



EMPLOYMENT TRIBUNALS

Claimant: Ms J Finch

Respondent: The Distribution Business Ltd

Heard at: Watford ET: by CVP **On:** 17 February 2022

Before: Employment Judge Tuck QC (sitting alone)

Appearances

For the Claimant: In Person

For the respondent: Mr S Way, Counsel

JUDGMENT ON REMEDY

- 1. The claimant is awarded compensation of £8138.16.**
- 2. The compensation for the prescribed period of 20/10/20 – 1/9/21 is £5167.92.**
- 3. The difference of £2970.24 is payable immediately.**

REASONS

4. Judgment on liability was promulgated on 6 December 2021, setting out that the Claimant had been unfairly dismissed, and that there was a one third chance of her retaining her job had a fair procedure been followed.
5. I was provided with a joint bundle of documents of 128 pages which included an updated schedule of loss, witness statement and written submissions from the Claimant and a witness statement on behalf of the Respondent from Ms Martland. I heard oral evidence from both the Claimant and Ms Martland.
6. The claimant's schedule included a claim for 2 – 4 weeks compensation for failure to provide her with a written statement of particulars of employment as at

the date her claim for had been submitted. Mr Way submitted that this required an application to amend and was grossly out of time. He had not caused any searches to be undertaken as to whether the claimant was provided with full particulars, either at the outset of her employment in 2001 or on the TUPE transfer to the current respondent in November 2013.

7. Section 38 of the Employment Act 2002 is clear that a tribunal **must** award compensation to an employee where, upon a successful claim being made under any of the tribunal jurisdictions listed in Schedule 5 thereto (which includes unfair dismissal), it becomes evident that the employer was in breach of its duty to provide full and accurate written particulars under s1 ERA 1996. This provision does not give a freestanding right to compensation, and is not dependent on a claim having been brought under s11 ERA for a breach of a section 1 ERA duty; it is sufficient for the tribunal to make a finding that the employer was in breach of s1 ERA at the time the main proceedings were begun. I therefore determined that I did have jurisdiction to consider this issue, and no application to amend was required.

Facts

8. The claimant was given notice of dismissal in July 2020, and paid her three months notice; her effective date of termination was 20 October 2020, by which time she had 19 complete years of service over the age of 41. She received a statutory redundancy payment. On 30 October 2020 the Claimant applied for universal credit and job seekers allowance. She sought advice and assistance from the Job centre in creating a CV and applying for jobs. She applied for positions in January, February and April 2021, and secured an interview in May 2021 in which she was successful. She was due to start her alternative employment – with a scaffolding firm – on 2 August 2021, but was called to perform jury service that month such that her start date was delayed to 1 September 2021. She has continued in this alternative employment - in which she works fewer hours and earns less money than when employed by the respondent, to date.
9. The Claimant gave evidence that her job searches were hampered by national lockdowns when she could not access assistance support, and explained that her confidence and self esteem had been damaged by her dismissal. She was also advised by staff at the job centre that given her age (she is now in her 60s) and the large number of redundancies they were seeing in their area when the first furlough scheme had been due to end, she would find the job market a challenging one.
10. Ms Martland provided a statement setting out the periods during which the post holder who was retained was on furlough, and only receiving 80% of her salary, and during which she was on 'part time furlough', working three days per week and on furlough for two days. The retained postholder accepted a 10% pay cut. Ms Martland's evidence was not challenged by the Claimant.

11. The Claimant did however state that she would not have accepted a 10% pay cut, and pointed to the fact that she had refused to accept this in the spring of 2020 when she was asked to. She explained that she could not afford a pay cut – and if she was facing full or part time furlough, this would have made her more reluctant.
12. In relation to the provision of written particulars of employment, the Claimant produced her 'offer' letter dated July 2001. She was frank in stating that she did not recall whether she received full particulars when she started her role, particularly as she has moved house twice since then. It was put to the Claimant that she received a letter in November 2013 on the TUPE transfer setting out her terms and conditions. Ms Martland said this was the practice of the Respondent during her period of employment, which had commenced in February 2014. As set out above, Mr Way did not cause searches for any such letter to be made prior to today's hearing – despite being on notice of this claim and its legal foundation since receiving the Claimant's documents on 28 January 2022. The Claimant in answer to Mr Way said "if you say so; I do not have it, but I am sure I did get a letter. I am sure everyone got a letter".

Submission.

13. The claimant told me she had expected to remain with the Respondent until her retirement which she had planned to enter into on her 66th birthday in July 2022. She said she cannot now afford to retire at that date and will have to continue working for longer. Her losses were set out clearly in her updated schedule of loss, along with details of the benefits she received between her EDT and starting new employment.
14. Mr Way made the following submission:
 - a. The claimant had failed to mitigate her losses by looking for jobs from the date her notice period commenced. Had she done so and taken 6 months to find a job, her period of loss would have ended in January 2022.
 - b. Had her employment continued, she would have been on furlough during the periods the current post holder was, such that the rates claimed by the Claimant are too high.
 - c. The claimant should give credit for receiving her full rate of pay during her notice period rather than a furlough rate of 80%.
 - d. The claimant cannot show she did not have written particulars at the material time, and her not pleading this matter should prevent any claim.
 - e. The correct amount for loss of statutory protection is not the £500 claimed, but £250.

Conclusions.

15. I am satisfied that the claimant took reasonable steps to mitigate her loss.

16. Had her employment continued, she would have had periods of full and part time furlough, but I accept she would not have accepted a pay cut.
17. The claimant has claimed losses from her effective date of termination; I was provided with no legal basis for a submission that she should give credit for sums which were contractually due to, and paid to her, prior to that date.
18. I accept that the claimant had intended to continue in this role until her anticipated retirement in July 2022. Had a fair procedure been adopted she had a one third chance of achieving this aim.
19. In light of the Claimant's frank evidence, I am unable to find, on a balance of probabilities, that the Respondent was in breach of its obligation under s1 ERA at the date the ET1 was presented.
20. As to loss of statutory rights, I consider that the appropriate amount is one week's gross pay at the rate the Claimant earned during her employment with the Respondent.
21. The sums awarded to the Claimant are therefore as follows:

Basic Award: The Claimant had 19 full years of service over the age of 41: her grossly weekly wage was £423 at her EDT;	28.5 weeks x £423	£12,055
Compensatory Award:		
Loss of statutory rights.		£423
Loss of Earnings from EDT 20/10/20 until new job started on 1/9/21. (Prescribed period)	From October 2020 until 11 January 2021 the person who was retained worked full time. Claimant would not have accepted 10% pay cut: she suffered losses of: £356 net per week x 12 = <u>£4272</u> From 11 January 2021 until 30 September 2021 the retained worker worked "flexi-furlough", on furlough for two days per	<u>£15080.16</u>

	<p>week and working three days per week. $\text{£}356 / 5 = \text{daily rate of } \text{£}71.20.$ For working three days = $\text{£}213.60$ For furloughed two days $\text{£}71.20 \times 2 - 20\% = \text{£}113.92$ Weekly loss of $\text{£}213.60 + \text{£}113.92 = \text{£}327.52$</p> <p><u>X 33 weeks = £10,808.16</u></p>	
Holiday pay during employment from EDT to new employment commencing:	Assuming the claimant would have taken $\frac{3}{4}$ of her annual leave during the first $\frac{3}{4}$ of the year, she would have had 21 days of holiday pay at 100% of her weekly wage, i.e, $\text{£}356$ net per week rather than $\text{£}327.52$, there is a further shortfall due to the claimant therefore of: $\text{£}356 - \text{£}327.52 / 5 \times 21$	$\text{£}119.62$
Loss of earnings from 1/9/21 to date of remedy hearing, 7/2/22	<u>£356</u> x 28 Weeks	$\text{£}9968$
Future Losses:: 7/2/22 to 19/7/22 – which had been the claimant's anticipated retirement date:	Ongoing loss of difference between wage with respondent and that earned in new employment: $\text{£}163 \times 23$ weeks	<u>£3749</u>
SUMS TO BE DEDUCTED:	Redundancy payment Sums earned in mitigation $\text{£}193 \times 28$ weeks	- $\text{£}12,055$ - $\text{£}5404$

22. The award adds to a total of **£41,394.78**, less the deductions gives a sum of **£23,935.78**. This must be reduced by 66% the Polkey deduction, giving a compensatory award of **£8138.16**

23. The compensatory award for the prescribed period is $\text{£}10,808.16 + \text{£}119.62$, less 66% = **£5167.92**

Employment Judge Tuck QC

8 February 2022

Sent to the parties on:
07 March 2022

For the Tribunal Office: