



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss J George  
**Respondent:** Clements Agency Limited  
**Heard at:** East London Hearing Centre (by Cloud Video Platform)  
**On:** 17 November 2021  
**Before:** Employment Judge McLaren

## Representation

**Claimant:** Ms I Semeniuk, Solicitor  
**Respondent:** Mrs S Leslie, Director

# REMEDIES JUDGMENT

The claimant's claim of unfair dismissal having succeeded the respondent is ordered to pay the claimant

- (i) a basic award of £3,187 (5 x 1.5x £425); and
- (ii) a compensatory award in the gross sum of £8,165 comprising loss of earnings from 09.02.19- 31.7.19
- (iii) For recoupment purposes;(a) monetary award £8,165 (b) prescribed element £2492.05; (c) period of prescribed element 09.02.19-31.07.19. The excess of the monetary award over the prescribed element is £5,672.05.

## Background

1. The liability hearing was heard on 9 and 10 January 2020. The issues agreed as to be determined at that hearing were as follows:

- a) The Claimant's Claim is made up of a claim for unlawful deduction of wages pursuant to Section 13 of the Employment Rights Act 1996 (ERA) as well as constructive unfair dismissal. The Claimant asserts that between the period to November 2018 and the date of her resignation on 6 February 2019 (four months) the Respondent made unlawful deductions from her wages in the total of £2,507 which was not agreed by her, and which has led to her resignation on 6 February 2019 in writing.

- b) The Tribunal is to determine whether the Claimant suffered such unlawful deduction of wages in breach of contract and to determine the amount. In addition, if the Tribunal agrees with the Claimant's submission that the wages were unlawfully deducted without consent whether this amounted to a fundamental breach of contract entitling the Claimant to resign and to determine whether the Claimant resigned as a consequence of such breach.

2. Having heard the evidence, I found that the complaint that the employer had made a deduction from wages in contravention of section 13 was well-founded and I made a declaration to that effect. I ordered the respondent to pay the claimant £1035, being the amount of the deductions made in contravention of section 13 ERA 1996. I also found that the claim for constructive dismissal succeeded.

3. Today's hearing was a reconvened remedies hearing to determine the basic and compensatory award due to the claimant. The previous remedy hearing had been adjourned because the respondent's representative was unwell and because, more importantly, the claimant had served the bundle late, allowing no time for the respondent to consider the same.

4. I was provided with a bundle of 80 pages and heard evidence from the claimant. In reaching my decision I took this into account, together with the helpful submissions by the parties.

#### Finding of facts

5. I had previously found that the claimant was employed from 30 April 2013 until she resigned on 6th February 2019. It was agreed that this was 5 years of continuous service. It was also agreed that her gross weekly basic pay was £425 a week, giving a net weekly basic pay of £357. Her role was in the marketing team approaching the owners of commercial properties to create leads to whom the respondent could sell its services disputing the calculation of commercial rateable values as set by HMRC.

#### Mitigation activity

6. The claimant's evidence on her attempts to mitigate was confused and contradictory. In a mitigation statement she stated that in the three weeks after her resignation she made a number of unsuccessful attempts to get new employment. In oral evidence she said that she did not make any attempts to find other jobs for a number of weeks. She later said that she had done some window shopping for jobs and looked on the Internet and in newsagents' windows. In cross-examination she described herself as in a complete panic and willing to do anything. Nonetheless, there was no evidence, for example, of sites that she had looked at or visited. There was no evidence of any applications being made which I would have expected if the claimant was as panic stricken and concerned as she has now said.

7. It being accepted that the claimant was excellent at her job, she was asked why she had not contacted any of the respondent's competitors to find employment with them, either immediately after losing her job at any time thereafter. The claimant initially said she did not know who the competitors were, but then changed her answer to say that all the competitors were family owned businesses. She

made a conscious decision not to work for a family business because she felt that made her vulnerable and put her back in a similar situation to that with the respondent which is a family owned business. She agreed, therefore, that she limited the scope of any attempt at mitigation by her decision to avoid family run businesses.

8. While the claimant stated that all companies that worked with rateable value claims were family owned, there was no evidence given of this, and it is not mentioned in her witness statement. On the balance of probabilities I find it unlikely that the claimant's contention is true. While there may be a preponderance of family owned businesses in a particular business area, on the balance of probabilities I find that at least a significant minority will not be set up in this way. There is for no reason why the claimant could not have approached these companies.

9. In her mitigation statement the claimant said that it was following these numerous unsuccessful attempts that she decided to open her own business in order to maintain her daily needs. On the balance of probabilities, I find that the claimant did not make any serious attempts to find other work in the three weeks after she left the respondent's business. There is simply no evidence of her doing so and I consider it more likely than not that she had made an active decision not to work for another employer in the same business area, but to set up her own company. Taking this step is an entirely reasonable way of seeking to mitigate loss and I find that the claimant acted reasonably in making this decision-.

10. While the claimant described the process of setting up a company as being a relatively simple one, I find that the decision to do so and the administration required were where she spent her attention in the first three weeks. I find that the claimant used this time to incorporate a company, locate a serviced office and plan contacting potential customers. She had set up the company by 7 March.

11. The claimant's written mitigation statement said that she had not developed the business at all and initially in answer to cross examination questions said that she had done nothing with the company. When she was asked further about this, the claimant gave contradictory answers about what she had done in relation to this company. She agreed that she had contacted an agent who had set up a company for her and she had registered this company at companies house. She had done some marketing of this company in that she made telephone calls in order to obtain clients. She was unclear and could not recall how many people she may have contacted. She initially said that these telephone calls had resulted in successfully winning the business of two or three clients but then changed her answer to one client only. She accepted that in relation to this one client she had taken their instructions, filled in an appropriate form on the government Gateway site and submitted a request for review of rateable value of the property. That request had not resulted in any change to rateable value and she had charged a and been paid £240 for this work.

12. It was agreed that the company was dissolved on 12 November 2019 and no income was declared from this company. The claimant stated that she did not make any money from this venture. She now accepts that she did make a small amount referred to above.

13. At the liability hearing I found that she was unable to pursue this venture due to a combination of family bereavement and personal ill-health. The claimant explained to me that in May 2019 she lost her father to whom she was very close. While his death was sudden and it was a shock, she told me today that it had no impact on her mental health and that she simply went through the normal grieving process but this did not cause or contribute to her depression at all.

14. In her mitigation statement provided for the remedy hearing, the claimant said that the sole reason that she was unable to run the business was her depression caused by the job loss, and that she could not run it alongside her ongoing depression therapy. It was agreed, however, that the business was effectively wound up in August and the depression therapy did not start until October. I find that the reason given in the written witness statement cannot therefore be the reason the claimant could not pursue the business. The chronology is incorrect. In relation to her father's death, the claimant's statement today that it did not impact her ability to run the business is contrary to the evidence that I previously considered and to my earlier finding, and I conclude again that the family bereavement had an impact on her. As I have not accepted the claimant's reason that led her to being unable to pursue the business I find that it was due to the bereavement and not because of treatment for depression.

15. The bundle contained an email exchange indicating an attempt to find a job dated 18 June 2019. The claimant explained that she had reached out to this company via a friend of hers with whom she had worked at the respondent's business and they had recommended her. The email is at page 55 of the bundle and states that at that time the company cannot accommodate the claimant's salary expectations and that if she were to explore options in London, £25,000 might be achievable. The claimant could not recall what salary she had asked for. She also stated that she earned more than £25,000 at the respondent when one took into account commission on sales generated. She could not recall if this was a sales company. She accepted that in any sales environment it will take some time to build up a pipeline of commission/bonus on sales. I find that in June 2019 the claimant was seeking a role at a salary that was higher than her basic salary with the respondent. I find that the reason she did not succeed in obtaining a role with this company was because of her salary. Not moderating her salary expectations is contradictory to the claimant's oral evidence that she was desperate to work and would undertake any job. That is not borne out by the documentary evidence.

16. I find that in June 2019 the claimant was capable of reaching out to a potential employer, discussing her past experience with that employer and impressing them sufficiently for them to suggest that they could explore options with her in the future. This does not indicate an individual whose depression is as the claimant describes it, that is so bad that she is unable to get out of bed.

17. The only other evidence in the bundle of mitigation is 21 January 2020 when the claimant appears to be looking for a pub cleaning job in Ilford.

### Depression

18. At the liability hearing I found that the respondent made a series of unlawful deductions and, as she had set out in the claim form, the claimant resigned in direct response to this breach of her contract and unlawful deductions. In her mitigation

statement the claimant stated that her resignation was partly due to a hostile working environment and that she suffered from work related depression and anxiety. The claimant was, however, clear in her oral evidence that she had not suffered from depression while at work. She had enjoyed her work and it was agreed by the respondent that she excelled at her tasks. She had not, accordingly, ever made the respondent aware that she suffered from depression or was likely to suffer depression, as this was not the case before she felt forced to resign.

19. The claimant was asked on a number of occasions what it was therefore that triggered the depression for which she subsequently suffered. She explained that it was triggered by losing her way of living. Having left her job she had no income on which to live. She was clearly a very driven individual who is accustomed to and enjoyed working and she explained that she found the inability to put food on the table, keep a roof over her head and to keep her car on the road caused her depression. She indicated that she had a visit from the bailiffs shortly after she lost her job and that she had significant money difficulties.

20. She stated in her mitigation statement that her health had deteriorated in spring of 2019, and she has been prescribed medication and counselling. There was some medical evidence in the bundle but this is not in the spring of 2019 but in October of that year. At page 42 of the bundle there is a letter dated 29.10.2019 from the GP which states that the claimant has been suffering from anxiety and depression since February 2019. It says, "she stated problems at work". There are no copies of the medical records to show when she went to the GP or was first prescribed medication. From the claimant's oral evidence, she confirmed that October was the first time she visited her GP and described her symptoms, at which point she was told she was suffering from depression and prescribed medication. I accept that while the GP has recorded problems at work this is based on what the claimant has told the GP who is merely reporting the claimant's words at that time. I also find that the GP, in dating the depression from February 2019, is reflecting what the claimant told him/her and this is not a clinical diagnosis of depression from that date.

21. Page 43 was an undated letter stating the claimant had been placed on a waiting list for CBT. There are then 3 appointment letters, and treatment starts on 7.10.2019. In a letter of 27.1.2020 the GP practice confirms that the therapy, which was to improve her mood, ended on 27.01.2020 and she is "moved to recovery".

22. The claimant began receiving universal credit at some point prior to 27 February 2019. In February 2020, having undertaken a work ability assessment, despite the fact her GP had reached a more positive position, it was determined that she had a limited capability for work. The claimant confirmed that she continues to be assessed in the same way, that is she has limited capability for work and still continues to receive universal credit.

23. The claimant explained that she made no attempt to find other work after June 2019 because of her depression. In April 2020 she began two courses, both were for one day a week and lasted for six months. During this time she was not looking for work at all. These courses would have finished by the end of September 2020. The claimant explained that from September 2022 to September 2021 she made no attempts to look for work at all which was due to lockdown. In September 2021 she has started a one-year course which she believes will assist in finding other work.

24. The claimant explained that she has a varied work experience having in the past worked in retail as a manager in Harrods, driven and ambulance and been a fitness instructor. She wishes to continue a career in retail.

25. While I accept that the claimant is currently suffering from depression, I find that this depression did not start until after 18 June 2019. Prior to that date the claimant had set up her own business, attracted at least one client for whom she had done work and had actively sought another role. The GP in identifying an earlier start date for the depression was doing so on the basis of the claimant's statements to them and the GP did not have the benefit of the evidence before me. As I find the depression did not start immediately on losing the job I also find that it is more likely that it was caused by the loss of her father and not by her financial circumstances. If the financial circumstances had indeed weighed on her mind in the way she now describes them, I find that she could have mitigated her loss to some extent. While I am sure that her finances now contribute to her state of mind and low mood, I find that this was not the cause of her depression.

#### Universal credit

26. It was agreed that the claimant had received universal credit for the period March 2019 to date. There is evidence in the bundle of the amounts paid between March and December 2019. We agreed the monthly figures that the claimant received, in March it was £592.21, April £657.21, May £656.21, June £269.21 and July £317.21. This is a total of £2,492.05.

27. The claimant also received separate rental payments of £386.28 which were paid directly to the landlord from June 2019 onwards.

#### Relevant Law-remedy

28. The claim is for unfair dismissal. s123 of the ERA 1996 provides that 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 insofar as that loss is attributable to action taken by the employer'.

29. The object of the compensatory award is to compensate the employee for their financial losses as if they had not been unfairly dismissed - it is not designed to punish the employer for their wrongdoing.

30. The calculation of the compensatory award falls under two headings, Immediate loss of earnings, and future loss. Immediate loss of earnings is the loss suffered between the effective date of termination to the date of the remedies hearing.

31. For dismissals occurring on or after 6 April 2018 and before April 2019 the statutory cap is calculated as the lower of £83,682- or 52-weeks' gross pay. As at February 2019 a week's pay was capped at £508.

Burden of proof on mitigation

32. The employer's liability will normally cease before the date of the remedies hearing if the employee has (or ought to have) got a new permanent job paying at least as much as the old job as there will no longer be a loss arising from the dismissal. Future loss will be awarded if the claimant has not got a new role despite sufficient efforts to find one by the date of the hearing. The tribunal will then award some period of future loss to cover the period until it is thought reasonable that the claimant would be a new employment.

33. The claimant is under a duty to mitigate her losses, but when calculating the compensatory award, the calculation should initially be based on the assumption that the employee has taken all reasonable steps to reduce his or her loss. The burden of proof regarding a failure to mitigate is on the wrongdoer. A claimant does not have to prove that he or she has mitigated the loss and tribunals are under no duty to consider the question of mitigation unless the employer raises it explicitly and adduces some evidence of a failure to mitigate.

34. If evidence as to non-mitigation is not put before the tribunal by the employer, it has no obligation to look for such evidence or to draw inferences. It is not enough for the employer to show that there were other reasonable steps that the employee could have taken but did not take. It must show that the employee acted unreasonably in not taking such steps.

35. It is not the case that the tribunal should simply accept the subjective view of the claimant, the tribunal's task is to consider all the circumstances in deciding whether the claimant has acted unreasonably in failing to find fresh employment or some alternative means of mitigating the losses as a result of having been unfairly dismissed.

Impact of manner of dismissal/ill health

36. Employers may be liable for prolonged loss of earnings where, due to the claimant's state of health, securing alternative employment may be problematic. This is similar to the approach taken in personal injury cases, where the defendant bears liability despite an injured person's pre-existing condition or predisposition to injury. Where the claimant remains out of work at the time of the remedies hearing, his or her state of health and prognosis will be relevant to the tribunal's assessment of the period over which future loss should be assessed.

Conclusion

37. I have found that the claimant did not suffer from depression initially after leaving her job. I also found that she made entirely reasonable attempts to mitigate her loss by taking the sensible step of setting up her own business and seeking to pursue that.

38. Unfortunately, this venture ultimately did not succeed and I have found that this was because the claimant began to suffer from depression which, on the balance of probabilities, I have found was not caused by the financial circumstances of the job loss, but by a family bereavement.

39. Applying the findings of fact to the relevant law I therefore conclude that the respondent is liable for the claimant's ongoing loss from the date of resignation until her depression made it impossible for the claimant to continue running the business. On the claimant's evidence this appears to be from August 2019.

40. I am therefore awarding a basic award of £3187. This is calculated as 1 ½ weeks pay for five years complete service at a pay rate of £425 a week. I am awarding a compensatory award from 9 February 2019 to 31 July 2019, that is until the claimant suffered from depression which is not due to the respondent's actions and which therefore breaks the chain of causation. That is 25 weeks loss at £357 a week, a total of £8,925.

41. The claimant received a payment of £520 from the respondent and earned £240 from her business. These sums must be deducted from the monies due from the respondent giving a compensatory award total of £8,165.

42. Recoupment then applies to £2492.05 of this sum

**Employment Judge McLaren  
Date: 18 November 2021**