EMPLOYMENT TRIBUNALS

Claimant: Aaron Ireland

Respondent: Wing Lee Creative Ltd

Heard at: Watford (via CVP) **On:** 7th June 2022

Before: Employment Judge Dick

Representation:
Claimant: Mr Tim Sheppard (counsel)
Respondent: Mr Nigel Boulton (an employee of the Respondent)

RESERVED JUDGMENT ON REMEDY

1. For breach of contract by failing to pay the Claimant accrued holiday pay, the Respondent is ordered to pay to the Claimant the gross sum of £ 894.88.

2. For breach of contract by failing to give the Claimant notice of dismissal, the Respondent is ordered to pay to the Claimant £ 2783.54, being the net loss grossed-up.

3. The Respondent is ordered to pay to the Claimant compensation for unfair dismissal of £ 30091.57, made up as follows:
    a. A basic award of £ 92, calculated as set out below.
    b. A compensatory award of £ 29999.57, calculated as set out below.

4. The recoupment regulations apply. For the purposes of reg 4:
    a. The relevant period is 13th May 2020 to 6th June 2022.
    b. The prescribed element is £ 24,316.
    c. The total monetary award is £ 33769.99.
    d. The difference between the total monetary award and the prescribed element is £ 9453.99

REASONS

INTRODUCTION

1. The hearing on remedy followed my findings, made after a hearing on 5th and 6th May 2022, that the Respondent unfairly dismissed the Claimant, and was in breach of contract by dismissing the Claimant without notice and by failing to pay the Claimant three months' accrued holiday pay upon dismissal. I had already decided that a fair redundancy process could have been completed in two weeks and that the compensatory award for unfair dismissal would be the subject of a 60 % deduction under the principles in *Polkey* v *A E Dayton Services Limited* 1988 ICR 142.

PROCEDURE, EVIDENCE etc.

2. The remedy hearing took place on the Cloud Video Platform, all the participants (bar me) attending remotely. I am pleased to record that again there were no significant technological problems and that all those appearing over CVP were able to participate fully.

3. Mr Boulton, who also acted for the Respondent at the liability hearing, explained that Mr Jackson was not able to attend for personal reasons, which were explained to me and which I accept. The Respondent was content to proceed (as it had been at the liability hearing) with Mr Boulton standing in for Mr Jackson. Although the parties had only recently received my reserved judgment on liability, both confirmed that they were not asking for any more time in which to consider whether a settlement might be reached.

4. In discussion with the parties I identified the issues I would have to decide, some of which were as follows:

    a. Having decided that there was 40 % chance that the Claimant would have remained in employment after a fair redundancy process, if that had happened, at what rate or rates would he have been paid, given that the Respondent's staff were on furlough and/or working less than five days per week over the relevant period?
    b. Relevant to (a) would be the hours that were in fact worked by Mr Toora following the Claimant's dismissal, since on my earlier findings Mr Toora would have been the only candidate for redundancy other than the Claimant if a fair process had been followed – if Mr Toora had in fact only worked for, say, three days per week then is reasonable to conclude that, had the Respondent kept on the Claimant instead of Mr Toora, he too would have worked a three day week.
    c. Had the Claimant taken sufficient steps to mitigate his loss by making efforts to find work following his dismissal, the burden

being on the Respondent to prove that he acted unreasonably? The Respondent accepted that he had made reasonable efforts to find work in his chosen field, but asserted that he should have cast his net wider earlier.

5. The remainder of the issues are set out as I make findings on them below.

6. Counsel for the Claimant took no issue with the awards being as follows: basic award – gross; compensatory award – net but subject to grossing up; notice pay – net; holiday pay – gross. There was no issue that the effective date of termination ("EDT"), taking account of the 6 week statutory notice period, was 13th May 2020. Counsel for the Claimant also accepted that, this being a redundancy case, there could be no question of an uplift to the award(s) for failure to follow the ACAS code.

7. I explained to Mr Boulton that the law did not allow me to take account of the Respondent's means in calculating any award.

8. I heard evidence from Mr Ireland, taking account of his witness statement so far as it was relevant to remedy. He was cross-examined by Mr Boulton. I also heard evidence from Mr Boulton, who gave oral evidence-in-chief and was then cross-examined. I also accepted into evidence a letter from Mr Jackson dated 6th June 2022. The part of the letter that did not recite Mr Jackson's disagreements with my earlier judgment dealt with submissions on remedy which Mr Boulton was able to expand upon. I then heard submissions.

9. During the course of Mr Boulton's evidence it became clear that he was unable to assist the Tribunal on issue 4(b) above as, he said, he did not know what hours Mr Toora had worked following the Claimant's dismissal. Though it was put to him on the Claimant's behalf that he was being deliberately unhelpful on this point, having heard his evidence I did not accept that suggestion and accepted that Mr Boulton simply did not know. Normally he could have phoned Mr Jackson and asked him, but as I have already mentioned, for personal reasons Mr Jackson was not available to take such a call. I therefore directed that, having heard the live evidence and submissions, I would reserve judgment on remedy, with the Respondent to have time to submit any evidence in writing on the point. The Claimant would then have the chance to respond, with both parties to indicate whether they submitted a further hearing would be required. In fact, no further hearing was required (see below)

FINDINGS ON THE ISSUES

10. I record my findings of fact on particular issues as I deal with them below. All facts were found on the balance of probabilities. I have indicated where there were material disputes as to the facts between the parties; where I have not done so, the material facts were not in dispute.

11. There was a dispute amongst the parties about whether the Claimant's gross annual pay was £ 39170.40 or £ 40464. Having seen the Claimant's payslips,

I find as a fact that his monthly pay was £ 3372 gross, £ 2473 net. Multiplying by 12 gives annual figures of £ 40464 gross, £ 29676 net. Dividing by 52 gives weekly figures of £ 778.15 gross, £ 570.69 net.

12. Following the hearing I was informed in writing that the parties had agreed the following about Mr Toora's work:
    a. From 1st April 2020 to 1st February 2021 Mr Toora was on 80% pay (with the help of the Coronavirus Job Retention Scheme ["furlough scheme"]).
    b. From March 2021 to September 2021 he was on full pay (albeit he was working only 50% of his usual hours; the other half of his pay being provided by the "flexi-furlough" scheme).
    c. After that he was on full pay in the usual manner.

13. Therefore, in assessing loss I take the approach that, had the Claimant stayed in employment instead of Mr Toora, he would have received:
    a. 80% of full pay from 1st April 2020 until the end of January 2021.
    b. Full pay from 1st February 2021.

14. As to whether the Claimant had taken adequate steps up until the time of the hearing to mitigate his losses, the Respondent has not satisfied me that the Claimant acted unreasonably. Given the Respondent's fair concession that the Claimant had taken reasonable steps to find work within his own field of expertise, I did not need to hear detailed evidence about the Claimant's job applications. The Respondent submitted in essence that the Claimant should have lowered his sights earlier – he had been out of work (subject to his new business – see below) for over two years. In normal times, I would agree. However, these were not normal times – during the course of the pandemic the Respondent was not the only firm making people redundant and I accept that any other work would have been very difficult for the Claimant to find. When positions did open up in, say, hospitality or driving work, the Claimant told me, there would be intense competition for them. The Claimant also told me, and I accept, that he registered for Job Seekers' Allowance about six weeks after he was dismissed and as part of that he received training and was able to come up with a business plan and eventually set himself up in business on his own on 21st March 2022. I give some weight to the fact that, as the Claimant told me, the Job Centre were supervising his efforts to find work and would of course had stopped his benefits if they did not think he was making reasonable efforts to find work, though I come to my conclusion on the evidence I have heard rather than relying simply on the Job Centre's judgement. My conclusion is that the Claimant did in the circumstances make reasonable efforts to find work, albeit that until recently those efforts did not bear fruit.

15. Over the course of the next year, the Claimant told me, he hoped to earn somewhere between half and three-quarters of what he had been paid by the Respondent, probably closer to one-half. Eventually, next year or the one following, he hoped to have a turnover close to the salary he received. At the time of the hearing he had not yet received any earnings as he had not been in business long.

16. By s 1 of the Emploment Rights Act 1996, an employer is under a duty to provide an employee with a written statement of employment particulars. Where a Tribunal finds in favour of an employee in a complaint of unfair dismissal, and the Tribunal finds that at the time proceedings begun the employer was in breach of their duty under s 1, the Tribunal must award the employee an additional two weeks' pay, unless there are exceptional circumstances which would make that unjust or inequitable, and may, if it considers it just and equitable in all the circumstances, award an additional four weeks' pay (Employment Act 2002, s 38 and Schedule 5). In this case, the Claimant submitted that the documents provided to him when he started employment (bundle 27.3 to 27.18) lacked certain information required by s 1. It was not suggested by the Respondent that there were any other documents which would have contained that information. The information said to be missing was:
    a. The date continuous employment began – this in fact seems to me to be recorded in the Statement of Terms of Employment at 27.4.
    b. The intervals at which remuneration is paid, the days of the week to be worked, pension – whilst the Statement of Terms of Employment does indeed lack that information, the information is contained in the accompanying Employment Rules Book, and the former document does say that the terms and conditions of employment include all of the provisions of the latter. It also specifically says that pension entitlement is set out in the latter.
    c. Training entitlement – there is indeed nothing about training.

17. I do not accept that the matters referred to in (b) above constitute a breach of s1; if I am wrong about that, the breach was clearly of the most trivial kind given that the matters were dealt with in another document. I was not presented with any evidence about what (if any) training there was available and it does not appear to me that the Claimant suffered any prejudice from the lack of information about it in his employment particulars. I therefore conclude that those exceptional circumstances mean that an award under s 38 would be unjust or inequitable.

18. The calculations below follow from my findings above (and those in my earlier judgment).

CALCULATIONS

1. Holiday pay – GROSS
    a. The Claimant completed 3 full months in 2020, so is entitled under his contract to 3/12 of his annual 23 day entitlement, i.e. 5.75 days
    b. Each day is at a rate of 1/260 of his annual salary
    c. 5.75*((1/260)*40464) = **£ 894.88**

2. Wrongful dismissal – NET

a. Given what I have said above, if the Claimant had worked out his notice it would have been for 6 weeks at 80% of pay plus £ 116.72 pension contribution
b. (6*0.8*570.69)+116.72 = £ 2739.31 net
c. Add £ 44.23 grossing up (see below)
d. Total **£ 2783.54**

3. Unfair dismissal
    a. Basic award
        i. I agree with the Claimant's (undisputed) calculation:
            1. 6*538*1.5 = 4842
            2. Less redundancy pay in fact received
            3. Total 4842 – 4750 = **£ 92**
    b. Compensatory award - NET
        i. Given that the Claimant has been compensated as above for the notice period, I start the calculation from the day after the effective date of termination.
        ii. Loss up to time of remedy hearing – 14th May 2020 to 6th July 2022
            1. During the notional 2 week consultation period (see para 54 of my liability judgment)
                a. 80% of 2 weeks' pay
                b. 0.8*2*570.69 = £ 913.10
            2. After that to the date of the hearing
                a. 27th May 2020 to 31st January 2020 – at 80%
                    i. 8 months' pay at 80%
                    ii. 8*0.8*2473= £ 15827
                b. 1st February 2021 to 6th June 2022 – at 100%
                    i. 16 months and one week at 100%
                    ii. (16*2473)+570.69 = 40138.69
            3. Employer pension 1011.60 p.a.
                a. 26 months: (1011.60/12)*26 = 2191.80
            4. Loss of statutory rights £ 350
            5. Total loss to date of hearing
                a. 913.10 not subject to "Polkey" reduction
                b. 15827+40138.69+2191.80+350 = 58507.49 subject to "Polkey" reduction
        iii. Future loss
            1. Until 7th July 2023
                a. 1 year's pay and pension 29676 + 1011.60
                b. Claimant expects to earn half to three-quarters of what he did – I will take 60%, i.e. 29676*0.6
                c. Loss 29676+1011.60-(29676*0.6) = 12882
            2. From 7th July 2023, Claimant expects to earn at or near previous salary – no further loss
        iv. Total loss
            1. Not subject to "Polkey" reduction 913.10
            2. Subject to "Polkey" reduction (58507.49+12882)*0.4 = 28555.80
            3. Total 28555.80 + 913 = 29,468.80

v. Grossing up
    1. The awards liable to be taxed are those for unfair dismissal and notice pay, which total 92 + 29468.80 + 2739.31 = 32300.11
    2. The first 30,000 is tax-free, meaning only 2300.11 will be subject to tax.
    3. I assume a marginal tax rate of 20% and gross up as follows
        a. 2300.11/0.8 = 2875.138
        b. Total to be added by grossing up 2875.138-2300.11= £ 575
        c. Award for unfair dismissal is approx. 12 times the award for notice pay, so distributing that £ 575 in the ratio 12:1
            i. Add £ 44.23 to notice pay award
            ii. Add £ 530.77 to award for unfair dismissal

vi. Grossed-up Compensatory award
    1. 29468.80 + 530.77 = **29999.57**

vii. The statutory cap will not apply as the threshold (52 weeks' gross wages) has not been reached.

RECOUPMENT

The Recoupment Regulations (i.e. the Employment Protection (Recoupment of Benefits) Regulations 1996) apply to this award. For a full explanation, see the Annex to this Judgement. For the purposes of reg 4:

The relevant period is 13th May 2020 to 6th June 2022.
The prescribed element is (58507.49*0.4)+ 913.10 = £ 24,316
The total monetary award is £ 33769.99 (894.88+2783.54+92+29999.57)
The difference between the total monetary award and the prescribed element (i.e. to be paid immediately to the Claimant) is 9453.99

TIME FOR COMPLIANCE

By rule 66 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237, the orders for the payment of money must be made within 14 days.

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Employment Judge **Dick**
Date: 7th July 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON
18 July 2022

FOR THE TRIBUNAL OFFICE

ANNEX TO THE JUDGMENT

Recoupment of Jobseeker's Allowance, income-related Employment and Support Allowance, universal credit and Income Support

The tribunal has awarded compensation to the claimant but not all of it should be paid immediately. This is because the Department for Work and Pensions (DWP) has the right to recover (recoup) any Jobseeker's Allowance, income-related Employment and Support Allowance, universal credit or Income Support which it paid to the Claimant after dismissal. This will be done by way of a Recoupment Notice which will be sent to the respondent usually within 21 days after the Tribunal's judgment was sent to the parties.

The Tribunal's judgment should state the total monetary award made to the claimant and an amount called the prescribed element. Only the prescribed element is affected by the Recoupment Notice and that part of the Tribunal's award should not be paid until the recoupment Notice has been received. The difference between the monetary award and the prescribed element is payable by the Respondent to the Claimant immediately.

When the DWP sends the Recoupment Notice, the respondent must pay the amount specified in the Notice by the department. This amount can never be more than the prescribed element of any monetary award. If the amount is less than the prescribed element, the Respondent must pay the balance to the Claimant. If the Department informs the respondent that it does not intend to issue a Recoupment Notice, the Respondent must immediately pay the whole of the prescribed element to the Claimant.

The Claimant will receive a copy of the Recoupment Notice from the DWP. If the Claimant disputes the amount in the Recoupment Notice, the Claimant must inform the DWP in writing within 21 days. The Tribunal has no power to resolve such disputes which must be resolved directly between the Claimant and the DWP.