



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs H McMahon

v

Heron Financial Limited

Heard at: Cambridge Employment Tribunal (via CVP)

On: 29th April 2021 (CVP)

Before: Employment Judge King

Appearances

For the Claimant: Mr L Varnam (counsel)

For the Respondent: Mr Gray-Jones (counsel)

RESERVED JUDGMENT

1. The claimant's claims succeed in the sum of £839.22 in respect of unlawful deductions from wages and wrongful dismissal.
2. The claimant's claims for unfair dismissal and unlawful deductions of wages succeed in the sum of £22,288.71.
3. The respondent's application for the sums owed to be deferred under Rule 66 is granted and enforcement of the sums at 2 above are deferred pending the outcome of the appeal in this case. For the avoidance of doubt the sums at 1 above should be paid within 14 days in the usual way.

REASONS

My reasons are as follows:

1. The claimant was represented by Mr Varnam (Counsel) who did not represent the claimant on the last occasion. The respondent was represented by Mr David Gray-Jones (Counsel). I heard submissions from

both sides and the parties had prepared a schedule of loss and counter schedule of loss in accordance with my order and there had been disclosure in respect of commission. The parties were able to agree some areas of dispute during the hearing.

2. Subsequent to the hearing but before this decision was promulgated I received correspondence from both sides. The respondent wrote on the 30th April 2021 concerning suggested wording for the stay it sought under Rule 66 and provided an ET judgment where such an order had been made. The claimant's solicitor's replied by email dated 7th May 2021 setting out its position that the wording was not appropriate in this case and renewing its argument that a stay was inappropriate and provided another ET judgment where this was not granted when an appeal was underway.
3. The respondent informed me at the outset of the hearing that the judgment of this Tribunal had been appealed but that there had been no progress update. It made no application for a postponement of the remedy hearing either in advance of the day or on the day on the basis of its appeal. The claimant informed me that by May 2021 it was not clear what if any parts of that appeal would succeed and that this was in respect of the findings of unfair dismissal and commission payable on deals that concluded after the claimant left employment. There are some sums owed to the claimant that do not fall within the potential appeal and the claimant argues as such I should not exercise my discretion to grant the application under Rule 66.
4. At the outset of the remedy hearing, the issues as to liability were therefore identified as follows.

The issues

Unfair Dismissal

5. What compensatory award should be made?
 - 5.1 The parties agree the basic award at £525.00. There is no Polkey deduction to be made;
 - 5.2 What pay is due to the claimant – is it 26 weeks pay and what has she already received?
 - 5.3 What is a week's pay for these purposes?
 - 5.4 Should the claimant get the expenses she has claimed in setting up her business.

Wrongful dismissal

6. The Respondent accepted it owed the claimant £83.07 has this been paid?
7. What is the correct payment for the notice pay and car allowance for 4 days in July 2019?

8. Has the respondent paid this?

Unauthorised deduction from wages

9. What commission is the claimant entitled to that remains unpaid?
- 9.1 The £195.94 commission agreed by the respondent was paid in March 2021 after my initial judgment.
- 9.2 £1,443.21 in respect of commission prior to dismissal is agreed but the respondent says this has been paid? Has this been paid?
- 9.3 What commission is due for the applications that the claimant submitted prior to the EDT but which did not complete before then?
10. The claimant sought £240.44 for two days sick pay which the respondent accepts was not paid and is due.

Uplift

11. Has the respondent unreasonably failed to follow the ACAS COP1 on disciplinaries in respect of the dismissal?
12. Has the respondent unreasonably failed to follow the ACAS COP1 on grievances for the unpaid commission?
13. If so, to what sums should the uplift be applied?
14. What is that uplift up to 25%?

Timing of payment

15. Should the Respondent's application under Rule 66 be granted?
16. If so, when should the time for payment of any of the award be?

The Law

17. Under the Employment Rights Act 1996 a number of provisions apply in respect of remedy. Firstly s24 in connection with determination of unlawful deduction from wages complaints and in connection with the unfair dismissal claim s118, s119, s123, s124 and s124A are all applicable in this case. For brevity these are not set out in full in this judgment but have been considered.
18. S.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULCRA 1992") provides:
- (1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.*
- (2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—*

- (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*
 - (b) the employer has failed to comply with that Code in relation to that matter, and*
 - (c) that failure was unreasonable,*
- the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.*
- (3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—*
- (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*
 - (b) the employee has failed to comply with that Code in relation to that matter, and*
 - (c) that failure was unreasonable,*
- the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.*
- (4) In subsections (2) and (3), “relevant Code of Practice” means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes.*
- (5) Where an award falls to be adjusted under this section and under section 38 of the Employment Act 2002, the adjustment under this section shall be made before the adjustment under that section.*
- (6)*

- (a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or –*
 - (b) Alleged that the employer had infringed a right of his which is a relevant statutory right.*
- (2) It is immaterial for the purposes of subsection (1) –*
- (a) whether or not the employee has the right, or*
 - (b) whether or not the right has been infringed;*
- but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.*
- (3) It is sufficient for subsection (1) to apply that the employer, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.”*

19. Rule 66 of the Employment Tribunal Rules of Procedure 2013 states,

“A Party shall comply with a judgment or order for the payment of an amount of money within 14 days of the date of the judgment or order, unless –

- (a) the judgment, order or any of these Rules, specifies a different date for compliance;*
or
- (b) the Tribunal has stayed (or in Scotland sisted) the proceedings or judgment.”*

20. The respondent referred me to a number of cases in their written skeleton argument to which I have had regard. The respondent has referred me to:

Wardle v Credit Agricole Corporate and Investment Bank [2011] ICR 1290
Acetrip Ltd v Dogra UKEAT/0238/18
Aon Training Ltd v Dore [2005] IRLR 894

21. The claimant also referred me to *Aon*.

The Hearing

22. The Claimant provided an updated schedule of loss, the respondent a counter schedule of loss. There was some additional disclosure and documentation from the parties. The respondent provided a written skeleton argument and I heard submissions from both sides.

Finding of Fact

23. The judgment of this Tribunal sent to the parties on 21st December 2020 made a number of findings or drew conclusions which are relevant to this remedy hearing as follows:
- 23.1 At paragraph 21.40 *The respondent failed to follow the ACAS Code of Practice on disciplinaries and grievances (COP1). The issue of uplift will be determined at the remedy stage if the parties cannot resolve this between them.*
 - 23.2 At paragraph 39 *I therefore do not make any reduction on the basis of Polkey.*
 - 23.3 At paragraph 41 *I consider that had she taken adequate steps to mitigate her loss she would have full mitigated her loss by December 2019 within her own business or having earned sums in mitigation in the interim. Her applications were few and far between and were not all in her field or area of expertise where her CV would have supported such applications. This period of loss is 6 months after dismissal and given her employment history she was able to work in her chosen field.*
 - 23.4 In paragraph 43 *In respect of the wrongful dismissal claim the respondent accepts that it owes the claimant for four days car allowance for July 2019 in the sum of £83.07. The other sums are disputed. I accept that the claimant is due both notice pay and car allowance for 4 days in July 2019 unless the respondent can satisfy the Tribunal that this has been paid. The respondent states this as per the second payslip the sums set out as "Salary". As the claim for wrongful dismissal is admitted the claimant's claim for this succeeds in the amount to be determined if the parties cannot agree it.*
 - 23.5 In paragraph 44 *The respondent accepts that it does owe the claimant for unauthorised deductions in the sum of £195.94 of unpaid commission. (now paid)*

- 23.6 In paragraph 45 *The respondent accepts that it has made an unauthorised deduction from the claimant's wages in respect of unpaid commission and this claim therefore succeeds also. The undisputed amount is £195.94 but the respondent also accepts at page 137 that £1,443.21 was owed to the claimant but says that this was all paid within the payment of £995 when she left. This cannot be right and in so far as any of this sum of £1,443.21 has not been paid the respondent will need to pay this. The Tribunal will determine this at the remedy hearing if the parties cannot agree it.*
- 23.7 In paragraph 51 *As such any applications submitted before the termination date that were successful entitle the claimant to commission whether she was there when it was paid or not. From the spreadsheet at page 137 this would appear to amount to £2,607.07 but the Tribunal will determine the amount if the parties cannot agree it.*
- 23.8 In paragraph 53 *The claimant's claim for unlawful deduction from wages in respect of two days full pay when she was off sick the Respondent says has been paid outside payroll which the claimant disputes. The respondent accepts that this should be paid and the claimant's claim for this succeeds insofar as this has not already been paid. The Tribunal will determine this if the parties cannot agree it.*

24. As far as is necessary I make the following additional findings of fact to determine the remedy issues the parties have not resolved by agreement.
- 24.1 The claimant set out in her original witness statement that income was received from the business of £13,819.17 but that actually £1,896.43 was received in the relevant period so her share of the income was £948.21. These are earnings in the relevant period so need to be offset against any expenses claim.
- 24.2 She also set out the business costs during the relevant period were £2,700.00 in mileage and other expenses of £1,241.35 but her counsel accepted that this was only 50% the claimant's expenses in the same way the income was only 50% hers. This totals £4,072.00 so 50% was £2,036.00. Less the income the sums sought were actually £1,087.79.
- 24.3 The respondent submitted that if expenses are to be awarded then all income including that earned but not paid in the relevant period must be given credit for and that she was already claiming car allowance for the same period as losses which would amount to double recovery, that there was no finding that it was reasonable for her to mitigate her losses in this way, that there was no indication as to how that mileage has been incurred and if the company is VAT registered it can reclaim the VAT.
- 24.4 The claimant did not claim universal credit during the time for which losses have been awarded in this claim.

- 24.5 The respondent accepts that £83.07 is due to the claimant in respect of her wrongful dismissal claim as it did not pay the 4 days car allowance. The respondent says that a payment of £311.54 was made to the claimant in her payslip at page 81 of the bundle in respect of the 4 days notice pay. This is in fact under the deductions section and labelled as unpaid holiday.
- 24.6 The respondent produced redacted bank statements for June and July 2019 which showed two payments to the claimant on the 4th July 2019 one for £2,283.48 and the other for £161.38. These bear little resemblance to the payslips it produced for June at pages 80-81 of the bundle. However, this was not a point of dispute between the parties. Whilst marked as a deduction this was a negative deduction so it is clear that the claimant received some money. I accept that the sum of £311.54 was paid to the claimant on this payslip as notice pay on page 81.
- 24.7 Despite making orders for disclosure around commission this is not still well set out. The claimant has sought varying sums throughout this matter. Much of the documentation was in the respondent's possession. The claimant's schedule of loss now set out a total due of £5,210.40. The respondent's counter schedule identifies £4,375.83 less the £195.94 paid so £4,179.89. My original judgment set out that £1,443.21 was owed in commission paid up to the date of dismissal and the total after appeared to be £2,607.07 but further information was required.
- 24.8 Again the claimant's case is not well set out here but I have already found that £1,443.21 was owed and the respondent has set out that this was paid within the payment when she left of £995.00 as identified in my original judgment this cannot be right, it can only be a payment towards that sum and does not extinguish it in full.
- 24.9 The claimant's grievance concerned unpaid notice pay, commission payments, the sick pay sought and her dismissal. This was dealt with in paragraph 21.38 of the judgment.

Conclusions

Unfair Dismissal

What compensatory award should be made?

25. The parties agreed the basic award in this case was **£525.00**.
26. No deduction was made in respect of Polkey. The claimant and respondent were able to agree the sums for the compensatory award during the adjournment. They agreed that the week's pay was £735.47. For the 26 weeks awarded this totalled £19,122.22. Again, this was agreed and it was agreed that the claimant had received £1,824.65 gross as notice pay which meant the valuation of her compensatory award as agreed between the parties was **£17,297.57**.

27. The remaining issue between the parties was whether the claimant should get the expenses she had claimed. The claimant claimed £2,993.14 in respect of expenses which her counsel accepted was for the partners of the business so her claim is actually for 50% of this value and calculating this correctly at 50% of the expenses less 50% of the income gave a value of £1,087.79 in respect of expenses.
28. Having considered what is just and equitable in this case and the respondent's submissions I am not satisfied that this case is one in which expenses should be paid. I accept the respondent's submissions that there is no evidence from the claimant as to how the mileage sums have been calculated. No supporting documentation has been provided in this regard. If the expenses are awarded there is a risk that the claimant will be in a better position.
29. I do not accept the respondent's position that there was no finding that setting up employment was reasonable in the circumstances. Whilst I accept I did not expressly say either way I did find that *I consider that had she taken adequate steps to mitigate her loss she would have full mitigated her loss by December 2019 within her own business or having earned sums in mitigation in the interim.* It is therefore clear that I saw setting up her own business as a way for her to reasonably mitigate her losses. I also do not accept the submission that when setting up a business expenses that flow should not be recoverable but there is some force in the argument that the claimant has already received a car allowance in her losses calculation so I should ensure that she does not double recover although a car allowance is about car purchase/lease servicing and running costs and it is normal to get business mileage and a car allowance albeit the former is usually at a lower rate than 45p per mile.
30. I am not clear what sums the claimant earned but did not receive during that period. I have awarded her commission in the claim for work done during employment but not paid and it would not be just and equitable to then not follow this logic when calculating the remedy notwithstanding the respondent relies on this here but has appealed that element of the original judgment. Her witness statement is not sufficiently detailed for her to prove the sums owed. The mileage calculation has been estimated at an average and notwithstanding the passage of time no formal accountant's accounts are before this Tribunal but their fees are sought so we know accountants were engaged. On this basis, I am not satisfied that it is just and equitable to award such sums and I make no such award in this case. I also make no reduction for the minimal sums earned in employment as these were swallowed up in the expenses as this is just and equitable and in any event the parties had agreed the compensatory award in respect of losses.

Wrongful dismissal

The Respondent accepted it owed the claimant £83.07 in respect of 4 days car allowance has this been paid?

31. The respondent accepts that this sum remains outstanding so the respondent should pay the claimant **£83.07**. There is no evidence of payment being made.

What is the correct payment for the notice pay and car allowance for 4 days in July 2019?

32. The claimant claims four days notice a £142.50 per day in her schedule the respondent submits that this should be £120.22 which was the agreed sum per day after an adjournment.
33. The total due to the claimant in respect of these 4 days is thus £120.22 x 4 = £480.88.

Has the respondent paid this?

34. As set out above, I accept that she has been paid £311.54 on her June payslip. There is therefore a shortfall of £169.34 in respect of notice pay in addition to the £83.07 which the respondent accepts.
35. The respondent should therefore pay the claimant the sum of **£252.41** in respect of her wrongful dismissal claim.

Unauthorised deduction from wages

What commission is the claimant entitled to that remains unpaid?

36. The £195.94 commission agreed by the respondent was paid in March 2021. I therefore do not award this sum in this judgment as it is no longer outstanding. It is however relevant as to uplift below as it was unpaid at the time of the liability hearing.

£1,443.21 in respect of commission prior to dismissal is agreed but the respondent says this has been paid? Has this been paid?

37. As set out above the respondent has made a payment to the claimant of £995 (at page 81) and since made an additional payment to the claimant of £195.94 but this leaves a shortfall of **£252.27**. This is owed to the claimant.

What commission is due for the applications that the claimant submitted prior to the EDT but which did not complete before then?

38. Aside from the point that the commission on deals submitted before dismissal but paid after dismissal has been appealed, the respondent accepts that the total unpaid to the Claimant is £4,375.83.
39. This includes the sums for commission that have been paid £195.94 and the sums of £1,443.21 already accounted for above. This means that the

respondent accepts that £2,736.68 falls within this category of commission for deals submitted before dismissal but paid after.

40. The claimant has set this out in a different way looking at total commission due and total commission paid over employment but I do not accept this way of calculating the commission as it unduly complex and does not represent the correct picture which should be evidence based.
41. I therefore award the claimant the sum of **£2,736.68** in unpaid commission for deals done before dismissal but for which the respondent was paid after dismissal.

Sick pay

42. The claimant sought **£240.44** for two days sick pay which the respondent accepts was not paid and is due.

Uplift

43. At paragraph 21.40 I found that *the respondent failed to follow the ACAS Code of Practice on disciplinaries and grievances (COP1). The issue of uplift will be determined at the remedy stage if the parties cannot resolve this between them.*
44. The issue is thus whether the failure on connection with the dismissal was unreasonable. The parties agree that this is a case where the code does apply.
45. The respondent states that the uplift should not apply in relation to the claims other than unfair dismissal as there was no breach of the Code in this regard. This was not a finding the Tribunal made as it deferred the matter to remedy.
46. The Tribunal pointed out the parties at the remedy stage that the definition of employee in TULCRA included ex employee. The uplift should therefore be considered in respect of notice pay, commission and sick pay which were raised as part of the grievance.
47. However, the claimant's claims as to unpaid commission on deals yet to be paid but which were submitted before the EDT should not be included in this amount as the claims had not yet arisen and this issue was not part of the grievance. It was about commission outstanding at the time of the grievance being submitted. This would not be just and equitable.
48. Was the failure unreasonable. This has to be balanced with the claimant not having sufficient service to bring a claim for unfair dismissal had she not been dismissed for asserting a statutory right but there were multiple breaches of the Code as set out in my judgment, no advance notice of the meeting, no letter after the dismissal and no appeal. The claimant did however raise these matters as part of her grievance and the respondent replied in writing but without any meeting. I therefore find that the

respondent's failure to follow the ACAS Code was unreasonable in connection with the dismissal.

49. With regard to the grievance there was a failure to follow the Code here too but was this unreasonable? By the time the claimant raised a grievance she had left a month earlier, she requested a reply in writing which she received. She did not get a right of appeal or a meeting. However the Code does apply to ex-employees and it should have been followed particularly with regards to the fact that it was not followed with the dismissal which was also raised. This was also unreasonable.

If so, to what sums should the uplift be applied?

50. As set out above the uplift should be considered on the unfair dismissal compensatory award of £17,297.57 in paragraph 25. In connection with the grievance process in respect of £252.41 in respect of the wrongful dismissal, £240.44 in respect of sick pay and £448.21 in unpaid commission outstanding at the time of dismissal.

What is that uplift between 10% and 25%?

51. I accept the respondent's submission that before making a percentage uplift the Tribunal should consider the total award and the effect of the uplift on that award and the total value of the claim. This is also a consideration when applying the just and equitable test in accordance with *Wardle* and *Acetrip*.
52. I also accept the respondent's submission that the employer was a small employer with no HR function and there has been no finding that there was a knowing and deliberate failure to comply with the Code. It is also relevant that the claimant has less than the usual two years service to bring a claim, she did raise a grievance after the process and she did get a written response although this was not an appeal it was akin to a written process. There was a dismissal meeting but no formal invite and no letter following dismissal.
53. It is important that I consider the uplifts separately in respect of each matter. I also have in my mind what is just and equitable and that a sizeable percentage on the dismissal uplift would net the claimant a large uplift on the sums award. Balancing all of these factors, I award the claimant a 10% uplift on the sum of £17,297.57 meaning that she will receive an additional **£1,729.76**. Had I not taken into account the totality of the award here, the percentage would have been higher at 15% but it is not just and equitable to award the higher percentage.
54. Turning now to the grievance process, the sums to which this applies are a lot smaller at £941.06 (consisting of £252.27 unpaid commission the £195.94 paid more recently, the sick pay at £240.44 and the notice pay £252.41). I do have to consider however again the totality of the award and the failures in this process. The claimant raised a grievance but a

month had passed, she asked for a response and got one in writing albeit with no right of appeal and there was no meeting. As such it is just and equitable to award a lower % as the failures are less. I have taken onboard the same points about the size and administrative resources of the respondent. In this case I award 10% on the sums owed and even considering the totality, I consider this to be just and equitable so the uplift on this sum is **£94.10**.

Timing of payments

55. The respondent has made an application under Rule 66 for the sums in this judgment to be deferred. This was opposed by the claimant. Having considered the submissions on the day and post the hearing from the parties in correspondence I grant the respondent's application in part.
56. I have not seen any appeal to the EAT but understand from the claimant's submissions it relates to the unfair dismissal element which is the bigger element of the remedy in this case and the commission post termination again the larger sum in this remedy judgment. I grant the respondent's application in respect of these claims but not the remaining uncontentious sums or the sums which relate to matters not appealed. This would not be in furtherance of the overriding objective.
57. The judgment of this Tribunal is therefore as follows:

Unfair dismissal

| | |
|--------------------|-------------------|
| Basic award | £525.00 |
| Compensatory award | £17,297.57 |
| Uplift | £1,729.76 |
| Total | £19,552.33 |

Unlawful deduction from wages (appealed)

Commission for deals submitted before EDT but paid after £2,736.38

Wrongful dismissal

Notice pay unpaid £252.41

Unlawful deductions from wages

| | |
|--------------------------|---|
| Unpaid commission | £252.27 (does not include £195.94 paid recently) |
| Sick pay | £240.44 |
| Uplift | £94.10 |
| <u>Total</u> | <u>£586.81</u> |

58. The respondent will pay the sums in bold of £839.22 within 14 days in the usual way and the sums not in bold totalling £22,288.71 enforcement of which is stayed pending the outcome of the respondent's appeal.

Employment Judge King

Date:28th July 2021.....

Sent to the parties on: ...

For the Tribunal Office