EMPLOYMENT TRIBUNALS

Claimant: **Miss KEELY TIMBRELL**

Respondent: **BUREIKA & CO. LIMITED**

Heard at: **Bristol (via CVP)** **On: 24th, 25th & 26th November 2021**

Before: **Employment Judge David Hughes**
Ms H Scadding
Ms R Hewitt-Gray

Representation
Claimant: John Hume (friend)
Respondent: Nigel Henry (litigation consultant, Croner)

JUDGMENT

The unanimous Judgment of the Tribunal is:

1. The Claimant's claim for unfair dismissal is dismissed upon withdrawal.

2. The Respondent contravened ss.13 and 39(2)(c) of the Equality Act 2010 by indirectly discriminating against the Claimant on the grounds of sex.

3. The Respondent is ordered to pay the Claimant the sum of £1,036.61 in compensation for financial losses caused by the Respondent's discrimination.

4. The Respondent is ordered to pay the Claimant the further sum of £9,100.00, in compensation for injury to the Claimant's feelings caused by the Respondent's discrimination.

5. The Respondent failed to pay the Claimant for annual leave that the Claimant had accrued, but not taken, before her employment ended. The Respondent is ordered to pay the Claimant the sum of £135.47 in respect of accrued but untaken annual leave.

6. The Respondent failed to provide the Claimant with a statement of the particulars of her employment, contrary to the Employment Rights Act 1996, s1. Pursuant to s38 of the Employment Act 2002, the Respondent is ordered to pay the Claimant two weeks' wages being £90.94.

7. The Respondent unreasonably failed to comply with the ACAS code of practice on disciplinary and grievance procedures. The sums awarded in paragraphs 3,4 and 5 above to the Claimant are increased by 22%.

8. The Claimant is awarded interest pursuant to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, Regulation 6, as follows:

(a) On the compensation for injury to feelings, at 8% from 20/04/2020 to 26/11/2021, and;
(b) On the compensation for other losses, at 8% from the mid-point between 20/04/2020 to 26/11/2021, and the latter date.

9. The total sum due to the Claimant is £14,137.89.

10. The Claimant's claim under the Part Time Workers (Prevention Of Less Favourable Treatment) Regulations 2000 is well founded and succeeds. The Tribunal makes no separate award in respect of this finding.

REASONS

Who everyone is

1. The Respondent is a company that runs the Royal Oak pub in Salisbury. It has also run another pub, in Southampton. Whether it still does so is not clear, but doesn't matter for this case.

2. The sole director of the Respondent is Ms Inez Williams. At the time that concerns us, there was another director of the company, a man named Steve Wicken. Mr Wicken is no longer involved with the Respondent, we were told. He no longer lives in the UK.

What the case is about

3. The Claimant used to work for the Respondent. She was employed from 01/07/2018, to 27/04/2020. On 20/04/2020, the Claimant received by email a letter dismissing her.

4. The Claimant's claim is for a detriment, contrary to Regulation 5 of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations (the Regulations) and indirect discrimination contrary to the provisions of the Equality Act 2010. Originally, she also claimed for unfair dismissal and for notice pay. and holiday pay pursuant to the Working Time Regulations 1998. A claim in respect of notice was dismissed on withdrawal on 25/03/2021. On 21/10/2021, the Claimant wrote to the Tribunal to withdraw her unfair dismissal claim. This was not a live issue before us, but had not formally been dismissed, so we formally dismiss it.

What happened

5. The Claimant started work with the Respondent in July 2018. She worked as bar staff. She is a mother, and worked various shift patterns for the Respondent, around her childcare commitments. She wasn't given any written statement of the terms of her employment.

6. Mostly, the Claimant worked on a Thursday evening. The pub held a quiz night on Thursdays, and it seems to have been a busy night. She sometimes worked on a Friday or a Saturday. She would often be told at the end of one week when she would be required the following week. That didn't always happen, and there seems to have been a considerable degree of flexibility on both sides of the arrangement. Less important to this case than the precise details of when she worked is the fact that she was a part-time worker.

7. In early 2020, the Covid-19 pandemic emerged. We were told that, on 13/03/2020, the UK government gave advice to the public against socialising indoors, and that on 20/03/2020, the first lockdown in England[1] was announced. The timing of those dates sounds about right to us.

8. Ms Williams told us that, at that time, business was seasonally less busy, but that the emergence of the Covid-19 pandemic had impacted significantly on trade.

9. Ms Williams told us that, when the closure of pubs was announced, it was not clear who would qualify for the Coronavirus Job Retention Scheme, commonly known as the Furlough scheme. She said that, under the circumstances, the Respondent could not retain staff, and decided to make redundancies. The exception to the decision to make redundancies was the pub manager, a woman named Kim, and the head chef, a man named Gabriel, who appears to have been known to staff as John John.

10. The bundle before us contained a number of text messages and emails. We will not set them all out, so as not to make these reasons too lengthy.

11. On 03/04/2020, Ms Williams messaged the Claimant, to ask her for her address and postcode. She explained that this was to help process the Claimant's wages, as the Claimant's end of shift time for a Thursday quiz night had not been recorded. After a chase-up, the Claimant responded.

12. On 04/04/2020, Ms Williams sent the following message to the Claimant[2]:

    Keely sorry to ask you this info today but government retention scheme is asking these questions.
    When did you start your employment with Bureika???
    Would you like to remain with us for the duration???
    These are questions that have been asked
    Thank you for your cooperation.
    Inez

[1] The situations in the other nations of the UK doesn't concern this claim.

[2] The original spelling and punctuation (or lack thereof) will be kept in messages quoted directly.

13. The Claimant responded, giving her approximate start date, and asking why this information was needed. Ms Williams in turn replied;

    This is the requirement and the accountant has to fill information we have all had to fill i. These questions
    Thank you X

14. The Claimant responded with a text message asking if she was being furloughed, and would she be sent a letter. Ms Williams replied as follows;

    The relief is from the Government
    The new words used are furlough and furloughed
    I will be sending letters to everyone this is a guidance I have to follow.
    X

15. On 15/04/2020, Ms Williams again messaged the Claimant. She said;

    Hi keely
    My credits are low I hope you receive this message.
    I have been in touch with bookkeeper and accountant ant will be in touch again Shortly.

16. On 20/04/2020, the Claimant messaged Ms Williams, saying:

    Hi Inez hope your well? Just wondering if I'm being furloughed and will you send me a letter to say I am? X

17. Ms Williams replied that same day, saying;

    Hi keely Yvonne (accountant has the matter.
    Today she will sending the letters. X

    Please can you send me your email address and yvonne will send the letter directly to you.
    Kind Regards
    Inez hope your family are well.

18. A letter was emailed to the Claimant that day. Rather than telling her that she'd been furloughed, it read as follows:

    We are sorry to be writing to you today but following the mandatory closure of the Royal Oak from midnight 20 March 2020 we have to notify you that your employment has ceased. None of us can predict when Bureika & Co Ltd will be able to re-open the Royal Oak and unfortunately whether there will be future trading at all.
    We will pay you your actual hours worked from 1 March to 20 March and one week's notice pay. This week will be calculated as your average as the average of your pay since 1 January 2020. This March salary amount is £106.73 and we will let you we will also let you know the payment date as soon as we can.
    Thank you for being such great employees and we wish you all the best for the future.

Very best wishes
Inez Williams and Steve Wicken

19. Subsequent text messages from that day and the following day indicate that the Claimant was, understandably, upset and confused. She had been given to believe that she would be furloughed.

20. Ms Williams responded with a text message. After some comments about feeling unwell, which are not relevant to this case, she said "…*I have emailed Yvonne to better understand myself I await her email…*".

21. This was followed by an exchange in which the Claimant wrote;

    My email says my employment has been ceased which I don't have a job. It's confusing I'm being told one minute I've been furloughed and the next I don't have a job. Hence why I'm confused about it x

    To which Ms Williams replied;

    Im confused also.
    Yvonne has not responded to me I await her response.
    X

22. On 26/04/2020, the Claimant wrote an email to Mr Wicken and Mr Williams. The email is fairly long, and we do not set out its contents. Its substance is a complaint that the Claimant had been led to believe that the Respondent's accountant would send her details of the furlough scheme. She clearly finds it hard to believe that the Respondent has dismissed her instead, asking for this to be made plain. She makes the point that she has three children, and although her earnings were not large at the pub, they were important to her. We should also say that the email is expressed with, in the circumstances, remarkable restraint and courtesy.

23. The response to this email came from Mr Wicken. It said;

    Keely

    Due to circumstances beyond my control causing the pub to close it was decided that we had to make deceive (sic) *decisions and in the circumstances end your employment with the company*

    We have therefore only Furloughed our essential full time staff

    I would hope and trust you understood that

    Thank you for everything Inez is arranging your payment due

24. The Claimant responded by email to Mr Wicken the following day. She referred in her email to having messages from Ms Williams explaining that the Respondent was in the process of initiating the furlough scheme into the business. She complained that the company had not entered into any discussion with her, that she had resented the reference to essential full-

time staff as it suggested that her role was not essential, and that her unavailability for full time work due to childcare commitments was the true reason why she had been dismissed.

25. Events thereafter are discussed below, when making our findings on the issues.

The issues

26. The issues were identified in a Case Management Order made by Employment Judge Dawson. Insofar as liability is concerned, they were as follows (omitting the issues relating to claims no longer pursued);

2. Detriment (Regulation 5 of the Part Time Workers (Prevention Of Less Favourable Treatment) Regulations 2000)
2.1 Did the respondent do the following things:
2.1.1 fail to furlough the claimant;
2.1.2 select the claimant for dismissal.
2.2 By doing so, did it subject the claimant to detriment?
2.3 If so, was it done on the ground that she was a part time worker?

3. Indirect discrimination (Equality Act 2010 s. 19)
3.1 A "PCP" is a provision, criterion or practice. Did the respondent have or apply the following PCPs;
3.1.1 choosing who to place on furlough according to whether they worked full time or part time;
3.1.2 choosing who to select for dismissal according to whether they were full time or part time workers.
3.2 the respondent denies that it had those PCPs.
3.3 Did the respondent apply the PCPs to the claimant?
3.4 Did the respondent apply the PCP to women, or would it have done so?
3.5 Did the PCP put women at a particular disadvantage when compared with persons with men?
3.5.1 The claimant says that women are put at a disadvantage because they are less able to work full time due to childcare responsibilities. That is denied by the respondent.
3.6 Did the PCP put the claimant at that disadvantage in that she had childcare responsibilities ?

4. Holiday Pay (Working Time Regulations 1998)
4.1 Did the respondent fail to pay the claimant for annual leave that the claimant had accrued but not taken when their employment ended?

27. It seems to us that issues 2.1.1 and 2.1.2 are flip sides of the same coin. It is not disputed that the Respondent failed to furlough the Claimant, and instead dismissed her.

28. Regulation 5 of the Regulations reads as follows:

5.— Less favourable treatment of part-time workers
(1) A part-time worker has the right not to be treated by his employer less

favourably than the employer treats a comparable full-time worker–
(a) as regards the terms of his contract; or
(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.
(2) The right conferred by paragraph (1) applies only if–
(a) the treatment is on the ground that the worker is a part-time worker, and
(b) the treatment is not justified on objective grounds.
(3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.
(4) A part-time worker paid at a lower rate for overtime worked by him in a period than a comparable full-time worker is or would be paid for overtime worked by him in the same period shall not, for that reason, be regarded as treated less favourably than the comparable full-time worker where, or to the extent that, the total number of hours worked by the part-time worker in the period, including overtime, does not exceed the number of hours the comparable full-time worker is required to work in the period, disregarding absences from work and overtime.

29. Mr Henry, who appeared for the Respondent, did not argue that dismissing the Claimant did not amount to a detriment for the purposes of Regulation 5. We consider that he was right not to do so.

30. Mr Henry focussed his argument on Reg 5(2)(a). He contended that the Claimant was dismissed not because she was a part-time worker, but because the Respondent no longer needed someone to fulfil her role.

31. The question of why the Claimant was selected for dismissal will be dealt with below.

32. The questions posed by issues 3.1.1 and 3.1.2 are flip sides of the same coin; if the Respondent based its decision on choosing whom to place on furlough according to whether an employee was a full-time or part-time worker, then it would seem to follow that it based its decision on whom to select for dismissal on the same factor. That certainly seems to us to be the case in the situation before us.

33. Why was the Claimant dismissed?

34. In addition to Kim and Gabriel, whom we have already mentioned, the pub employed a man named Tom as a part-time chef, a woman named Teya, Teya's sister Zara, a man named Alex, and another Tom. All of those named, except Kim and Gabriel, worked part time.

35. In addition, Ms Williams worked in the pub. She worked long hours – her working day might start before 08:00hrs with deliveries, and not end until closing time at night.

36. All of the part-time staff were dismissed. The two full-time members of

staff were retained. Ms Williams was neither dismissed nor furloughed. Her employment status was probably not the subject of proper consideration.

37. In order to decide why the Claimant was selected for dismissal, we must first identify who made the decision.

38. We find that the decision to dismiss the Claimant, and the other part-time members of staff, was made by Mr Wicken. Our reasons for so finding are as follows:

(a) The text messages indicate that Ms Williams was under the impression that the Claimant would be furloughed. She asks the Claimant for information apparently relevant to the furlough scheme. She refers to the bookkeeper and accountant getting in touch with the Claimant. She told us in evidence, and we accept, that the accountant was working with Mr Wicken, and we think it probable that the accountant was advising Mr Wicken. Ms Williams' text messages at paragraphs 20 and 21 above indicate surprise and confusion at being told by the Claimant that she hadn't been furloughed;

(b) It is, of course, possible that Ms Williams' text messages were part of some ruse on her part to mislead the Claimant into thinking that Ms Williams was not party to the decision. In her evidence, Ms Williams did appear at times to be concerned with whether answers might harm the Respondent's case, for example, she appeared extremely reluctant to use the word "dismissal". But we think that both her evidence on this point and her text messages at the relevant time were honest;

(c) Ms Williams told us that her relationship with Mr Wicken had been abusive. We are mindful that we have not heard from Mr Wicken. But in her evidence, Ms Williams told us that she worked very long hours for low wages – something like £520 per month – and that she was not paid a divided by the company on top of that. She had only a 5% shareholding in the Respondent. That she worked such hours, for so little pay, supports her contention about the nature of her relationship with Mr Wicken;

(d) We have Mr Wicken's own words, in documents in the bundle. There were long messages, which look like Facebook messages sent to the Claimant by him. To set those messages out in full would unduly extent these reasons. But in one, he says that he was "…*not involved as from 5-12-2019 Inez took out Sole Tenancy of the Royal Oak…thus ending my management role in the Pub and you became an employee of the new Tenant.*" Although Mr Wicken had, we were told, left the UK for The Gambia, the Claimant's employer remained the same. As for the suggestion that Mr Wicken was no longer involved in managing the

Respondent company, that he replied to the Claimant in the email mentioned in paragraph 23 above is inconsistent with that;

(e) In the same Facebook message, Mr Wicken writes "*I believed you was discharged as The Royal Oak no longer required your part time services*";

(f) In a Facebook message on the same page in the bundle – whether it is part of the same message is not clear – Mr Wicken wrote "…*I personally responded to ACAS and set down the position as I understood the circumstances of the time – Inez did I believe lay you off…*". Why Mr Wicken was engaged with the Respondent to the extent of responding to ACAS, if he no longer had any involvement, would be surprising. We find that he remained involved in managing the company, albeit he was not physically present in the UK. We do not accept as accurate his suggestions that Ms Williams was the decision maker.

(g) Mr Wicken sent other emails to the Claimant. In a long message sent from the Claimant's mobile phone on 28/04/2020, she had asked for the Respondent to consider placing her on furlough. If the Respondent wouldn't do that, she asked that it consider allowing her to take leave, so that she remained an employee. If it would not do that, and genuinely considered that there was a redundancy situation, she asked that the Respondent "*…use a fair process to* make (her) *redundant*".

(h) Mr Wicken's response included the following:

> "*Keely*
>
> *I have responded to you clearly and given you the decision.*
> *…*
> *If Inez has confused you then take it up with her personally. Bureika has finalised your casual part time position and deemed you not an essential worker for furlough.*
> *…*"

It is noteworthy that Mr Wicken not only responds from his own email account, but using the first person;

(i) The Claimant sent Mr Wicken a reply. She received this reply from him on 29/04/2020;

> *Keely*
>
> *The decision has been made and we have dealt correctly with this, your personal issues with Inez and how you organise your family*

caring is not for me to respond

We have furloughed our deemed essential worker under the circumstances …"

(j) Later that same day, after a further message from the Claimant, Mr Wicken replied;

For complete clarity your employment with Bureika has ended and matters have been concluded

As stated we have furloughed those employees considered essential and full time to be retained pending resolution of current position fo closure of The Royal Oak
…"

(k) In an email to Acas dated 19/05/2020, Mr Wicken wrote

I'm very sorry but Ms Timbrell is clearly indicating matters that was never discussed or agreed upon by me the Company MD and Secretary who has always dealt with payroll and employment matters.

I cannot agree further and believe that I have authorised a proper conclusion of her employment

If other matters have been discussed with Inez she was not in a position or authority to have agreed furlough with Keely, perhaps Keely is of a different opinion but I can see on evidence to support her claim
…

39. We consider, on the basis of the above material and what Ms Williams told us in her live evidence, that Mr Wicken was the decision maker. We think that he probably took advice from the Respondent's accountant. We find that Ms Williams did not take part in the decision making process.

40. The question then becomes, why did Mr Wicken decide to dismiss the Claimant?

41. In addition to the communications referred to above, we also have a lengthy Facebook post from Mr Wicken. It is not possible, from the copy in the bundle, to tell when it was made. Much of the post consists of what can only be described as a rant by Mr Wicken about what he believes to be shortcomings in "*English Social Society*", and which we do not need to set out. But he does make comments that are directly relevant to this case. He says "*The COVID-19 support Furlough scheme was I believe a great support to maintain full time paid employment"*. In apparent reference to the Claimant, he writes "*I am amazed that one part time bar staff that worked irregular hours and less than 16hrs week averaging less than 30hrs a month got so offended for not being retained and furloughed when Pubs was ordered to close down in March 2020 has now made a*

claim…".

42. Addressing us in closing on the part-time worker regulations, Mr Henry submitted that it would be difficult for us to find the Claimant's treatment was purely based on part-time status. The word "purely" was, he recognised, a gloss. Insofar as the claim in respect of indirect sex discrimination is concerned, it is a gloss that would lead us into error. It suffices for the Claimant if the protected characteristic had a sufficient influence on the outcome – see Nagarajan -v- London Regional Transport[3].

43. Although there are references to only essential workers being furloughed by the Respondent, in almost every instance that reference is accompanied by a reference to part time or full-time status. In his Facebook post referred to in paragraph 41 above, he expressly states his understanding that the furlough scheme only covered full time employees.

44. We find that the Claimant was selected for dismissal because of her part time status. We find that Mr Wicken adopted, on behalf of the Respondent, a policy that part time staff would be dismissed, and not offered furlough. His repeated references to the Claimant's part time status lead us to that conclusion.

45. For the purposes of the claim under the Equality Act, it is not necessary for us to determine whether or not Mr Wicken's decision was taken purely for that reason. We are satisfied that the dominant reason why he selected employees for furlough or dismissal was their part time status.

46. We are mindful that Ms Williams was neither furloughed nor dismissed. Because of her position as a director of the company as well as an employee, we consider that her treatment by the company is of little use in identifying whether or not Mr Wicken adopted a policy that part time employees should be dismissed rather than furloughed.

47. The answer to the questions posed in issues 3.1.1 and 3.1.2 is that the Respondent did indeed have a policy of choosing whom to dismiss and whom to place on furlough based on part time status.

48. The Claimant was dismissed as a result of the application of that policy to her by Mr Wicken. The answer to the question posed in issue 3.3 is that the policy was applied to the Claimant.

49. Issue 3.4 poses the question, did the Respondent apply the policy to women, or would it have done so? The answer is that it applied the policy to its part time staff. Both men and women were impacted by it. But it seems to us that the question posed in issue 3.5 is perhaps more apt; did the policy put women at a particular disadvantage when compared with men? Mr Henry acknowledged that, if a policy of dismissal based on part time status were found by us to have been adopted, that would put the Claimant, and women generally, at a disadvantage.

[3] [1999] IRLR 572, HL.

50. Issue 3.6 asks, did the policy put the Claimant at a disadvantage in that she had childcare responsibilities. We find that it did. Her childcare responsibilities prevented her from undertaking full time work.

51. The list of issues did not identify an argument that the policy would be justifiable under s19(4) of the Equality Act. That may be understandable, as the Respondent's primary case was that it had no such policy. But Mr Henry sought to contend that, if we found that there was such a policy, it would nonetheless be justifiable under s19(4).

52. S19 provides as follows:

19 Indirect discrimination
(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

53. We having found that there was a discriminatory policy, the question is, whether the Respondent can show that it was a proportionate means of achieving a legitimate aim.

54. We do not underestimate the challenge that the lockdown presented to the hospitality industry. We accept that, in adopting the policy, Mr Wicken was seeking to ensure the survival of the Respondent, so that it could resume trading when circumstances permitted. We accept that that is a legitimate aim.

55. Was the policy a proportionate means of achieving that?

56. The proportionality of the means chosen for achieving that aim is for us, the Tribunal, to judge. We have to make our judgment based upon a fair and detailed analysis of the working practices and business considerations involved – see Hardy & Hansons PLC -v- Lax[4].

57. We have already found that the aim of the policy was legitimate. The Respondent's pub had been required to close. The aim that the policy sought to pursue – the survival of the Respondent – was itself unrelated to any discrimination based on sex. The policy was capable of achieving, or helping to achieve, the legitimate aim, by reducing the expenditure on staff whose work would not be needed so long as the pub was unable to trade.

[4] [2005] EWCA Civ 846 [2005] I.C.R. 1565

58. The policy impacted on the majority of the Respondent's staff. We have no evidence as to the impact on people other than the Claimant. Its impact on the Claimant was significant. She was not able to work full time because of her childcare responsibilities. Although the sums she was earning may not appear large, it would be wrong to find that they were not significant to her.

59. What consideration was given, or should have been given, to alternative measures? It seems to us that a reasonable employer in the Respondent's position would have considered placing all its staff on the furlough scheme. The evidence set out above indicates that Mr Wicken did not give any real consideration to placing part time workers on furlough. He appears to have misunderstood that it was only available to full time workers. When asked by the Claimant to consider putting her on furlough, he brushed the request off. Although we were told by Ms Williams that furloughing staff would have incurred some expense, related to the fact that the Respondent no longer has the services of its then- accountant, that does not seem to us to have formed part of the reasoning – if the refusal to consider furloughing part time staff at all seriously can be termed "reasoning" – of Mr Wicken.

60. Mr Wicken not only closed his mind to the possibility of furloughing part time staff, he also refused the Claimant's request that she be put on leave – we understand this to be unpaid leave. He refused her request that, if that was unacceptable to him, the Respondent undertake a fair redundancy process.

61. We find that the Respondent's policy pursued a legitimate aim, but was not a proportionate means of doing so. The Respondent could and should have given serious consideration to other options, such as furloughing part time staff or offering unpaid leave. There is no good reason why these were not seriously considered.

62. We do not find that the Respondent is able to make out a s19(4) defence.

63. Turning back to the consideration of the claim under the part-time worker regulations, we have already found that the Claimant was dismissed because of her part time status. We see no reason why the conclusion should be any different when considering the position under the regulations.

64. Turning now to the claim in respect of holiday pay, under the Working Time Regulations. Mr Henry focussed his argument in closing on the contention that the Claimant's entitlement to holiday pay should be calculated on the average of what she earned in the previous 13 weeks.

65. The Working Time Regulations, as in effect from 06/4/2020, provide as follows:

16.— Payment in respect of periods of leave
(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 and regulation 13A, at the rate

of a week's pay in respect of each week of leave.
(2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3) and the exception in paragraph (3A) .
(3) The provisions referred to in paragraph (2) shall apply–
(a) as if references to the employee were references to the worker;
(b) as if references to the employee's contract of employment were references to the worker's contract;
(c) as if the calculation date were the first day of the period of leave in question;
(d) as if the references to sections 227 and 228 did not apply;
(e) subject to the exception in sub-paragraph (f)(ii), as if in sections 221(3), 222(3) and (4), 223(2) and 224(2) and (3) references to twelve were references to—
(i) in the case of a worker who on the calculation date has been employed by their employer for less than 52 complete weeks, the number of complete weeks for which the worker has been employed, or
(ii) in any other case, 52; and
(f) in any case where section 223(2) or 224(3) applies as if—
(i) account were not to be taken of remuneration in weeks preceding the period of 104 weeks ending—
(aa) where the calculation date is the last day of a week, with that week, and
(bb) otherwise, with the last complete week before the calculation date; and
(ii) the period of weeks required for the purposes of sections 221(3), 222(3) and (4) and 224(2) was the number of weeks of which account is taken.
(3A) In any case where applying sections 221 to 224 of the 1996 Act subject to the modifications set out in paragraph (3) gives no weeks of which account is taken, the amount of a week's pay is not to be determined by applying those sections, but is the amount which fairly represents a week's pay having regard to the considerations specified in section 228(3) as if references in that section to the employee were references to the worker.
(3B) For the purposes of paragraphs (3) and (3A) "week" means, in relation to a worker whose remuneration is calculated weekly by a week ending with a day other than Saturday, a week ending with that other day and, in relation to any other worker, a week ending with Saturday.
(4) A right to payment under paragraph (1) does not affect any right of a worker to remuneration under his contract ("contractual remuneration") (and paragraph (1) does not confer a right under that contract).
(5) Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and, conversely, any payment of remuneration under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

66. The effect of Reg 16(e)(ii) is that, as the Claimant had been employed for more than 52 weeks, her entitlement to holiday pay is to be calculated by

reference to her average pay over 52 weeks. That is subject to a consideration of whether s224(3) or s223(2) – referring to weeks in which no remuneration was payable – is concerned. It seems to us that those are questions going to remedy, rather than to liability. As to the question of what is the time period by reference to which her remuneration is to be calculated, we consider that the answer to that is, subject to any s224(3) or s223(2) considerations, or any transitional provisions relating to the change in April 2020, 52 weeks.

67. For the reasons we have explained, we uphold the Claimant's claim for indirect sex discrimination under the Equality Act 2020, her claim under the Part time workers regulations, and – subject to the qualification referred to – her claim under the working time regulations

Remedy

68. The parties were able to agree certain questions going to remedy. They agreed that, had the Claimant been furloughed, she would have been paid £36.46 per week. They agreed that the Claimant's claim in respect of holiday pay should be met with an award of £135.47 per month. And they agreed that the appropriate award pursuant to s38 of the Employment Act 2002 – it being admitted that there had been a failure to give the written particulars required by s1 of the ERA 1996 – is £90.94.

69. We are grateful to the parties for the efforts in reaching agreement on these matters, and for the helpful way in which the remaining dispute was identified and addressed.

70. The parties identified their remaining dispute as concerning the amount of any Vento award, and the duration of any future loss.

Vento

71. The Claimant in her schedule of loss sought an award of £9,100. This is at the top end of the lower bracket of the updated Vento guidelines.

72. The Respondent contended that a sum at the bottom of the lower end should be awarded. Mr Henry pointed out that the Covid-19 pandemic was going to have caused the Claimant hurt feelings, and that is not the Respondent's fault.

73. It is right that the pandemic may have caused the Claimant hurt feelings, and we are mindful of this. But the evidence before us shows that the Claimant was hurt by her dismissal. She was incredulous at being told that, rather than being furloughed, she was dismissed. She was clearly very upset.

74. In response to her communications with the Respondent – communications which, as we have already observed, were remarkably courteous and restrained, she met with high-handed responses from Mr Wicken, who also criticised her on social media.

75. Although we agree that the bottom bracket of the Vento guidelines is appropriate, we consider that an award at the top of that bracket is warranted. We award the Claimant £9,100 in compensation under this heading.

Duration of future loss

76. The Claimant found new employment on 30/09/2020. She contends that she should be awarded a sum reflecting what she would have received had she been furloughed – the weekly sum was agreed – until that date.

77. The Respondent contends that there are any number of reasons why a pub might experience decreasing trade. A new pub may open up the road. There are ups and downs in the hospitality industry. We were told by Ms Williams that business was seasonally low before the pandemic struck. The Respondent contends that, for those reasons, the Claimant's future loss should be limited to 1 week's pay.

78. We find the Respondent's argument to invite us to engage in an unwarranted degree of speculation.

79. The Respondent also mentions that, because she was not working for it during the pandemic, she would have been free to work longer hours at the other pub, unrelated to the Respondent, at which she worked. But the pandemic and its impact on pub opening makes that, we consider, an unrealistic argument, and the Respondent did not ask that the Claimant give specific evidence on remedy, so as to be able to cross-examine her on that.

80. Had the Claimant been furloughed, it is overwhelmingly likely that she would have remained on furlough until she found her new job. We think that the appropriate measure of her financial losses run from 20/03/2020, to 30/09/2020. From that sum would need to be deducted one week's wages, the agreed amount of which was £45.47.

Acas code

81. The list of issues identifies, at issue 5.14, the following questions:

Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the claimant and, if so, by what proportion up to 25%?

82. The Respondent's argument on this point was simply that there was no grievance.

83. We consider that the Acas Code did apply. The Claimant's text messages from 21/04/2020 onwards would have been interpreted by a reasonable employer as raising a grievance.

84. The question of the date of termination is not, we think, relevant here.

Although the ET3 appears to accept the date of termination given in the ET1 – 27/04/2020 –when we came to consider remedies, both parties invited us to consider the date of termination as being 20/04/2020, and we agreed to do so. That means that the grievances were post-termination. But that does not mean an employer can ignore them – see Base Childrenswear Ltd v Otshudi[5].

85. We find that the Respondent did unreasonably fail to comply with the Acas code.

86. We further find that its failure to do so was serious. Other than ignoring the Claimant entirely or directly hurling vulgar abuse at her, it is difficult to see that the Respondent could have behaved more poorly. Mr Wicken's responses to her were arrogant and high-handed.

87. Because it is possible to envisage an extreme case in which an employer could have behaved in a worse way re the Code, we do not award an uplift of 25%. We do, however, think an uplift very near the top is warranted. We award an uplift of 22%.

Interest

88. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996/2803, reg 6, provide as follows:

(1) Subject to the following paragraphs of this regulation—
(a) in the case of any sum for injury to feelings, interest shall be for the period beginning on the date of the contravention or act of discrimination complained of and ending on the day of calculation;
(b) in the case of all other sums of damages or compensation (other than any sum referred to in regulation 5 and all arrears of remuneration, interest shall be for the period beginning on the mid-point date and ending on the day of calculation.
(2) Where any payment has been made before the day of calculation to the complainant by or on behalf of the respondent in respect of the subject matter of the award, interest in respect of that part of the award covered by the payment shall be calculated as if the references in paragraph (1), and in the definition of "mid-point date" in regulation 4, to the day of calculation were to the date on which the payment was made.
(3) Where the tribunal considers that in the circumstances, whether relating to the case as a whole or to a particular sum in an award, serious injustice would be caused if interest were to be awarded in respect of the period or periods in paragraphs (1) or (2), it may—
(a) calculate interest, or as the case may be interest on the particular sum, for such different period, or
(b) calculate interest for such different periods in respect of various sums in the award,
as it considers appropriate in the circumstances, having regard to the provisions of these Regulations.

89. The rate of any interest to be awarded was conceded by Mr Henry to be

[5] [2019] EWCA Civ 1648 [2020] I.R.L.R. 118.

8%.

90. Interest on the sum awarded in respect of Vento runs, we consider, from 20/04/2020 to the date of our decision.

91. Interest on all other sums runs from the mid point date, until today's date. The mid-point date is calculated as provided for by Reg 4(2), and is half way between 20/04/2020 and the date of our decision.

92. For the sake of completeness, no arguments were advanced before us on the following issues:

    (a) That the Claimant had not taken reasonable steps to replace lost earnings (issue 5.9)
    (b) That the Claimant had suffered any personal injuries (issue 5.12);
    (c) Polkey-type arguments (issue 5.13)

93. We have considered compensation in respect of the discrimination claim. Although we uphold the claim under the part-time workers regs, we make no separate award for that claim, as to do so would amount to double-recovery.

94. We went through the calculation of the Claimant's compensation at the hearing, and the calculations were agreed. The total sum to be awarded to the Claimant was calculated to be to £14,105.97.

95. However, those calculations were based on the award under s38 of the Employment Act 2002 should be subject to the uplift of 22% for the unreasonable failure to comply with the Acas code. As the judgment was being prepared, it became apparent that this appeared to be an error, as s38 is not listed in Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, and therefore no uplift should be applied to that element of the award. There would be a consequent impact on interest.

96. Upon revisiting the calculations, it appeared that there may have been a mathematical error. The error identified regarding s38 should have led to a slightly lower sum being awarded, but the revised calculations came to a slightly higher sum. We therefore directed that the parties be sent notice of the revised calculations, and asked to make representations by 13th December 2021, on the following questions:

    (a) Whether an award under s.38 EA 2002 can be subject to an uplift, and;
    (b) Whether the calculations that the Tribunal had sent to them, which are indicated below, were agreed.

97. The parties were sent the figures that are set out below. They were also given a total, which was £14,131.

98. No response was received from either party.

99. The Claimant' compensation is to be calculated as follows:

(a) Her financial losses as a result of her dismissal. 20th March to 30th September = 27 weeks and 5 days @ 36.46 per week. From that sum should be deducted £45.47, representing 1 week's wages. 24.8 weeks (as 2.9 weeks paid at full rate as holiday pay) £904.75. This sum was as worked out and agreed at the hearing. With the 22% uplift, it comes to **£1,103.80**.
(b) To that sum should be added £135.47, representing the agreed sum in respect of holiday pay. With the 22% uplift, it comes to **£165.27**;
(c) To that sum should be added a sum representing the holiday pay that the Claimant would have accrued on furlough. Parties agreed that that would be 2.9 weeks at the full weekly rate, a total of £131.86. With the 22% uplift, this comes up **£160.87**;
(d) The sum of **£90.94**, representing the award pursuant to EA2002 s38
(e) Vento compensation £9,100 with 22% uplift **£11,102**;
(f) Interest on the award for injury to feelings, calculated and agreed at the hearing, in the sum of **£1,423.49**;
(g) Interest on financial losses **£91.52**.

100. The total sum is therefore **£14,137.89**.

101. The above sum is very slightly higher that the total calculated and communicated to the parties, when their observations were invited. Rather than delay matters further, the judgment will be given in the sum that we calculate to be correct. However, the parties are reminded that Rule 71 of the Rules of Procedure contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, provides as follows:

Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

102. If either party considers that there is a mistake in the calculation of the sum above, they may wish to apply for reconsideration.

Employment Judge Hughes
Date: 21 December 2021

Judgment & reasons sent to parties: 12 January 2022

FOR THE TRIBUNAL OFFICE