EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109285/2021

Final Hearing Held by CVP on 28 March 2022

Employment Judge M Robison

Mr R Thompson	**Claimant** **In Person**
The Management Committee of Pollock Golf Club	**Respondents** **Represented by** **Mr T Muirhead -** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the respondent shall pay to the claimant the sum of ***SIX THOUSAND TWO HUNDRED POUNDS AND NINETY PENCE (£6,200.90)*** in respect of unfair dismissal.

REASONS

1. At the outset of this hearing Mr Muirhead advised that, following the decision of Employment Judge Strain issued 21 September 2021 (with reasons supplied on 18 March 2022) that the claimant was an employee, liability for unfair dismissal is conceded.

2. This hearing therefore considered remedy only.

3. I heard evidence from the claimant only. The respondent had lodged a file of productions (to which the claimant had contributed documents) and the claimant also lodged a number of documents (which broadly related to liability). The documents are referred to either as R or C and page number.

Findings in fact

4. The claimant commenced employment with the respondent on or about 1 March 2017.

5. Initially the claimant was employed to help with club and private events and worked on a rota system for evening and week-end work. His duties were varied.

6. The claimant's hours varied from week to week. He worked more hours in the summer months and less in the winter. This was primarily because he mainly worked in the evenings, and the club was open in the summer months until 11 pm but closed at 5 pm in the winter months.

7. This flexibility suited the claimant because he had two other jobs.

8. The claimant's earnings for the year from end March 2020 to January 2021 (adding May 2020) were as follows:

Date	Payment type	units	rate	Amount net	Amount gross	page
28/3/20	Basic	26.50	8.21	£217.57	£217.57	R33
23/4/20	Leave of absence	1.00	146.8	£416.80	£416.80	R34
22/6/20	Basic	144	8.72	£1103.36	£1,255.68	R35
24/7/20	Basic	148	8.72	£1062.38	£1290.56	R36
26/8/20	Basic	55	8.72	£502	£479.40	R37
24/9/20	Basic	128	8.72	£760.73	£1116.16	R38
27/10/20	Basic	55	8.72	£471.34	£479.60	R39
23/11/2020	Basic	67	8.72	£522.40	£584.24	R40

16/12/20	Basic	65.99	8.72	£545.57	£575.45	R41
May 2020				£416.80	£416.80	
Total 2020				**£6,018.95**	**£6,832.26**	
2021						
20/1/21	-	-	-	£87.54		R42
24/1/21	Basic	9	8.72	£150.42	£78.48	R43

9. The claimant was furloughed in April and May 2020. No pay slip for May was produced. The claimant was paid £416.80 net/gross for the month of May.

10. The claimant's furlough ended when some restrictions were lifted for outdoor events, which meant that golf clubs could open. He took on the role of a so-called "covid bouncer" which was to ensure that no-one went into the clubhouse because indoor activity was still banned.

11. Towards the end of 2020, the claimant requested to be put on furlough again but the respondent instead paid him holiday pay of 40 hours on top of the small number of shifts that he had completed in November. He was informed by whatsapp on 26 November 2020 (C1). Again in December the respondent paid the claimant holiday pay of a similar amount on top of a small amount of shifts undertaken (R41).

12. The claimant's average gross weekly pay for the period from March to December 2020 (43 weeks, including May) was £1 58.89; and net weekly pay £139.98.

13. The claimant's P60 end of year certificates showed that he earned £9,636.12 for the year to 5 April 2019 (R46) and £6,551.94 for the year end to 5 April 2020 (R47).

14. The claimant's second job was with an organization called Apex, having commenced employment some eight years ago. He was not put on furlough in this job. He was paid minimum wage on an hourly basis for the hours he

worked and the arrangement was flexible depending on their level of orders. Two months of the year, usually August and September, he would undertake a servicing trip when he would work more hours.

15. For the tax year 2020/1, as at 25 January 2021, he was paid gross to date £2,732.

16. He also worked for an organisation called Sonik Pocket having commenced employment approximately three and a half years ago towards the end of 2019. He worked 32 hours per week and was paid an annual salary of £20,000.

17. The claimant's employment with the respondent terminated on 22 January 2020.

18. Following his dismissal, the claimant sought similar flexible work during the evenings which he could combine with his other employment. He did not seek alternative employment where day time hours were offered. He needed flexibility so that he could combine working hours with his other two jobs. He realised the golf club model would suit his needs. He sought another similar arrangement with another golf club. Because of the pandemic other golf clubs were not hiring at that time. He applied for a job with Royal Troon Golf Club which he saw advertised in August 2021.

19. The claimant commenced employment with them on 1 September 2021 (R52). The claimant earned £494.23 to 25 September 2021 (R51). He thereafter earned between £800 and £900 each month.

20. The claimant continued in employment with Apex following his dismissal.

21. During 2021 , from January to July, he was paid as follows:

Date	**Payment type**	**Net**	**Page number**
25/1/21	Basic	£550	R76
22/2/21	Basic	£600	R77

29/3/21	Basic	£655	R78
27/4/21	Basic	£655	R79
25/5/21	Basic	£655.20	R80
29/6/21	Basic	£655.20	R81
27/7/21	Basic	£710	R82
Total		£4,480.40	

22. The claimant continued to work for Sonik Pocket. His salary remained at the same level after his dismissal, although was impacted by furlough (R83 - R92). His employment with Sonik Pocket has now terminated.

Relevant law

23. Under section 113 Employment Rights Act 1996 (ERA), if the Tribunal finds that the claimant has been unfairly dismissed, it can award compensation under Section 112(4). Section 118 states that compensation is made up of a basic award and a compensatory award.

24. A basic award is based on age, length of service and gross weekly wage (section 119). The amount is one and a half week's pay for every year that the employee was not below the age of 41, one week's pay for each year of employment when he was not below the age of 22, and a half week's pay where the employee was not within those bands, subject to a maximum.

25. A "week's pay" is calculated in accordance with the provisions of the Employment Rights Act 1996, Part XIV Interpretation, Chapter II, sections 220 to 230.

26. For the purposes of calculating compensation, section 229(2) of Part XIV Chapter II states that "where under this chapter account is to be taken of remuneration or other payments for a period which does not coincide with the periods for which the remuneration or other payments are calculated the

remuneration or other payments shall be apportioned in such manner as may be just.

27. Section 123(1) ERA states that the compensatory award is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer. This generally includes loss of earnings up to the date of the hearing (after deducting any earnings from alternative employment), an assessment of future loss, if appropriate a figure representing loss of statutory rights, etc.

28. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRA) provides that if the ACAS Code of Practice entitled "Disciplinary and Grievance Procedures" applies and it appears to the Tribunal that the claim concerns a matter to which the Code applies and that the employer has failed to comply with the code in relation to that matter, and the failure was unreasonable, then the Tribunal may, if it considers it just and equitable in all the circumstances, increase the compensatory award it makes to the employee by no more than 25%.

Tribunal deliberations and decision

29. The respondents, rightly in my view given the circumstances, conceded liability in this case, that is they accepted that the claimant was unfairly dismissed.

30. The focus then of this hearing was only on remedy, and in particular the level of compensation.

A week's pay

31. In order to calculate compensation due, I must determine the level of "a weeks pay", which was in dispute in this case. Even where a claimant does not have normal working hours, a week's pay will normally be calculated using a 12 week reference period (sections 220-224 of the ERA).

32. However, if remuneration is paid in irregular amounts at irregular intervals, as in this case where the remuneration fluctuates according to the season,

section 229(2) ERA will apply. This stipulates that where account has to be taken of payments outside the 12-week period they should be apportioned in such manner as may be just.

33. Mr Muirhead calculated a week's pay to be £148.05, as set out in his counter schedule of loss (R101). This was calculated on the basis of the claimant's average earnings for the period from March to December 2020.

34. It should be noted that this calculation apparently misses out pay for May 2020. That is presumably because no pay slip was lodged relating to that month. The claimant's evidence was that he thought that could be an error on the respondents' part. In any event I accepted the claimant's unchallenged evidence that he was on furlough for May, as he had been in April when he received £416.80 gross/net. I accepted his evidence that he had also received £416.80 while on furlough for the month of May.

35. If pay for May is included in the calculation it would appear that the average gross weekly pay for March to December of 2020 was in fact £158.89.

36. In contrast the claimant argued for a different approach to the calculations. His position was that the average should include 2018/2019, which was a pre-pandemic year when he earned more.

37. The claimant relied on the P60s he had lodged showing that his average gross and net earnings over tax years 2018/2019 and 2019/2020. I understood him to suggest that average weekly pay for those two years was £155. I did note that the claimant's earnings were lower in the latter year, which was also a pre-pandemic year.

38. As Mr Muirhead recognised, Tribunals often have to take a broad brush approach to the calculation of damages. S. 229(2) permits me in a case such as this, where the claimant's earnings were irregular and fluctuated seasonally, to look over such period as I consider "just".

39. In the circumstances I decided that to take account of the months from March to January in respect of which pay slips had been lodged (but including the month of May). The average weekly pay then for that period was £158.89. I

take account of the fact that 2021 was also a pandemic year when earnings would have been disrupted.

Basic award

40. The claimant is entitled to one week's pay calculated as above for each full year of his employment with the respondent (ie the gross figure), which is 3 x £158.89, which is a total of £476.67.

Compensatory award

41. The compensatory award is that which the Tribunal considers just and equitable and relates to losses which the claimant has suffered as a result of the actions of the employer.

42. The compensatory award takes account of the net weekly wage, which I have calculated to be £139.98 (£6,018.95 divided by 43 weeks for period March to December 2020, including May).

43. The calculation is based on the losses running to a relevant cut off date, which may be the date of the Tribunal, less sums earned during that period in mitigation of the losses suffered.

Cut off date for losses

44. The claimant obtained replacement employment which commenced 1 September 2021 . He submits that is the cut off date for his losses.

45. That would mean that he is seeking compensation for 31 weeks,

46. However, the claimant argues that he should receive compensation for 39 weeks. This is because the claimant argues that the respondent was "lining up" to dismiss him from November 2020 when, instead of paying furlough, he was paid his holiday pay. He seeks his average weekly wage for those additional weeks.

47. I did not accept that argument. As I understood it, there was no obligation on any employer to put an employee on furlough, and an employer could pay holiday pay to ensure that an employee was in receipt of income when there

was no work for them to do because of lockdown. Mr Thompson advised in any event that he would get limited shifts during the winter months because the club was not open in the evenings.

48. Mr Muirhead on the other hand argued that losses should be calculated to the date of the hearing. That would therefore include the claimant's increased wages at Royal Troon Golf Club, which should off set the losses. The claimant gave evidence (in cross examination) that his income had increased "significantly" with Royal Troon Golf Club after his first month with them, and he indicated that he was in receipt of around £800 to £900 per month.

49. Mr Muirhead argued that the claimant would otherwise get the benefit of a ''windfall" as a result of being dismissed by the respondent, and the respondent would suffer a penalty. He argued that the additional pay should be off set against the losses.

50. In support of that argument he relied on the case of *Ging v Ellward Lancs Ltd* 1991 ICR 222. That case confirms the general rule that a tribunal should off set the employees new earnings against their losses to calculate the overall loss. This would mean that where a claimant gets a better paid job after a period of unemployment, the compensation will be based on the pay in the previous employment, less what has been earned in excess of that pay in the new job.

51. However it has been recognised that the application of this rule can lead to iniquitous results, in particular where a claimant has secured a higher paid permanent job prior to the date of the hearing. I took account of the fact that section 123(1) ERA requires tribunals to award such sums as they consider just and equitable which leaves some scope for them to use their discretion to circumvent the more undesirable aspect of the *Ging* decision. *(See Lytlarch Ltd v Reid 1991 ICR 216 and Fentiman v Fluid Engineering Products 1991 ICR 570).*

52. Taking account of that, and bearing in mind that this is a matter for judicial discretion, the EAT in *Whelan and anr* v *Richardson* 1998 ICR 318 held that the employment tribunal had been correct to treat as the cut-off point the date

that the employee secured permanent employment that was at least as well paid as the original job. The principle therefore would appear to be that compensation will be calculated until the date of the hearing unless the claimant obtains a job that pays at least as well as the previous job, when the cut off date is the date of commencement of the new better paid job.

53. In a case such as this, where the claimant obtains new employment in the period between the date of dismissal and the date on which the tribunal assesses compensation, it may well be appropriate to cut off losses on the date the new job started. Indeed, I consider that it would be unfair to penalise the claimant for getting a better paid job after he was dismissed. Since ultimately the amount of compensation due is that which the Tribunal considers just and equitable, and in all the circumstances of this case, I conclude that it is just and equitable to designate as a cut off date the date on which the claimant's replacement employment with Royal Troon Golf Club commenced.

54. This means that the renumeration earned there is irrelevant, as is the fact that the claimant advised (in submissions) that his employment with Sonik Pocket has been terminated in August 2021 .

55. Thus the losses for the period amounts to 31 weeks x £139.98 which is £4,339.38.

Reduction for mitigation

56. The respondent, relying on the year to date earnings for 2020 in respect of the claimant's job with Apex, and pay in 2021 , argued that the claimant had worked additional hours to compensate for the loss of his job with the respondent. Mr Muirhead argued that this should apply as partial mitigation and should be deducted from the sums which the respondent was due to pay.

57. He relied on an e-mail which the claimant sent to the respondent and the Tribunal setting out his losses (R44). In particular he relied on the following paragraph:

"As the annual pay from Pollock is under £10,000 for the past two years and since my employment there I have always required to have additional working arrangements to support myself, I work at a start-up company Sonik Pocket with whom I am still employed as well as with Apex Gas Gen with whom I am still employed, since this situation has arisen I have had to rely more heavily on my income from these two sources taking extra hours from Apex when ever they are available. This has not replaced my earnings from Pollock but it has allowed me to survive overwhelming debt".

58. The claimant's position was that any increase in hours undertaken with Apex would relate to hours he would worked anyway and would be in addition to anything he had earned with the respondent. He explained that the reason he earned more with Apex in 2021 than in 2020 was because of the pandemic; the year to date figure in his pay slip for January 2021 was not representative of what he would earn in a normal year from Apex. Although he was not furloughed, other employees were, and he was kept on in a limited role "to keep the doors open/the lights on", whereas during 2021 those furloughed employees came back to work. He explained that he worked at Apex between the hours of 9 to 5, whereas his employment at Royal Troon Golf Club is in the evenings. His dismissal from the respondent freed up time to do more hours at a similar time and with similar flexibility but it did not give him any time to work at Apex. In short, he would have done those hours anyway, in addition to shifts he would take with the respondent.

59. Mr Muirhead made the point that the claimant had been ordered to provide copies of all wage slips in respect of his employment with Sonik Pocket and with Apex for the period from 1 January 2020 until the date he commenced with Royal Troon Golf Club. Mr Muirhead pointed out that the claimant had only lodged pay slips from January 2021, and not from January 2020 as required by the order. The claimant's position was that he had misread the order and understood it to be for the period from 2021 after he was dismissed from his employment.

60. That document order was issued on 7 March 2022 and was due to be complied with by 15 March (and it is assumed that it was complied with by

that date). Given that the claimant is not legally represented, and it is understandable that he might think that wage slips were only sought for the period after he had been dismissed, and given that the respondent produced the bundle, but did not, apparently point out this error to the claimant, I accept the claimant's position that he had misread the terms of the order, and that it was not an attempt to avoid revealing his 2020 earnings (if that is what Mr Muirhead sought to argue).

61. Further, his explanation why his earnings for 2020 should be so low as at January 2021 is entirely plausible given the pandemic. I noted too that he had been paid £550 in January 2021, when he was still working for the respondent. He also said that at certain times of the year he would undertake a servicing trip which involved travel throughout the country which had inevitably been disrupted by the pandemic.

62. I therefore accepted that it was not appropriate to discount losses accrued between January and September caused by the actions of the employer with the income which the claimant would have in any event received from Apex.

63. Mr Muirhead argues in any event that the claimant has failed to mitigate his losses, by failing to get another job to make up the lost income, such as with Amazon who were advertising at the time, or applying for a driving job. The claimant's position was that it was difficult to get a job with similar flexibility which fitted in with his other two jobs in terms of hours, not least because of the pandemic.

64. I accepted that it was difficult for the claimant to secure similar flexible employment which could fit around the hours he worked in his other two jobs. I noted that the claimant was dismissed when the country was again in lockdown from January to April 2021. I accept that given the implications of the pandemic, that he could not get another job at a golf course, and that he applied for the first job which he saw when opening up which was in August 2020.

65. I therefore accept that the claimant had sought to mitigate his losses.

66. Mr Muirhead also submitted that the claimant was likely to be put on furlough had he remained with the respondent, but the Tribunal heard no evidence to that effect and the claimant was not questioned about that during his evidence. In any event the claimant would have received furlough pay and while there was no evidence about the level of furlough pay that he might have been entitled to receive, he had previously received around £420 per week which is not far off what his losses have been calculated at. Because this was brought up in submissions, the claimant mentioned in response that he believed that other employees had been hired to do the job that he had been doing and would have done had he not been dismissed.

Loss of statutory rights

67. Mr Muirhead argued that the claimant should receive £300 for loss of statutory rights. The claimant, having researched matters, now argues that he should receive £600.

68. While there is no set figure, I take the view that £300 is an appropriate award in this case, where the claimant had only built up three years of service in the job with the respondent, and where he had, by August 2020, secured new employment, so could calculate continuous service in that new job from then.

Procedural unfairness

69. Where a respondent has failed to comply with the ACAS disciplinary and grievance code of practice, the compensatory award can be uplifted to a maximum of 25%.

70. Although the respondent in this case had conceded unfair dismissal, that related not only to the substantive decision but also to the fact that no procedure had been followed prior to the claimant's dismissal. Mr Muirhead explained that the reason for this was because the respondent believed that the claimant was not an employee, so I assume that they were relying on that fact to conclude that there would be no requirement to follow any procedure before dismissing (R31 and R32).

71. That is a very risky position for an employer to take and that is not least because it would be best practice to ensure procedural fairness when dispensing with the services of any worker, but also there are a range of employment protection rights available to those who are workers but not employees in any event.

72. In this case, the respondent sought to make it clear in the contract issued to him that the claimant was a "casual worker" and not an employee. That was apparently an attempt to avoid the legal obligations they would owe to employees. As is clear from the findings in fact made by EJ Strain, the reality of the situation was that the claimant's treatment and conditions pointed to him being an employee.

73. The respondent presumably thereby sought to avoid the implications of employment protection laws. The fact is that they operated on the mistaken understanding that the claimant was a worker and not an employee, and the risk was with them.

74. In this case, I find that there was a complete failure to comply with the ACAS Code of Practice and that failure was unreasonable. I find that the respondents' rationale did not in any way excuse their actions, even if that explained them. I therefore find that the compensatory award should be uplifted by 25% for the failure to comply with the requirements of the ACAS Code of Practice.

Holiday pay

75. I understood that the claimant accepted that he had received all of the holiday pay due to him. In so far as he argued for outstanding holiday pay, this appears to relate to the fact that he was "forced" without consultation or agreement to take holiday pay for the months of November and December 2020. As discussed above I did not accept that argument

76. I conclude that the claimant is not entitled to holiday pay.

Compensation table

Head of loss	Calculation	Total
Basic award	3 x £158.89	£476.67
Compensatory award		
Loss of statutory rights		£300
Loss from 23/1/21 to 1/9/21 (start of replacement job)	31 x £139.98	£4339.38
ACAS uplift (25%)		£1084.85
Total award		**£6,200.90**

77.

Employment Judge: Muriel Robison
Date of Judgment: 05 April 2022
Entered in register: 05 April 2022
and copied to parties