EMPLOYMENT TRIBUNALS

Claimant: Mrs A Bickley

Respondent: Jarretts Motors Limited

HEARD AT: London South Employment Tribunal by CVP (Video)
On: 9 March 2022

BEFORE: Employment Judge C M Macey

REPRESENTATION:

Claimant: Mr Bithell, Free Representation Unit volunteer
Respondent: Mr Foster, Solicitor

RESERVED REMEDIES JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant is awarded £2,017.75 in respect of her claim for breach of contract. This is a gross sum.

2. The Claimant is awarded £8,164.22 in respect of her claim for unfair dismissal, consisting of:

   2.1 a NIL basic award; and

   2.2 a compensatory award of £8,164.22.

REASONS

INTRODUCTION

3. Judgment on liability relating to this claim was promulgated on 4 October 2021 ("Liability Judgement") under Rule 21 of the Employment Tribunals Rules of Procedure 2013 ("Rules") because the Respondent did not present a response. The Claimant's claims for unfair dismissal, breach of

contract and unpaid annual leave were successful. The Respondent was allowed to participate in this remedy hearing under Rule 21(3) of the Rules.

ISSUES

4. The issues for the remedy hearing were agreed to be as follows:

Unfair dismissal

4.1 What basic award is payable to the Claimant, if any?

4.2 If there is a compensatory award, how much should it be? The Tribunal will decide:

4.2.1 What financial losses has the dismissal caused the Claimant?

4.2.2 Has the Claimant taken reasonable steps to replace the lost earnings, for example by looking for another job?

4.2.2 If not, for what period of loss should the Claimant be compensated?

4.2.3 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? The Respondent said that the Claimant would have been dismissed in any event, therefore, any award should be reduced by 100%. The Claimant contended that she would not have been dismissed.

4.2.4 If so, should the Claimant's compensation be reduced? By how much?

4.2.5 Does the statutory cap of fifty-two weeks' pay apply?

Wrongful dismissal/notice pay

4.3 What was the Claimant's notice period? This was not in dispute: it was 5 weeks' notice.

4.4 Was the Claimant paid for that notice?

Holiday pay (Working Time Regulations 1998)

4.5 Did the Respondent fail to pay the Claimant for annual leave the Claimant had accrued but not taken when their employment ended?

Sums already paid by the Respondent

4.6 Has the Respondent already paid sums in respect of any of the above to the Claimant? If so, how much?

PROCEDURE, DOCUMENTS AND EVIDENCE HEARD

5. The form of this hearing was a remote hearing by CVP.

6. There was a bundle of documents. There were written witness statements and oral evidence from the Claimant and Mr Wilmouth the Managing Director of the Respondent. The Claimant produced a Schedule of Loss and the Respondent produced the Respondent's Response to the Schedule of Loss.

7. The Respondent instructed Mr Foster on 7 March 2022. On the same day Mr Foster sent Mr Bithell and the Tribunal a Notice of Acting, the witness statement of Mr Wilmouth and the Respondent's Response to the Schedule of Loss. Unfortunately, the email to Mr Bithell went into the junk folder of his email account. Mr Bithell was not aware that Mr Foster had been instructed or of the documents until the morning of 9 March 2022 when Mr Foster telephoned him. Mr Bithell requested an additional 20 minutes to prepare for the hearing. I allowed Mr Bithell an additional 30 minutes to prepare and decided to allow supplemental questions of the witnesses. Mr Foster didn't object.

FACTS

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.

9. The Claimant was employed by the Respondent (a car dealership) between 15 December 2014 and 5 August 2020 initially as a Sales Administrator until around June 2016. The Claimant was then placed in a dual role of marketing and Mr Wilmouth's personal assistant. Between June 2016 and 5 August 2020, she additionally worked as a cashier, purchase ledger clerk and an ad hoc Service Advisor. The Claimant was a flexible and trusted employee of the Respondent. The Claimant worked flexible shifts at the Respondent to accommodate her childcare.

10. The Claimant's gross annual basic pay was £19,340.40. Her gross weekly basic pay was £371.93. Her net weekly pay was £305.00. The Claimant's age at dismissal was 37. The Claimant did not claim benefits.

11. The Claimant's and the Respondent's annual pension contributions were 3% of the Claimant's annual basic salary. This equals £1,160.42 per annum and £22.30 per week.

12. Prior to working for the Respondent the Claimant had been employed as a Service Advisor from 2004 until she joined the Respondent.

13. The Claimant has children who are vulnerable. Her daughter had a pulmonary heart valve replacement in 2018. Her son has previously been hospitalised with respiratory issues. The Claimant has had to consider her vulnerable children when she has been looking for work following her dismissal.

14. From 18 March 2020 the Claimant was isolating at home because of her concern about bringing coronavirus into her household.

15. On 23 March 2020, the United Kingdom was placed into lockdown due to the Covid-19 pandemic. On 24 March 2020 the Claimant was placed on furlough by the Respondent [40-41].

16. On 5 August 2020 Mr Wilmouth sent a WhatsApp message to the Claimant asking if she could meet him [67] and they agreed to meet at 16.30 on 5 August 2020 [67]. At the meeting on 5 August 2020 Mr Wilmouth handed the Claimant a letter [68]. It stated "*Due to your position and a wish not to significantly unsettle staff, we have conducted a limited selection and consultation period. Your position itself is being made redundant.*"

17. It further stated "*Your redundancy calculation is £1859.69 which will be paid directly into your account next week. We do not expect you to work your notice period and this will continue to be paid at month end and we would like you to finish today*."

18. The Claimant was not given notice of dismissal or redundancy before 5 August 2020.

19. The Claimant did receive £1,859.69 on 7 August 2020.

20. Mr Wilmouth's evidence was that the Claimant received further payments of £1,319.19 and £781.85. The Claimant's evidence was that she received one further payment of £781.52 in June 2021. The original P45 of the Respondent [69-70] evidences this payment.

21. An email to Duncan Froude of the Respondent from Amanda O'Brien of the Respondent dated 15 June 2021 [75] states what payments payroll thought should have been made to the Claimant in July 2020. It also states: "*Amanda left in July but was owed some notice pay etc.…"*. When shown this email in cross-examination Mr Wilmouth conceded that it was possible that payroll had been using the wrong leaving date to calculate the payments due to the Claimant on termination.

22. I find that the Respondent's payroll based their calculations on an incorrect leaving date. The Claimant's leaving date was 5 August 2020, it was not in July 2020. I, therefore, find that the Claimant only received one further payment of £781.52 in June 2021 (in addition to £1,859.69 paid on 7 August 2020).

23. It is not disputed that as of 5 August 2020 the Claimant was owed £557.90 for accrued holiday outstanding on the termination of her employment.

24. In the Claimant's evidence she also stated that she had not been paid for the period from 1 August 2020 until 5 August 2020. The Claimant did not include this in her Claim Form. The Liability Judgment did not consider this claim. The Claimant's Schedule of Loss does not mention this claim or specify it as a head of loss. Nor did Mr Bithell make an application to amend the Claim Form to add this claim. I am, therefore, not going to consider this claim any further.

25. The Claimant wrote to the Respondent on 21 August 2020 [78] requesting that the Respondent place her on furlough in August, September and October 2020. Mr Wilmouth gave evidence that if the Respondent had acceded to her request, then the Claimant would have received 80% of her basic pay and, therefore, her loss of earnings should be only 80% of her basic pay. The Claimant did not accept in cross-examination that she would have been kept on furlough if she had not been dismissed. She gave evidence that her duties would still have needed to be undertaken. In the letter dated 21 August 2020 the Claimant had also offered to work from home as an alternative to furlough.

26. The Respondent has not provided evidence about other employees who were kept on furlough after August 2020 and how long they were kept on furlough.

27. I accept the Claimant's evidence that if she had not been dismissed she would not have been kept on furlough.

<u>What would have happened if the Claimant had not been unfairly dismissed?</u>

28. Mr Wilmouth gave evidence that this was a genuine redundancy situation and that there was no work available for the Claimant and there was an excess of staff for the work that was available. The Claimant gave evidence in cross-examination that she considered she was not genuinely redundant because the work she had been undertaking was distributed to other staff members at the Respondent. Mr Wilmouth conceded that some of her work was distributed to other staff, including to himself. He also stated on cross-examination that part of the Claimant's role had included verifying work that sub-contractors to the Respondent were undertaking, and this wasn't given to another staff member at the Respondent.

29. I find that part of the work the Claimant was undertaking for the Respondent did cease to exist, that being the verification of work carried out by the sub-contractors, and that her other tasks were redistributed to other staff members, including Mr Wilmouth.

30. The Claimant gave evidence that a fair procedure would have included placing her into a selection pool with other employees. The Claimant stated that there was another person at the Respondent who was in a similar position to the Claimant apart from doing more marketing than the Claimant.

31. Mr Wilmouth gave evidence that if a fair procedure had been followed the Claimant would have been placed into a selection pool of one. His evidence was that the Claimant was the only person in the Battle branch doing the sort of work she did, which was mainly as a stand-in for others as work demanded. He also confirmed that other roles at the branch included salespeople, administration staff, sales administrators, a service manager, two service advisors, a parts manager/ parts assistant, three or four technicians/ mechanics and a valetor. He stated that the accounts' function was a central accounts function that was based off-site.

32. When cross-examined about why the Claimant was in a unique position Mr Wilmouth stated the Claimant was essentially carrying out a cover role and was an excess person effectively.

33. Neither the Claimant nor the Respondent provided any other information or documents to support their evidence on what would have been a fair selection pool in this situation. The letter informing the Claimant of her redundancy [68] referred to conducting a limited selection procedure because of the Claimant's position and not wishing to significantly unsettle staff. There was no explanation in this letter why the Claimant's position had led to a limited selection procedure.

34. I find that there was at least one other person at the Respondent with whom the Claimant could have been pooled for selection for redundancy. The individual the Claimant identified in her evidence as being in a similar position to her other than carrying out more marketing. I do not accept the Respondent's evidence that the Claimant was in a truly unique position.

35. No evidence was put before the Tribunal about what selection criteria would have been used if the Claimant had been put into a pool with another employee.

36. I accept the Claimant's evidence that had she been placed into a pool with this other individual she would not have been dismissed because of the other value she added to the Respondent. The Respondent did not lead any evidence about this and Mr Foster did not cross-examine the Claimant on this point.

37. The Claimant's evidence was that if the Respondent had followed a fair procedure she would have been offered alternative employment. The Claimant identified two positions. The position of Trainee Service Advisor at the Crayford Branch of the Respondent and the position of Service Advisor at the Guildford branch of the Respondent. On cross-examination the Claimant conceded that the job advertisement [84] for the Trainee Service Advisor at the Crayford branch was posted online on 23 November 2020 and, therefore, would not have been available around the time she was being made redundant in August 2020.

38. The Service Advisor position job advertisement [83] was posted on 10 September 2020 and the advertisement indicates it had been posted onto Indeed's website 22 days ago. The Claimant in her letter dated 11 September 2020 to Mr Wilmouth [79] also referred to the advertisement for this role and that it had been advertised just 4 days after she was made redundant. On cross-examination Mr Wilmouth conceded that 22 days prior to 10 September 2020 was 19 August 2020. I find that the position of Service Advisor at the Guildford branch was available around the time the Claimant was being made redundant.

39. The Claimant lives in Battle in East Sussex. She is currently travelling to Brighton for work. Mr Wilmouth gave evidence that the journey from Battle to Guildford was approximately two and a half hours, and it would take longer if there was traffic. The Claimant in cross-examination stated that she would have considered the job position in Guildford. Given the Claimant's evidence that in her search for employment after her redundancy she needed to consider her vulnerable children I find that she would not have accepted the

position of Service Advisor in Guildford if the Respondent had offered it to her as alternative employment.

40. Mr Wilmouth gave evidence that there was a position in Southampton, 100 miles away from Battle. Again, for the reasons set out in the above paragraph I find that the Claimant would not have accepted the position in Southampton.

Claimant's income since dismissal

41. Following her dismissal, the Claimant was out of work for 5 months and 27 days. The Claimant stated that this was due to the pandemic and her parental responsibilities. When looking for a new position she needed something that would be suitable for her childcare responsibilities, and she needed to consider that her children were vulnerable. Her evidence was that she started searching for work within a few days after she was dismissed. That she made approximately 20-25 applications and had two interviews.

42. Mr Wilmouth gave evidence that the Claimant should have been able to find a position within the care industry or in catering in autumn 2020. On cross-examination the Claimant stated she had been looking for jobs in administration, cleaning, working in warehouses, catering, and healthcare. That she had been looking on Facebook and job agency websites. That she had made applications through Facebook and by email.

43. The Claimant has not provided documents to demonstrate her search for a new job between 5 August 2020 and 1 February 2021. The Respondent has not provided details of specific job positions that the Claimant could have applied for in autumn 2020.

44. I accept the Claimant's evidence that she had to consider her vulnerable children and her childcare responsibilities when she was searching for a new job. I also find that she was searching for jobs on Facebook and with job agencies, that she did make approximately 20-25 applications and that she did have two interviews.

45. On 1 February 2021 the Claimant started employment with the NHS (NHS East Sussex Partnership Trust) as a domestic assistant. She is still in this role.

46. Between 19 February 2021 and 24 March 2021 the Claimant worked for Hastings Insurance Services Limited. The Claimant left this position because it was not flexible enough to fit in with her childcare responsibilities.

47. On 25 March 2021 she started work with FFrench's Fish and she left FFrench's Fish in February 2022.

48. On 7 February 2022 she started work at Caffyns VW in Brighton (Caffyn's Plc) and is still working in that role.

49. It's not disputed that she received the following net sums up to 31 October 2021:

49.1 £1,189.71 from Hastings Insurance Services Limited for the period between 19 February 2021 and 24 March 2021;
49.2 £302.30 in February 2021;
49.3 £323.57 in March 2021;
49.4 £983.78 in April 2021;
49.5 £1637.34 in May 2021;
49.6 £1617.24 in June 2021;
49.7 £1653.94 in July 2021;
49.8 £1335.90 in August 2021;
49.9 £1,771.37 in September 2021; and
49.10 £1677.05 in October 2021.

50. In the Claimant's Schedule of Loss she claims an ongoing future loss of £300 per month. This was due to a reduction in the number of hours she worked for FFrench's Fish from 31 October 2021 onwards. The Claimant gave evidence that her hours at Ffrench's Fish reduced because they hired more staff. The other staff were given more hours and her hours reduced as a result.

51. Currently the Claimant is receiving net pay of £195 per month from the NHS and an NHS pension of 5.6% of gross earnings. Pay slips from the NHS [87-94] detail the Claimant's pension contributions from 1 February 2021 to 30 September 2021. The Claimant also works 20 hours per week for Caffyns VW and is paid a gross hourly rate of £11.57 per hour. She won't be entitled to pension at Caffyns until May 2022.

52. The Claimant incurred £12.54 in fuel expenses travelling to job interviews.

LAW

53. I have considered the legislation and caselaw referred to below.

Breach of contract – notice pay

54. An employer will be in breach of contract if they terminate an employee's contract without the contractual notice to which the employee is entitled, unless the employee has committed a fundamental breach of contract which would entitle the employer to dismiss without notice. If there is no expressly agreed period of contractual notice, there is an implied contractual right to reasonable notice of termination. This must not be less than the statutory minimum period of notice set out in section 86 of the Employment Rights Act 1996 ("ERA"). For someone who has been employed 5 years, this is 5 weeks' notice.

55. The aim of damages for breach of contract is to put the Claimant into the position they would have been in had the contract been performed in accordance with its terms. Damages for breach of contract are, therefore, calculated on a net basis, but may need to be grossed up to take account of any tax that may be payable on the damages. Damages relating to notice pay are subject to tax.

Unfair dismissal

56. The statutory provisions relating to the compensatory award are set out in section 123 ERA.

123 Compensatory award

(1) … the amount of the compensatory award shall be such amount as the tribunal consider 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 expense reasonably incurred by the claimant in consequence of the dismissal,
and
(b)… loss of any benefit which he might reasonably be expected to have had but for the dismissal.

…
(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 …

124 Limits of compensatory award etc.

(1) The amount of –
… (b) a compensatory award to a person calculated in accordance with section 123 shall not exceed the amount specified in subsection 1ZA.

(1ZA) the amount specified in this subsection is the lower of –
(a) [£88,519 - for dismissal in 2020/2021], and
(b) 52 multiplied by a week's pay of the person concerned.

<u>Polkey</u>

57. I need to consider whether any adjustment should be made to the compensation on the grounds that if a fair process had been followed by the Respondent in dealing with the Claimant's case, the Claimant might have been fairly dismissed, in accordance with the principles in **Polkey v AE Dayton Services Ltd [1988] AC 344.** The burden of proof is on the Respondent.

58. There are three possible outcomes: first, I may find that the Claimant would clearly have been retained if proper procedures had been adopted, in which case no reduction ought to be made. Second, I may conclude that the dismissal would have occurred in any event, with a possible delay to allow for a fair procedure. This may result in a limited compensatory award only to take account of any additional period for which the employee would have been employed had the proper procedure been adopted. Third, it may be impossible to say what would have happened, and I should make a

percentage assessment of the likelihood that the employee would have been retained.

59. In undertaking this exercise, I am not assessing what I would have done; I am assessing what this employer would or might have done. I must assess the actions of the employer before me, on the assumption that the employer would this time have acted fairly though it did not do so beforehand: **Hill v Governing Body of Great Tey Primary School [2013] IRLR 274 at para 24**.

60. As the Liability Judgment did not consider whether there was a fair reason for the dismissal in assessing **Polkey** I considered section 139 Employment Rights Act 1996. This provides, as far as relevant:

> *"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –*
>
> *(a) The fact that the employer has ceased or intends to cease-*
> *(i) to carry on the business for the purposes of which the employee was employed by him, or*
> *(ii) to carry on that business in the place where the employee was so employed, or*
>
> *(b) the fact that the requirements of that business-*
> *(i) for employees to carry out work of a particular kind, or*
> *(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,*
> *have ceased or diminished or are expected to cease or diminish."*

61. I also considered the Tribunal's decision in **Handley -v- Tatenhill Aviation (ET/2603087/2020**) that held that an employee who is supported under the Coronavirus Job Retention Scheme (CJRS) will not be unfairly dismissed simply because their employer decides to make them redundant when they could have furloughed the employee for longer.

CONCLUSIONS

Holiday pay accrued and outstanding on termination

62. The parties agreed that the Claimant had accrued holiday pay of £557.90 outstanding on termination.

63. The Claimant received a payment of £781.52 in June 2021.

64. I, therefore, award NIL for accrued holiday pay outstanding on termination.

Breach of contract – notice pay

65. The Claimant is entitled to 5 weeks' notice pay covering the period from 5 August 2020 to 9 September 2020.

66. £305.00 (net basic weekly pay) multiplied by five equals £1,525.00. This net amount grossed up equals £1,906.25. £22.30 (weekly pension contributions) multiplied by five equals £111.50. I award a total award of £2017.75.

Unfair dismissal

Unfair dismissal basic award

67. The Claimant's basic award entitlement is £1,859.65, which is calculated as follows:

Employment dates	15/12/2014 – 05/08/2020
Length of service	5 complete years
Age	37
Multiplier	5
Weekly wages	£371.93
Basic award	**£1,859.65**

68. The Claimant received a redundancy payment of £1,859.69 from the Respondent on 7 August 2020.

69. I, therefore, award NIL for the basic award.

Polkey

70. Firstly, I need to decide whether there was a genuine redundancy situation. The wording in section 139 ERA is wide and it must be considered whether the business' requirements for its employees to carry out work of a particular kind had ceased or diminished or was expected to cease or diminish, this is a question of fact for the Tribunal. Part of the Claimant's work had ceased to exist (checking the sub-contractor's work), and the business required fewer employees to carry out the other tasks the Claimant had been doing. I find this was a genuine redundancy situation. Further, agreeing with the rationale in **Handley,** the Respondent did not need to keep the Claimant on furlough instead of making the Claimant redundant.

71. Secondly, I need to consider what would have happened if the Respondent had carried out a fair procedure. I found that a fair procedure would have been to pool the Claimant with the individual she identified in her evidence. I also accepted the Claimant's evidence that if she had been pooled with this individual and fair selection criteria had been applied then the Claimant would not have been dismissed. Applying the principles of **Polkey** this means that no reduction should be made to the compensatory award.

72. This means I do not need to consider the issue of alternative employment. I do find, however, that in assessing **Polkey** it would not have been a requirement on the Respondent to offer the positions available in Southampton and Guildford to make the procedure fair. A reasonable employer also would not have offered alternative employment two to two and a half hour's drive away from where the Claimant lives.

Unfair dismissal compensatory award

73. In relation to the Claimant's immediate loss of earnings, I find that:

73.1 the Claimant suffered immediate loss of earnings (including pension contributions) of £6,709.65 from 10 September 2020 up to and including 31 January 2021;

73.2 the Claimant suffered partial immediate loss of earnings of £1,165.65 from 1 February 2021 up to and including 30 April 2021;

73.3 the Claimant did not suffer a loss of pension contributions between 1 February 2021 and 30 April 2021;

73.4 the Claimant had fully mitigated her loss by May 2021;

73.5 the economic uncertainty caused by the Covid-19 pandemic and subsequent lockdowns led to many prospective employers putting vacancies on hold. This economic background made it much more difficult for the Claimant to seek alternative employment, than under normal circumstances;

73 .6 the Claimant has taken reasonable steps to mitigate her losses. I accept that she needed to consider her vulnerable children when she was looking for work and this limited the number of suitable positions; and

73.7 the Claimant would not have been kept on furlough if she had not been dismissed so, I have calculated her immediate loss of earnings at the full amount.

74. In relation to the Claimant's future loss, I find that her reduction in hours due to the hiring of more staff by FFrench's Fish in November 2021 and the Claimant's subsequent decision to leave Ffrench's Fish in February 2022 and start working for Caffyn's VW in Brighton are not losses caused by the dismissal. They are not losses attributable to action taken by the Respondent.

75. The Claimant is entitled to her fuel expenses incurred when travelling to job interviews of £12.54.

76. I also award the Claimant £500 in respect of her loss of statutory employment rights.

Credit for sums already received

77. The Claimant received £781.52 from the Respondent in June 2021. £557.90 is in respect of her accrued holiday pay outstanding on termination. This leaves a further £223.62.

78. I have deducted £223.62 from the compensatory award.

79. I award the Claimant £8,164.22 in respect of the compensatory award for unfair dismissal.

Employment Judge Macey
Date: 24 March 2022

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