

**Case No's:**  
**1600693/2018**  
**1601041/2018**  
**1601042/2018**



# **EMPLOYMENT TRIBUNALS**

**Claimants:** Mr Stewart Brooker  
Mr Michael Davies  
Mr Larry Ford

**Respondent:** R & M Williams Limited

**Heard at:** Cardiff (in person)

**On:** 15 February 2022

**Before:** Employment Judge E Sutton

## **Representation**

**Claimants:** Mr Barklem (Counsel)

**Respondent:** Mr Paur (Counsel)

# **RESERVED REMEDY JUDGMENT**

1. The Respondent shall pay Mr Brooker compensation for unfair dismissal in the total sum of £25,797.80, subject to the usual statutory deductions.
2. The Respondent shall pay Mr Davies compensation for unfair dismissal in the total sum of £11,423.00, subject to the usual statutory deductions.
3. The Respondent shall pay Mr Ford compensation for unfair dismissal in the total sum of £26,109.68, subject to the usual statutory deductions.
4. No recoupment of benefits are necessary under the Employment Protection (Recoupment of Benefits) Regulations 1996 for any Claimant.

# REASONS

## Preliminary

1. The three Claimants were represented by Mr Barklem (counsel), and the Respondent was represented by Mr Paur (counsel). I am grateful to them both for their assistance in this matter. Mr Brooker attended the hearing and gave evidence. To support his case, I also heard evidence from Mr Steven May who was the Director of the Welsh Division of Roalco Limited. I also heard evidence from Mr Davies and Mr Ford. I was also provided with an agreed hearing bundle which included witness evidence from each Claimant and a schedule loss, and a counter schedule prepared by the Respondent.
2. I will not burden this judgment by including the complex history to these proceedings. This can be found in the decision of Employment Judge Beard dated 1 November 2018 (see [https://assets.publishing.service.gov.uk/media/5cde99bb40f0b652ba4721f6/Mr\\_S\\_Mattravers\\_and\\_Others\\_v\\_Ian\\_Williams\\_Ltd\\_Others\\_-\\_1401044.2018\\_-\\_Judgment.pdf](https://assets.publishing.service.gov.uk/media/5cde99bb40f0b652ba4721f6/Mr_S_Mattravers_and_Others_v_Ian_Williams_Ltd_Others_-_1401044.2018_-_Judgment.pdf)).
3. Thereafter, the Employment Appeal Tribunal ('EAT') considered the matter following an appeal by the Respondent. The EAT upheld the decision of Employment Judge Beard by order dated 22 January 2020; namely that there was a TUPE transfer on 1 January 2018 (as set out in regulation 3(1)(b)(ii) of the Transfer of Undertakings (Protection of Employment) Regulations 2006) between Ian Williams and the Respondent, R&M Williams Limited.
4. By reason of the decision of the EAT, the Respondent now accepts that it is the relevant employer for the purpose of the present claims for unfair dismissal, and also accepts that the effective date of termination for each Claimant was 2 January 2018. I was made aware at the outset of the hearing that liability was no longer in issue.

## The issues

5. The specific issues which I need to consider when determining the basic and compensatory award for each Claimant in their respective claim for unfair dismissal, as addressed by counsel in closing submissions, are as follows:

- (1) In relation to Mr Brooker, born on 26 April 1954 (now age 67):
  - a. When his employment began;
  - b. What his gross weekly pay was;
  - c. What the notice period was;

- d. Whether a future loss of earnings of 10 months is just and equitable in all the circumstances;
  - e. Whether a loss of statutory rights should be included, and if so, how much.
- (2) In relation to Mr Davies, born on 26 January 1964 (now age 58):
- a. What his gross weekly pay was;
  - b. Whether a future loss of earnings of 12 months is just and equitable in all the circumstances;
  - c. Whether a loss of statutory rights should be included, and if so, how much.
- (3) In relation to Mr Ford, born on 27 April 1949 (now age 72):
- a. What the notice period was;
  - b. Whether a future loss of earnings of 12 months is just and equitable in all the circumstances;
  - c. Whether a loss of statutory rights should be included, and if so, how much.

## The legal framework

6. The only remedy for unfair dismissal sought by each Claimant is compensation. The legislation provides for basic and compensatory awards. The key parts of the Employment Rights Act 1996, for the purpose of the current claims, are as follows:

### **118.— General.**

(1) Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—

- (a) a basic award (calculated in accordance with sections 119 to 122 and 126, and
- (b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126).

### **119.— Basic award.**

(1) Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—

- (a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,
- (b) reckoning backwards from the end of that period the number of years of employment falling within that period, and
- (c) allowing the appropriate amount for each of those years of employment.

(2) In subsection (1)(c) “the appropriate amount” means—

- (a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,
- (b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and
- (c) half a week's pay for a year of employment not within paragraph (a) or (b).

(3) Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty years.

### **123.— Compensatory award.**

*(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of 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 in so far as that loss is attributable to action taken by the employer.*

*(2) The loss referred to in subsection (1) shall be taken to include—*

*(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and*

*(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.*

*(3) x*

*(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.*

*(5) x .....*

7. For the avoidance of any doubt, the compensatory award is to fully compensate each Claimant as if they had not been unfairly dismissed, but not to award a bonus or punish the Respondent. Additionally, in terms of the future loss of earnings claimed, whilst looking into the future is always a speculative exercise, I have a wide discretion over my decision as regards the appropriate period.

### **Findings of fact**

8. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed bundle of documents.

### **In relation to Mr Brooker**

#### **a. Effective date of employment**

9. Mr Brooker did his very best in evidence, but found it extremely difficult to recall when exactly he began working for Roalco Limited and how the figure of 16.4 years had been arrived at as set out in his schedule of loss at pg 112. The figures in the bundle range (as regards his employment commencement date) from 1998, 2000 to 2001. He told me that he began working for Roalco Limited 'in around' 2000 and was employed as a stone mason. Importantly, Mr Brooker's account was corroborated by Mr May who I found to be a clear and straight forward witnesses. Mr May had been the Director of the Welsh Division of Roalco Limited and was able to explain events between 2000 – 2013. He was clear in his written and oral evidence that Mr Brooker began working for Roalco in 2000 and that during that time, he employed Mr Brooker on the sites for Blaenau Gwent Council.

10. I have looked at the contemporaneous records to assist me further in ascertaining when Mr Brooker's employment most realistically began. Although Mr Paur sought to limit the number of years to 12 (as that had been the

previously agreed redundancy period), there was no cogent evidence that 2006 was a significant date. The document from HMRC dated 2 February 2021 provides a helpful summary of Mr Brooker's employment history from 1999 to 2020 [pg 113] and the Respondent did not challenge the veracity of this document. The submission of the Respondent that there was a gap in employment in around 2005 was not supported by the written documentation or oral evidence.

11. In my judgment, the HMRC document is the best evidence that 2000/01 was the first period that Mr Brooker began working for Roalco Limited. Roalco was TUPE transferred to Ian Williams Limited in either 2013 (according to Mr Brooker) or 2014 (according to Steven May), but what matters (for the purpose of my decision) is that Mr Brooker, on the balance of probabilities, had around 17 years of continuous employment from 2001 until the effective date of termination on 2 January 2018.
12. There is no specificity regarding when during 2000/01 Mr Brooker began working for Roalco Limited and on behalf of Mr Brooker, Mr Barklem limited his submissions to 16 years. I accept that there is clear evidence to that effect, and find that Mr Brooker was continuously employed by the Respondent for a period of 16 years.

**b. What Mr Brooker's gross weekly pay was**

13. Various figures are unhelpfully quoted in the bundle, and Mr Brooker was unable to explain the differences when questioned by Mr Paur. However, in closing, Mr Paur agreed that Mr Brooker's gross weekly pay was £523.77 – helpfully pointing towards the spreadsheet like document from Ian Williams at pg 118.
14. The limit on a week's pay for calculating the basic award for unfair dismissal was £489 at the time. I find that Mr Brooker's gross weekly pay was capped at £489.
15. By reason of issues (a) and (b) above, and based on Mr Brooker being entitled to 1 ½ weeks gross pay for each year of employment (as he was above the age of 41 throughout), I find that the basic award for Mr Brooker is **£11,736** (16 x 1.5 x £489).

**c. What the notice period is**

16. In closing submissions the parties (very helpfully) had moved forward and agreed that 12 weeks, at a net weekly figure of £417, was the appropriate

amount for this head of claim, which totalled **£5,004**. For the avoidance of doubt, I agree these figures.

**d. Whether a future loss of earnings of 10 months is just and equitable in all the circumstances**

17. I remind myself that issues of mitigation are matters of fact and the burden of proof is on the Respondent. Mr Brooker does not have to prove he has mitigated his loss. The Respondent has to show that Mr Brooker acted unreasonably.

18. I have had regard to the written evidence which highlights that Mr Brooker did make some enquiries in his search for new employment. In particular, in February 2018 with Dean O'Leary [pg 115], in August 2018 with GEE. C Roofing [pg 116] and in October 2018 with Dunkerton Utilities [pg 117]. He was cross examined, quite properly, as to whether this was the extent of his searches. He explained that this was not the case, and that he had made further enquiries, but accepted that this was not evidenced in writing, and that he did 'stick' to local businesses as opposed to looking further afield. In Mr Brooker's words, he was 'one of the oldies' and jobs would often go to younger workers, but that he really tried. He stated that he was not in receipt of any benefits, notwithstanding that he is now aged 67, and that he was really keen to obtain another job. It was noticeable that two prospective employers attended the tribunal to speak to the efforts made by Mr Brooker to secure work with them. It was unnecessary for me to hear from them in the end, but their presence was noted.

19. Mr Brooker claims a future loss of 10 months from 3 April 2018 to 1 February 2019 at a rate of £417 per week which totals £18,070 ( $£417 \times 52/12 = £1,807 \times 10$ ). Mr Barklem submitted that the lack of documentation regarding searches for alternative employment can be explained by Mr Brooker mainly using word of mouth and being reliant on local offers. With such an approach, he submitted that there would not be detailed records. The Respondent says that the period claimed is excessive and that no award should be made as (i) Mr Brooker was offered a contract and (ii) he made no real effort to obtain alternative work.

20. I agree with Mr Paur that 10 months is excessive. I have considered the efforts made by Mr Brooker, the difficulties he faced due to his age, and find that a 5 month period would be just and equitable in all the circumstances. On the basis of a weekly net amount of £417, that totals **£9,035** ( $£417 \times 52/12 = £1,807 \times 5$ ).

**e. Whether a loss of statutory rights should be included, and if so, how much**

21. This head of claim relates to the value of accrued statutory rights that have been lost. Where an employee begins a new job following the termination of their employment, they will need to accrue 2 years' continuous service before they will have acquired the right to claim unfair dismissal or a statutory redundancy payment, and may have lost the right to a lengthy statutory notice period if they have been employed for several years. There is no particular figure that should be awarded, but it is usually around £250 to £500.

22. In *Countrywide Estate Agents & Ors v Turner* UAEAT/0208/13/LA, the Employment Appeal Tribunal held that the Employment Tribunal was entitled to award 2 weeks' gross pay (limited to the weekly pay in force) for loss of statutory rights, as the claimant would take another 2 years to accrue those rights.

23. In Mr Brooker's case, the Respondent submitted that there should be no award under this heading, stating that he has not subsequently obtained further work, but if a limited award were to be made, that it should be limited to £250. I am prepared to make an award under this head in the sum of **£450** which takes on board the argument of Mr Barklem that a loss of such rights is more acute for a claimant such as Mr Brooker who has less time to build up such rights more easily. That is less than 2 weeks' gross pay, but reflects a proportionate approach for the reason given.

**In relation to Mr Davies**

**a. What his gross weekly pay was**

24. It was agreed that Mr Davies commenced work with the Respondent on 1 January 2010 [pg 136] and that he had 8 years of continuous employment.

25. Mr Davies says his gross weekly pay was capped at £489 based on his pay slips which show a gross weekly pay of £500 [see pg's 125-128] for the period October - November 2017 onwards. The Respondent says it was £465.27 (gross) based on information provided by Ian Williams [pg 142]. Mr Paur on behalf of the Respondent says I should discount the pay slips provided as they may not provide a true picture. On this issue, I prefer the evidence of Mr Davies, as verified by his pay slips. This is the best evidence when compared with the information provided by Ian Williams, which although helpful (as an amalgamated document), the provenance is unknown, and it is obvious that

some of the information contained therein (eg, the stated dates of birth of the employees) is wrong.

26. By reason of the above, and based on Mr Davies being entitled to 1 ½ weeks gross pay for each year of employment (as he was above the age of 41 throughout), I find that the basic award for Mr Davies is **£5,868** (8 x 1.5 x £489).

**b. What the notice period is**

27. In closing, the Respondent provided the figure of £381 x 8 = £3,048. Mr Barklem, provided a net figure of £420 x 8, stating that the figure was £3,360. On the basis of my finding regarding Mr Davies' gross weekly pay, I find that Mr Barklem's figures are to be preferred, and that the notice period should be quantified in the sum of **£3,360**.

**c. Whether a future loss of earnings of 12 months is just and equitable in all the circumstances**

28. Mr Davies states that he commenced new employment on 23 January 2018 for LCB Construction at a rate of £652 per fortnight (or £326 per week). In closing, Mr Barklem stated that Mr Davies claims the difference between 52 weeks at £420 (£21,840) and 52 weeks at £326 (£16,952) which equates to a difference of £4,888. I have not been provided with any written evidence regarding Mr Davies' current employment. There is no good reason why this has not been provided. Mr Davies has had the benefit of legal representation who would have been aware of the need to provide this. It is also of concern that in oral evidence, Mr Davies was unable to say what his rate of pay actually was, and was unable to confirm that the stated (written) amount of £326 per week was accurate.

29. Mr Paur on behalf of the Respondent submitted that there should not be any award for a future loss of earnings in light of the evidence submitted, but stated that if I was against him on this point, that an award limited to one month would be reasonable. One month at £420 equates to £1,820 (£420 x 52/12). I agree that in the absence of any written documentation to verify the difference in rates of pay and having regard to Mr Davies' inability to assist me when giving oral evidence, that a modest award only in the sum of **£1,820** would be just and equitable in all of the circumstances.

**d. Whether a loss of statutory rights should be included, and if so, how much.**

30. The Respondent says that statutory rights should be limited to £250. Mr Davies says that £450 is the reasonable figure and that this should be slightly less than



Mr Brooker as Mr Davies was able to get another job. As a compromise between the two, and having regard to Mr Davies finding another job fairly quickly, I consider that he should receive **£375** under this head.

**In relation to Mr Ford**

**a. What the notice period is**

31. It was agreed that Mr Ford commenced employment on 1 January 2002 as a carpenter. It was agreed that the basic award, based on 16 years of continuous service, was **£11,166.48**.

32. The dispute related to the number of years notice Mr Ford was entitled to. However by the end of the closing submissions, Mr Barklem agreed with the Respondent that the notice period was limited to 12 weeks at £381.40, which totalled **£4,576.80**. For the avoidance of doubt, I agree with these figures.

**b. Whether a future loss of earnings of 12 months is just and equitable in all the circumstances**

33. I have carefully considered the evidence submitted by Mr Ford in relation to the steps he has taken to attempt to secure new employment. In particular:

- (1) Jan/ Feb 18 Contacted RSL Builders, John O'Halloren, Wates foreman Gareth Price and BJ Hoskins (x 4), by telephone [PDF 151]
- (2) Feb 18 Contacted Coran Davies builders, Cardiff merchandising and Leon Construction [PDF 151], by telephone
- (3) March 18 Contacted M I Space, Mears Group Ltd, site foreman Wayne Farrah, and RSL builders, by telephone [PDF 152]
- (4) April 18 Contacted Lewis and Perkins, M I Space and Fab Flooring by telephone [PDF 152]
- (5) May 18 Contacted Lewis Perkins, Mears group, and Action Rail Civil Engineering
- (6) 18.06.18 Search for employment (Coran Davies Contractors) [132]. Also an undated letter at [133] from RSL Builders. Also contacted Dragon Construction, and DDP

- (7) July 18      Contacted IHM Home Improvements, MI Space and Fab Flooring
- (8) Aug 18      Contacted C H Walsh and Sons, TES Dec Director Tom and John O'Halloren

34. At the time of his dismissal, Mr Ford was over 68 ½ years old. When cross examined regarding the fact that 65 is the retirement age, Mr Ford explained that he '*had no option but to carry on*'; explaining (in particular) that he had an outstanding mortgage. He also explained that he enjoyed his work and wanted to carry on.

35. Mr Paur submitted that Mr Ford was offered a new contract, made no real effort to mitigate his loss, and taking everything into account, including his age, that the award for future loss of earnings should be nil. Mr Barklem submitted that Mr Ford's future losses totalled £19,832.80 on the basis of 52 weeks claimed at £381.40. I found Mr Ford to be a straight forward and credible witness and considered that he did take reasonable steps to attempt to secure a new job which was no small task for a man of his age (as he candidly stated to me). Whilst I consider a 12 month period to be disproportionate, in my judgment, a 6 month period is just and reasonable in all the circumstances; particularly having regard to the multiple inquiries made by Mr Ford over an 8 month period. This totals **£9,916.40** (£381.40 x 52/12 x 6).

**c. Whether a loss of statutory rights should be included, and if so, how much**

36. I consider that **£450** is an appropriate sum taking account of the fact that a loss of such rights is more acute for a claimant such as Mr Ford who has less time to build up such rights more easily.

**Conclusions**

37. By reason of the above, the Respondent shall pay Mr Brooker compensation for unfair dismissal in the sum of **£25,797.80** comprising of:

(1) Basic award	<b>£11,736</b>
(2) Compensatory award	
(a) Non-payment of notice	<b>£4,576.80</b>
(b) Loss of earnings	<b>£9,035</b>
(c) Loss of statutory rights	<b>£450</b>

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38. By reason of the above, the Respondent shall pay Mr Davies compensation for unfair dismissal in the sum of **£11,423** comprising of:

- |                              |               |
|------------------------------|---------------|
| (1) Basic award              | <b>£5,868</b> |
| (2) Compensatory award       |               |
| (a) Non-payment of notice    | <b>£3,360</b> |
| (b) Loss of earnings         | <b>£1,820</b> |
| (c) Loss of statutory rights | <b>£375</b>   |

39. By reason of the above, the Respondent shall pay Mr Ford compensation for unfair dismissal of **£26,109.68** comprising of:

- |                              |                   |
|------------------------------|-------------------|
| (1) Basic award              | <b>£11,166.48</b> |
| (2) Compensatory award       |                   |
| (a) Non-payment of notice    | <b>£4,576.80</b>  |
| (b) Loss of earnings         | <b>£9,916.40</b>  |
| (c) Loss of statutory rights | <b>£450</b>       |

Employment Judge E Sutton

Date: 9 March 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 22 March 2022

FOR EMPLOYMENT TRIBUNALS  
Mr N Roche