the period of employment from the TUPE transfer up to the Claimant's dismissal. There are 11 pay slips, but the last of these does not cover a full working week. Taking into account the first 10 pay slips, ie discounting the last one as not representative, gives average pre-dismissal weekly pay of £578.45 gross or £459.41 net.

19.2 The witness statement relied on by the Respondent for the purpose of this remedy hearing suggests that the Claimant would have left its employment soon after the date of his dismissal in any event. However, this was not pushed in cross-examination of the Claimant and there is, in effect, no evidence to support that assertion. The tribunal finds that the Claimant would not have left of his own accord at any time between 30 October 2017 and 3 May 2018.

19.3 It is clear that the Claimant was receiving £350 per week from his father for the period from dismissal to the end of 2017. The Respondent says that this was pay for work being done because it is described as 'pay' in one version of the spreadsheet disclosed by the Claimant. The Claimant says that it was not, and refers to the other version of the spreadsheet which describes these payments as subsistence loans. There is little evidence to say what the Claimant was in fact doing, in terms of work or otherwise, during this period, but in the tribunal's judgment it is unnecessary to make any express finding on that point since the key question, the tribunal finds, is whether there was ever any intention that the Claimant would repay the sums he was being paid by his father. There is effectively no evidence that the Claimant has repaid or ever intended to repay those sums. They were income received by the Claimant which, had he not been dismissed, he would not have received.

19.4 Turning to the period from 1 January to 3 May 2018, the Claimant accepts that he was working and being paid £350 gross per week. His position is that he was working on a building site with his father who was contracted to a building company. He says that he invoiced the company for his services, but was in fact paid by his father in order that he would not have to wait for the company to pay him. He did not then receive any additional sums when the invoices were paid. The Respondent contends that the Claimant received both £350 per week from his father and in addition the sums for which he invoiced the company.

19.5 It is not at all clear what arrangements were entered between the Claimant, his father and/or any company or other third party relating to the provision of the Claimant's services. The tribunal notes that the sums invoiced did not equate precisely to £350 per week for the

relevant period. However, it seems unlikely that the Claimant was paid twice for the same periods of work, ie that he received pay from two sources for the same work. It is more likely, the tribunal finds, that he was being paid by, or through, his father who was sub-contracted to a building company. His father paid him £350 gross per week, and any sums received in relation to the invoices were then paid to his father.

19.6 The tribunal therefore accepts that the Claimant's only source of income during the period from 1 January to 3 May 2018 was £350 gross per week.

19.7 The Respondent says that there is no evidence that the Claimant paid tax or NI on that sum. The Claimant says that he did. The tribunal has seen no tax returns or accounts for the relevant period. However, the tribunal notes that the Respondent has adopted the same net weekly pay figure as given by the Claimant, ie which assumes that tax and NI were paid, and although the Respondent says this was simply copied from the Claimant's figures, the Respondent did not suggest in its counter-schedule that the figure is wrong.

19.8 Based on all the evidence present to it, the tribunal finds that the Claimant did pay tax and NI on his earnings from 1 January 2018 onwards and that his net earnings were £308.52 per week during that period.

19.9 As noted above, the Respondent contends that the Claimant would have been able to obtain a head chef position earning as much as he was with the Respondent within 2 months of his dismissal, ie before the end of 2017. However, as the Respondent accepted in submissions, the burden of proving a failure to take reasonable steps to mitigate losses, and of showing when and at what level of earnings the Claimant would have been able to obtain alternative work, rests on the Respondent. The tribunal finds that there is, in effect, no evidence of any job that the Claimant could or should have obtained at any time before 3 May 2018 which would have paid him more than the work he did in fact obtain.

Discussion and conclusions

20. **Basic award**

The correct multiplier is agreed as 5. There is a dispute as to the appropriate multiplicand, ie gross pre-dismissal weekly pay (subject to the statutory cap if applicable). The Claimant's average pre-dismissal weekly pay was £578.45 gross. However, that was based on an hourly rate of £10.50 which, as noted in the liability reasons, was not a rate ever paid to the Claimant before the TUPE transfer to the Respondent. Indeed, it was an increased hourly rate introduced by the Claimant's mother (his pre-transfer employer) at the point of the transfer to reflect the fact that post-transfer he would not receive benefits such as the use of a car and fuel and a certain level of free food and drink. In the circumstances, it is clear that the sole or principal reason for the purported increase in hourly rate from £9 to £10.50 was the transfer and that it was, therefore, void pursuant to regulation 4(4) of TUPE.

21. The tribunal finds that the appropriate multiplicand must therefore be based on the gross weekly pre-dismissal pay to which the Claimant was entitled, even if he was in fact paid at a higher rate because the Respondent did not realise that he was not legally entitled to that higher rate; this, in the tribunal's judgment, is the correct interpretation of the provisions as to the calculation of a week's pay in Chapter II of Part XIV of the ERA in which the reference to remuneration 'payable' to an employee must mean the sum to which the employee is entitled.

22. Taking the gross weekly pay of £578.45 based on £10.50 per hour, and recalculating this on the basis of £9 per hour gives a gross weekly sum of:

£578.45 ÷ £10.50 x £9 = £495.81

23. Since this sum is still in excess of the maximum amount of a week's pay for these purposes (see section 227 of the ERA), the multiplicand must be reduced to the statutory maximum of £489 per week.

24. The basic award is therefore:

5 x £489 = **£2,445**

25. **Compensatory award**
The tribunal finds that the appropriate sum for loss of statutory rights is £450.

26. As noted above, the Claimant's pre-dismissal net earnings were £459.41 per week. Converting that to a sum based on £9 per hour instead of £10.50 gives:

£459.41 ÷ £10.50 x £9 = £393.78

27. The tribunal has already found that the Claimant received £350 per week for the period of 9 weeks from dismissal to the end of 2017 and that he has not repaid it, and never had any intention of repaying it. Further, as the Claimant accepted during the remedy hearing, he did not treat it as earned income and has paid no tax or NI on it. It therefore falls to be deducted in full from his loss of earnings.

28. That gives a net weekly loss of earnings of £43.78 for the period to the end of 2017, ie a total loss for that period of:

9 x £43.78 = £394.02

29. The Claimant's ongoing loss from 1 January to 3 May 2018 was £85.26 per week, ie his net pre-dismissal entitlement to weekly pay of £393.78 less his net weekly mitigation pay from 1 January 2018 onwards of £308.52. The period from 1 January 2018 to 3 May 2018 is 18 weeks. His losses for that period are therefore:

18 x £85.26 = £1,534.68

30. That gives a total compensatory award of:

£450 + £394.02 + £1,534.68 = **£2,378.70**

31. **ACAS uplift**
The tribunal reminds itself that section 207A of TULR(C)A requires it to consider whether the trigger requirements for an uplift have been met and, if so, whether the tribunal should exercise its discretion and, if so, what percentage uplift would be appropriate. Even if the parties agree that an uplift is or is not appropriate, that is not determinative.

32. In this case, it seems clear to the tribunal that the trigger conditions are met and, in all the circumstances, including the small size of the Respondent's business, the tribunal exercises its discretion and awards an uplift of 10%. That the parties have agreed the same outcome on this issue gives the tribunal some comfort that its own independent conclusions are appropriate.

33. The total of the basic and compensatory awards is £4,823.70. The uplift is therefore:

£4,823.70 x 10% = **£482.37**

34. Finally, the tribunal notes the following:

34.1 Although both parties mentioned a number of matters in their schedule / counter-schedule such as (on the Claimant's side) underpayment of wages and (on the Respondent's side) overpayment of wages and/or holiday, none of those matters was pursued at this remedy hearing and nor, as far as the tribunal can see, could they have formed part of its decision-making as to a remedy for unfair dismissal.

34.2 There was no suggestion from the Respondent that there should be any reduction in basic or compensatory award under any of the relevant provisions of sections 119 and 123 of the ERA, and nor does the tribunal consider that any of those provisions is engaged in this case.

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Employment Judge K Bryant QC
26 April 2021 – Croydon