



EMPLOYMENT TRIBUNALS

Claimants: Mrs Rebecca Winkworth
Mrs Shirley Rosan

Respondent: West Ewell Stores Ltd (in voluntary liquidation)

Heard at: London South (via CVP) **On:** 21 April 2021

Before: **EMPLOYMENT JUDGE BECKETT** (sitting alone)

The Claimants represented themselves
The Respondent did not attend

RESERVED JUDGMENT

Employment Tribunals Rules of Procedure 2013 – Rule 21

1. The Claims for unfair dismissal, redundancy payments, notice pay, holiday pay and breach of contract are successful.
2. The Respondent is ordered to pay the sum of £7,825 to Mrs Winkworth.
3. The Respondent is ordered to pay the sum of £1,674.26 to Mrs Rosan.

Reasons

4. Claimants both worked for the Respondent and made claims relating to unfair dismissal, a redundancy payment, notice pay, holiday pay and breach of contract.
5. Both Claimants attended the Tribunal and in light of the similarity of their claims, the claims were dealt with together in the absence of any objections. I consolidated the two files.

6. The Respondent failed to present a response to the claims within the time limit. No representative attended the hearing on behalf of the Respondent.

The Hearing

7. Both Claimants gave evidence in support of their claims, and were able to provide some of the documentation required by the Tribunal. The Respondent did not contest any of the claims.
8. Both Claimants had attended the Tribunal in person as Mrs Rosan was not able to join via CVP.
9. Not all of the supporting documentation had been brought to the Tribunal and the hearing was postponed after hearing evidence, for the Claimants to be able to return home and email any further documents into the Tribunal.
10. Due to the lockdown restrictions and Mrs Rosan's lack of access to CVP, only Mrs Winkworth appeared over the CVP link in the afternoon. Mrs Rosan had been able by that time to provide the relevant documents to Mrs Winkworth to forward to the Tribunal. Mrs Rosan was content for Mrs Winkworth to deal with both Claimants' cases in light of the issue regarding internet access.
11. In light of the documents that were provided, and the evidence given by each Claimant, I proceeded to make findings in respect of each claim.

Findings

12. Mrs Winkworth (RW) was employed by the Respondent as a supervisor, at the West Ewell store. She started employment at the store, which was on Ruxley Lane in Epsom, Surrey, on 6th February 2007.
13. The Respondent took over the store in August 2018 and both claimants' contracts were transferred to the Respondent under the TUPE provisions.
14. Mr Kirupananthan Nadarajah was the Respondent company's director and was a person with significant control.
15. RW was contracted to work 35 hours per week, and was paid just over minimum wage. She often worked 41 or 42 hours, and was paid for those extra hours.
16. Mrs Rosan (SR) was employed as an assistant at the same store from 12 November 1997. She was also contracted to work 35 hours per week.
17. RW received a message from Mr Nadarajah, who employed her at the West Ewell Store, on Saturday 18 July 2020 at 21.39 which advised her that the shop was shutting the following day due to turnover. The message was addressed to RB and SR, albeit it was

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only sent to RW. Mr Nadarajah stated that the employees should “find alternative opportunities”.

18. RW responded informing the Respondent company was liable to pay them 12 weeks' notice and needed to formalise the position.
19. Neither Claimant received any further messages or correspondence from the Respondent or Mr Nadarajah.
20. Both Claimants wrote to Mr Nadarajah, separately, setting out their claims in respect of notice pay, outstanding holiday pay and redundancy pay. They also requested pay slips and their P60.
21. The letters were sent with a requirement for the recipient to sign for them. The letters were signed for on 24 July 2020. No response was received.
22. The Claimants sent in their ET/1 forms in August after the required consultation with ACAS. RW's claim form was received on 11 August 2020, and SR's on 16 August 2020. No ET/3 has been received from the Respondent.
23. The store was visited shortly after the closure, and was seen to have its shutters down and lights off during usual opening hours.
24. The Respondent is noted on Companies House's Register to be under voluntary liquidation.
25. I have considered proportionality in respect of each claim.

Law

Law relating to unfair dismissal

26. Section 94 of the Employment Rights Act 1996 (the ERA 1996) confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111.
27. The employee must show that he or she was dismissed by the Respondent under section 95.
28. Section 98 of the 1996 Act deals with the fairness of dismissals.
29. Section 98(4) provides:

“... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a

sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case”.

Law relating to redundancy

30. The statutory definition of redundancy is defined in s139(1) of the Employment Rights Act 1996. The provision states that:

“an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

(a) the fact that his employer has ceased, or intends to cease –

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business –

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish”.

31. In order to qualify for a statutory redundancy payment, an individual must satisfy two criteria.

32. The individual must be an employee (section 135 ERA 1996) and have accrued two years' continuity of employment (section 155 ERA 1996).

Redundancy and unfair dismissal

33. Redundancy is a potentially fair reason for dismissal under section 98(2)(c) ERA 1996. However, the fact that an employee was dismissed by reason of redundancy does not mean the dismissal was not unfair.

34. The Tribunal will consider, amongst other issues, the reasons for the selection of the individuals, the method of selection and consultation.

Law relating to holiday pay

35. Under the Working Time Regulations 1998 workers are entitled to 5.6 weeks leave each leave year.

36. The Claimants are entitled to be paid in lieu of accrued but untaken holiday on termination of employment. There was no contractual right and therefore leave must be calculated with the statutory formula, as set out in Regulation 14(3)(b) of the WTR.

37. Each Claimant has only worked part of a leave year, which entitles them to a pro rata accrual under reg 13(5) of the WTR.
38. Each Claimant was able to state to the Tribunal how many days annual leave they had accrued at the point of dismissal. There was no evidence provided by the Respondent to contradict these assertions.

Law relating to notice periods

39. All employees who have completed one month or more continuous employment with the same, or an associated, employer are entitled to a statutory minimum period of notice. The relevant period is defined within section 86(1) of the Employment Rights Act 1996.
40. An employee is entitled to not less than twelve weeks' notice if his or her period of continuous employment is twelve years or more.
41. An employee being dismissed for reason of redundancy is entitled to the same period of notice that they would have if they were dismissed for any other reason.
42. The maximum period of notice is capped at 12 weeks. Each Claimant had worked for the Respondent for more than 12 years.

Conclusions

43. The claims in respect of unfair dismissal, notice pay, holiday pay, breach of contract and redundancy pay are well-founded.
44. The Respondent has not responded to the claims, nor served any documentation.
45. In any event, the claims are supported by the evidence heard, and by the documents provided by each Claimant.

Remedy

Basic Award

46. The Claimants brought various bank statements, old pay slips and other documentation to the Tribunal. Those that I deemed relevant were copied for the Tribunal's file.
47. The last pay slip that had been provided by the Respondent to either Claimant had been in December 2019.
48. In respect of RW, she had received payments from the Respondent in April of £1,250.43, May of £1,142.18, June of £1,254.58 and July of £1,378.37 (all of 2020).
49. I used the last four months of pay to calculate a weekly pay figure of £323 (gross).

[4,979 divided by 4 = 1,244.75, divided by 4.3 = weekly net payment 290, grossed up to 323]

50. RW's basic award is therefore £4,522.

51. In respect of SR, her hours had been reduced without prior agreement by the Respondent following Covid-19, and the payments she received in May 2020 and June 2020 (£956.26 and £732.56) did not properly reflect her usual wages.

52. I therefore used the months of December 2019 to March 2020 inclusive to calculate her weekly wage. The weekly pay figure for SR is £293 (gross).

[4,622 divided by 4 = 1,156, divided by 4.3 = weekly net payment 270, grossed up to 293]

53. SR's basic award is £8,790 as the length of service is capped at 20 years.

Compensatory award

54. In respect of the compensatory award, I have considered what award I consider is just and equitable in each case.

55. The losses suffered were attributable to the employer. Both claimants have tried to mitigate the losses. Both claimants applied for benefits upon being made redundant. RW only received one payment and then found employment in another shop. However, she was only given 27 hours to work, so that although her hourly pay has improved, her overall wages have been reduced. SR has continued her benefits application, having worked all her life, until being made redundant at the age of 63 following some 24 years' employment at the West Ewell store.

Notice pay

56. Both claimants were entitled to 12 weeks' notice pay. This payment is still available for claimants who have found alternative employment during that notice period, as RW did (*Norton Tool v Tewson* [1972] ICR 501 principle applies).

57. RW is entitled to £3,876 in notice pay.

58. SR is entitled to £3,516 in notice pay.

Holiday pay

59. RW informed the Tribunal that she had 7 days' leave accrued and claimed the same as unpaid leave. Whilst she did not have any documentation to support how many days leave she had taken, she gave evidence on this point on oath and there was no opposing evidence provided.

60. RW is therefore entitled to £452 in respect of holiday pay.

61. SR gave evidence that she was owed 13 days in respect of leave that she had accrued and not taken.

62. She is therefore entitled to £545 in respect of holiday pay.

Future losses

63. Had there been a fair redundancy procedure, that process would have been likely to take between four and six weeks.

64. However, the shop was closed, due to a reported lack of business, as a result of the Covid-19 pandemic.

65. Both Claimants had worked at the store for many years and neither contributed in any way to their redundancy. However, even if a fair process had been followed, it is likely that the business would have closed in any event.

66. It could be argued that the Respondent ought to have started a redundancy procedure some weeks before the decision was made to close the store, as there must have been financial documents to support the closure decision. However, without such information it is difficult to assess a proper timeframe.

67. I must consider the material I have available to me, and decide upon a just and equitable compensation for each Claimant. But for the store's closure, it is likely that each Claimant would have continued to work at the store for a significant period of time, as they had done already.

68. I bear in mind the position of the Respondent, and proportionality.

69. In respect of RW, she started another job on 1 August 2020. As outlined above, she lost about £50 per week in taking the new job. In considering what award to make for her future loss of earnings, I have considered the new role which the claimant has undertaken, the fact that she had to reduce her hours but received a higher hourly rate of pay.

70. RW remains in that post at today's date (so, almost nine months of employment). There have been significant issues in gaining and retaining employment during the pandemic, and she has not been able to increase her hours to compensate for the loss.

71. She is an experienced manager/ supervisor within the retail industry. In my view it is fair and equitable to award RW the sum of £400, to cover the losses for the next month, in the anticipation that now lockdown is ending and the non-essential shops are reopening, she should be able to extend her hours of working to full time or obtain a position elsewhere.

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72. In respect of SR, she did not apply for other posts but did apply for benefit. That application was successful, and a bank statement provided by SR shows that the DWP paid her JSA of £148.70 every two weeks (so, £74.35 per week).

73. SR has taken some steps to mitigate her loss, albeit not by applying for further employment.

74. In my view, in light of the lockdown and recent reopening of non-essential shops, it is fair and equitable to award a nominal sum of £200 to reflect future loss of earnings.

Loss of statutory rights

75. Both claimants will have to work for any new employer for two years in order to acquire the right to be able to claim unfair dismissal and redundancy payments. This loss of statutory rights ought to be compensated.

76. In light of RW's service of 14 years, I award a nominal sum of £350.

77. In light of SR's service of 24 years to the store, I award a nominal sum of £400.

Total losses and deductions

Mrs Winkworth

78. I have calculated the loss to Mrs Winkworth, as set out above, as £9,400.

79. In respect of deductions Mrs Winkworth has received the sum of £1,575 in respect of her redundancy.

80. Therefore, she is entitled to £7,825.

81. This amount is gross and the Claimant must account to HMRC independently in respect of this award.

Mrs Rosan

82. I have calculated the loss to Mrs Rosan, as set out above, as £13,451.

83. Mrs Rosan has received payments of £9,579 and £2,197.74 in respect of her redundancy. These total £11,776.74.

84. Therefore, she is entitled to £1,674.26.

85. This amount is gross and the Claimant must account to HMRC independently in respect of this award.

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Employment Judge Beckett

London South

Date: 4 May 2021

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