



# EMPLOYMENT TRIBUNALS

**Claimant:** Wendy Adams  
**Respondent:** Lighthouse Vending Services Limited

**Heard at:** Birmingham (hybrid hearing and via CVP)

**On:** 14<sup>th</sup> July 2021

**Before:** Employment Judge Beck

## Representation

Claimant: In Person, assisted by Mr Bate, Claimants brother

Respondent: Laurentt Davies, Managing Director, In Person

# JUDGMENT ON REMEDY

Upon the tribunal having determined (by a judgment dated 9/10<sup>th</sup> February 2021) that the claimant was unfairly dismissed and dismissed without notice in breach of contract, the judgment of the tribunal on remedy is that:

1. The respondent is ordered to pay the claimant damages for breach of contract in the sum of £1140.00.
2. The respondent is ordered to pay the claimant compensation for unfair dismissal in the sum of £575.90.
3. The Employment Protection (Recoupment of Jobseekers Allowance and Income Support) Regulations 1996 apply in this case. The prescribed period is 26/9/19 to 14/7/21. The Prescribed Element is £83.90. The Benefit Office is Dudley Benefits Office, Alexander House, 32 Wolverhampton Street, Dudley, DY1 1JR.

# REASONS

## Introduction

1. The claimant provided a bundle of documents for this remedy hearing which included bank statements, wage slips, post office receipts and a statement from the respondent dated 7/7/21. The claimant did not submit a written statement in the remedy bundle.

2. Both parties were given the opportunity to give evidence to the tribunal, and both parties had the opportunity to cross examine the other on the contents of their evidence.

3. I took the opportunity prior to the parties giving evidence to establish if there was any measure of agreement between the parties, to any of the sums requested.

4. In relation to notice pay, the claimant accepted that her claim for notice pay in her schedule of losses at page 33 based on 9 years entitlement was not correct. The parties were reminded of my findings on the 10/2/21, that the claimant had been employed since the 20/10/16, based on the contract of employment dated 1/9/16. The claimants dates of employment were from the 20/10/16 until the effective date of termination, the 29/8/19.

5. The parties were directed to paragraph 13(3) of the claimants 2016 contract, which stated 'once you have been employed for a continuous period of 4 weeks, you shall be entitled to notice of 2 weeks which will increase by 1 week for each year of continuous employment'. Both parties accepted that the claimant was entitled to payment based on a 4 week notice period.

6. At the hearing in February 2021, I recorded in my judgment that the parties agreed the claimants gross weekly pay was £328 and £213 net. The respondent maintained that these were the correct figures. The claimant's schedule of loss at page 33 referred to a gross weekly pay of £340.40 and a net weekly pay of £284.31, and she maintained that those figures were correct.

7. In relation to the basic compensation award, the claimants schedule of loss referred to 9 years service as above, which the claimant accepted was incorrect. On the basis the claimant has 2 full years of service from 20/10/16 until the 20/10/18, and the claimant aged 56 is entitled to one and a half weeks pay for each full year of service, the parties accepted the claimant was entitled to 3 weeks gross pay.

### **Evidence Heard**

8. The claimant gave evidence confirming when she was employed by the respondent, she received the minimum wage, £8.21 for a 40- hour working week. She was unable to explain how the gross weekly figure of £340.40 and the net weekly figure of £284.31 had been arrived at. She explained she had received advice from the Citizens Advice Bureau, who had asked her for various figures during a telephone consultation, and they had prepared the schedule of losses on her behalf.

9. After the termination of her employment on the 29/8/19, the claimant confirmed she received Job Seekers allowance in September 2019 and October 2019. She accepted her bank statements revealed 4 payments in that period totalling £516.94, not the 5 weeks at £73.10 referred to on the schedule of loss. The respondent put to her that her losses for this period totalled £990.80, not £1056.05, based on her own figures. This was on the basis the £516.94 received divided by 6 weeks amounting to £86.15 per week. The claimant's gross figure of £284.31 per week minus the £86.15 equalling £198.16 multiplied by 6 being

£990.80. The claimant accepted the respondent's calculations.

10. For the period October to 11<sup>th</sup> November 2019, the claimant worked on a self employed basis delivering parcels for Hermes. She did not have a contract of employment, was not aware what her hourly rate was, and did not have a set number of hours worked. Payment was made on the basis of how many parcels were delivered, and the size of those parcels. On the basis of bank statement entries, the claimant accepted earning £1480.11 over that period, paid to her in 7 varied payments. The claimant was unable to confirm the date in October she started this role, explaining she got it a week before signing off Jobseekers Allowance. The claimant accepted her bank statements showed receipt of £1480.11, which was in excess of the £739.58 earnings referred to on her schedule of loss. The claimant explained that 2 additional payments were made to her by Hermes, after she had given the figures to the Citizens Advice Bureau who has calculated the schedule of loss for her. The respondent put to the claimant the total earned of £1480.11 divided by 6 weeks amounted to £246.68 weekly net pay. Deducting this from £284.31 net pay equated to a £37.63 weekly loss. The claimant accepted this, and the respondent's assertion the correct claim should be for £225.78. (£37.63 x 6 weeks).

11. On the 11<sup>th</sup> November 2019 the claimant started a new job for Vendaid, as a route operator, on a minimum wage 35 hours per week contract. The minimum wages being paid of £8.51. She confirmed this was the same job she undertook when employed by the respondent. The schedule of loss claims the difference between the claimant's salary whilst employed by the respondent, and the salary at the new employer Vendaid, for a 65-week period, from 11/11/19 to the date of the tribunal hearing on the 10/2/21. The schedule of loss confirms the gross weekly pay figure of £297.85 gross and £270.28 net. The sum claimed being £911.95, based on £284.31 net pay minus £270.28 net pay equalling £14.03 multiplied by 65 weeks totalling £911.95. The respondent did not challenge the figures, but put to the claimant it was unfair he should be responsible for payment of the difference, when she was working 5 hours less contractually per week. The claimant asserted that the respondent in her opinion should pay.

12. The claimant's position was she was unable to increase her hours at Vendaid, above the 35 hours she was contracted to do, and therefore the respondent should pay the difference. She confirmed she was placed on furlough in April, May and June 2020 and did not seek any payments for this period, although felt that the respondent should continue to pay the difference in her salary to the date of the remedy hearing, although this was not claimed on the schedule of loss.

13. The claimant requested a payment for loss of statutory rights of £300.00. The respondent put to the claimant that in November 2021, she will have acquired 2 years statutory rights with Vendaid, and therefore should not be entitled to the payment, the claimant did not agree with this.

14. The claimant requested a 20% uplift in relation to the respondents alleged failures to follow the ACAS code, this was confirmed in the schedule of loss submitted by the claimant.

15. In relation to contributory negligence, and the claimant's admissions to smoking in the company van with the door open, the claimant when cross examined did not accept there should be any reduction in her award on this

basis. She maintained that the respondent wanted to get rid of her anyway.

16. In relation to any Polkey reduction to the award, to reflect the chance that the claimant's employment would have ended anyway, if correct procedures had been followed, the claimant maintained she was not dismissed for the smoking incident, and the respondent wanted her out some time before that.

17. The respondent gave evidence, confirming his position that the claimants gross weekly pay was £328.40 a week, based on an hourly rate of £8.21, with a net weekly figure of £284.00 / £285.00, whilst in his employment. This was based on a 40 -hour working week, and the 2 figures on the claimant's banks statements for July and August 2019. (£1,237.26 and £1288.80 totalling £2526.06 divided by 8.85 weeks totalling £285.52) He confirmed his view the claim for notice pay based on 4 weeks was correct, and the basic award should be based on 3 weeks gross pay.

18. The respondent stated he felt it was unfair for an ACAS uplift to be applied, as the claimant had sent appeal letters to the wrong address, therefore preventing the company going through this process. For the period of unemployment, he put forward the claim should be for £990.80, based on the bank statement, £516.94 received, divided by 6 weeks, £86.15. £284.31 net salary minus £86.15 being £198.16 times by 6 weeks is £990.80.

19. The respondent put forward the claim for the Hermes period of employment should be £225.78. This was on the basis the £1480.11 income received on the claimant's bank statements divided by 6 weeks amounted to £246.68 net weekly pay. Based on £284.31 net pay at the respondent's company per week, minus £246.68 weekly net pay at Hermes, the difference of £37.63 multiplied by 6 weeks equalling £225.78.

20. The respondent did not accept he should be liable to pay the difference in pay between the 40- hour role at the respondents company and the 35 -hour role at Vendaid, for any period of time. He did not accept this was relevant to the claim. The respondent did not challenge the minimum wage of £8.51 per hour was paid, and the gross figure of £297.85 per week and £270.28 net per week salary.

21. The respondent's evidence was the claimant should not receive a payment to reflect a loss of statutory rights, based on the fact she would acquire the 2 years required for unfair dismissal rights in November 2021. He highlighted that although with hindsight he may have conducted another meeting with the claimant, he would still have dismissed her for her conduct of smoking in the company van, and her behaviour to Joanne Palmer. He confirmed that he would have dismissed the claimant for smoking in the company van alone. He confirmed that he felt there should be a reduction in the award for the claimant's contributory conduct, of smoking in the company van, and because he would have dismissed her anyway.

## Findings made

22. I find that the claimants weekly gross salary whilst employed by the respondent was £328. The claimant in evidence accepted she was paid the minimum wage of £8.21 whilst working for the respondent. It was accepted 40 hours per week was worked, £8.21 multiplied by 40 is £328.00 weekly net salary. This was also put forward by the respondent.

23. I find that the claimants weekly net salary whilst employed by the respondent was £284.31. The claimant was unable in evidence to demonstrate how this figure was arrived at on her schedule of loss. The only information in the bundle relevant are the entries on the bank statements for July and August 2019 showing salary received of £1237.26 and £1288.50 respectively. The respondent calculated those figures totalled £2525.76, divided by 8.85 weeks gave a net weekly salary of approximately £284.00 / £285.00 which the claimant accepted. I accept £284.31 on the basis it accords with both the respondent's calculation, and the figure put forward on the claimants schedule of loss.

24. I find the claimant is entitled to a notice payment based upon the contract of employment at paragraph 13, and a period of employment from 20/10/16, the date the contract was signed until the date of dismissal, the 29/8/19. For 2 years full service, this equates to 4 weeks notice multiplied by net pay of £285.00, totalling £1140.00. The claimant was under a duty to mitigate her loss for this 4 - week period, and the bank statements and evidence demonstrate she obtained Job Seekers Allowance for this period. The parties accepted that a 4- week notice period was applicable. The benefits paid will be recouped by the Department for Work and Pensions.

Total notice pay is £1140.00.

25. I find in relation to the basic award that the claimant is entitled to 3 weeks gross pay. The parties agreed that this was the position. The claimant's period of employment was from 20/10/16 until the 29/8/19, a period of 2 years and 10 months. Full years count for the basic award calculation, and the claimant is entitled to 1 ½ weeks gross pay for each year of service she was not below the age of 41.

Total basic award calculation is £328.00 x 3 = £984.00

26. I have considered if there should be a reduction of the basic award under **section 122 (2) Employment Rights Act (1996)**, to reflect any contributory conduct of the claimant before dismissal. The claimant's position was that there should be no reduction, the respondent put forward the admissions to smoking in the company van were relevant. I found as a fact that the claimant had smoked in the company van, and her admission to doing so was relevant in my view to her dismissal. Accordingly, I take the view that there should be a reduction in the basic award of 50% to reflect her contributory negligence.

Basic compensation award of £984.00 – 50% reduction (£492.00) = £492.00.

27. In relation to the compensatory award, the parties agreed the claimant received JSA payments of £561.94 over a 6 week period, in September / October 2019. The claimant was not able to explain how the figure of £1056.05 on the schedule of loss was arrived at. The claimant accepted the respondents

calculation of £516.96 (as evidenced in the bank statements) divided by 6 totalling £86.15 per week. The net weekly salary at the respondent's company of £284.31- £86.15 totalling £198.85, multiplied by 5 weeks claimed on the schedule totalling £990.80.

I accept the claimant's loss for the 5 week period was £990.80, and this is a loss incurred as a consequence of the dismissal.

Compensatory award for JSA period September / October 2019: £990.80

28. In relation to the claimants subsequent 6 weeks period of self -employment with Hermes, in October/ November 2019, the claimant was not able to substantiate the £966.30 on the schedule of loss form. The claimant accepted her bank account entries showed a total of £1480.11 being received in relation to the Hermes role. The claimant could not confirm her hourly rate, or number of hours worked. The respondent put to the claimant her net weekly wage, based on £1480.11 divided by 6 weeks was £246.68. The claimant accepted this, and accepted the respondents calculation that her net weekly wage when employed by the respondent, of £284.31 minus the net weekly pay at Hermes of £246.68 showed a weekly net loss of £37.63. The respondent put forward that the claimant's losses for this period were £37.63 multiplied by 6 weeks, totalling £225.78, which the claimant accepted. I accept the figures, and the losses were as a result of the dismissal.

Compensatory award for Hermes period October / November 2019: £225.78

29. I accept that the claimant obtained a new role from the 11/11/19 with Vendaid, in the role of route operator, an identical position to role the claimant undertook with the respondent. The contract was for 35 hours a week, at the minimum wage of £8.51. The respondent did not challenge the £297.85 per week gross figure the claimant put forward on her schedule of loss, nor the £270.28 net figure. Her claim being for 65 weeks from the date of termination of employment, 29/8/19 to the 10/2/21, the date of the first tribunal hearing. The respondent did not challenge the calculation of £284.31 net weekly pay with the respondent minus £270.28 net pay with Vendaid totalling £14.03 weekly difference, multiplied by 65 weeks totalling £911.95. The claimant submitted the respondent should pay the full sum. The respondent put forward that as the claimant was working 5 less hours per week, he should not be required to pay the additional sum representing the difference in the contract between the 2 companies of 5 hours.

30. The claimant continues in the role at Vendaid. She confirmed in evidence she did not seek any compensation for April, May, June 2020, when she was on furlough from Vendaid. The schedule of loss does not seek any compensation for the period after the February 2021 first hearing. It is reasonable to allow the claimants claim until the February hearing date. She was not in a position to increase her hours at Vendaid, and confirmed this in evidence. She was not cross examined about efforts she has made to seek additional work to cover the extra 5 hours per week, or efforts made to seek a new role which may have paid more/ or been a 40 hour contract. The losses she sustained were as a result of the loss of employment with the respondent, and she had mitigated her losses by obtaining equivalent employment. On the basis by February 2021, she had been employed by Vendaid for 15 months, it would have been reasonable that the claimant should then have sought alternative or additional employment, if she

was still dissatisfied by the discrepancy in salary. I do not award any loss of earnings for the period February 2021 to 14/7/21, the claimant did not submit payslips or bank statements for this period as evidence to substantiate any losses she states she incurred.

Compensatory award for Vendaid employment November 2019/ February 2021: £991.95

31. The claimant sought £300.00 compensation to reflect the loss of statutory rights. The respondent pointed out that in November 2021 the claimant will have worked for her employer Vendaid for 2 years, and therefore will have acquired her statutory rights again, and therefore should not receive this compensation. I accept the respondent's argument in this regard, the claimant has nearly acquired 2 years employment rights again with her new employer. I accept the respondent's evidence that he would have dismissed the claimant anyway, had he followed correct disciplinary procedures for her behaviour of smoking in the company van.

32. The claimant has not sought any compensation for future losses, and it would seem appropriate in light of the fact the claimant secured a very similar job shortly after her employment ended with the respondent. A percentage reduction under the Polkey principles to futures losses is not relevant.

33. The claimant seeks a 20% uplift to the compensatory award, to reflect the claimants lack of compliance with the ACAS Code of Practice on Disciplinary and Grievance procedures. The respondent highlighted the claimant admitted in evidence at the previous hearing, sending letters requesting an appeal hearing to the wrong company address. The respondent requests that the uplift for the breach of ACAS code is not allowed. I remind myself of my findings in my judgement dated 10/2/21. The respondent I found did not follow a reasonably fair procedure, written statements were not taken from witnesses or the claimant, the claimant was not interviewed, or given an opportunity to put forward her side of events, or have a witness attend the meeting that took place on the 29/8/19. The claimant did admit sending her letters regarding the appeal to the wrong address. I allow for this, and order a reduced 15% uplift in the compensatory award to reflect breaches of the ACAS Code of Practice.

15% Uplift to Compensatory award of £319.28

34. In accordance with **section 123 (6) Employment Rights Act (1996)**, and considering my findings at paragraph 26, I have found the claimants dismissal was contributed to by the claimant's behaviour, in smoking in the company van. I find the claimants conduct of smoking in the company van blameworthy. Therefore, I find it is just and equitable, to reduce the compensatory award on the same basis I have reduced the basic award, by 50%.

Reduction of compensatory award by 50% (£1233.91)

### **Schedule of Compensation**

**1. Basic Award of: £328.00 x 3 = £984.00**

**Deduction of 50% contributory negligence( £492.00) = £492.00**

## 2. Compensatory Award

(a) September / October 2019 - JSA  
 $£284.31 - £86.15 = £198.85 \times 5 = £990.80$

(b) October/November 2019 - Hermes  
 $£284.31 - £246.68 = £37.63 \times 6 = £225.78$

(c) November 2019/ February 2021- Vendaid  
 $£284.31 - £270.28 = £14.03 \times 65 = £911.95$

Total compensatory award = £2,128.53

(d) Loss of statutory Rights: Not awarded

(e) Future losses not awarded – no Polkey reduction

(f) Failure to comply with ACAS Code of Practice  
15% uplift of £319.28 = £2447.81

(g) Reduction of 50% based on claimant's contributory negligence  
50% of £2447.81 = £1223.90

(h) Reduction of compensatory award by amount of notice pay to avoid double recovery for the period 29/8/19 to 26/9/19  
 $£1223.90 - £1140.00 = £83.90$

Final basic award= £492.00  
Final compensatory award £83.90  
Total award=£575.90

## Recoupment

The prescribed element is £83.90. The prescribed period is 26/9/19 to date of remedy hearing 14/7/21. The total award is £575.90. The balance is £575.90 - £83.90 = £492.00.

Employment Judge Beck on 09/08/2021