



# EMPLOYMENT TRIBUNALS

## Claimants

(1) Matthew Blanche  
(2) Jasia Blanche

## Respondent

v Keldene Limited t/as Barkway  
Services Station

**Heard at:** Bury St. Edmunds

**On:** 4<sup>th</sup> to 8<sup>th</sup> July 2022

**Before:** Employment Judge: Mr. A Spencer  
Mrs. S. Laurence-Doig  
Mrs. J. Costley

## Appearances:

**For the Claimant:** Miss S. Bewley (counsel)

**For the Respondent:** Mr. K. Zaman (counsel)

## RESERVED JUDGMENT

It is the unanimous judgment of the tribunal that:

1. The first claimant was unfairly dismissed by the respondent.
2. The respondent shall pay to the first claimant an award of compensation for unfair dismissal assessed at £33,276.02.
3. The second claimant was unfairly dismissed by the respondent.
4. The respondent shall pay to the second claimant an award of compensation for unfair dismissal assessed at £3,312.48.
5. The first claimant was wrongfully dismissed in breach of contract by the respondent.
6. The respondent shall pay to the first claimant damages for breach of contract (uplifted pursuant to section 207A Trade Union and Labour Relations (Consolidation) Act 1992) assessed at £13,533.24
7. The second claimant was wrongfully dismissed in breach of contract by the respondent.
8. The respondent shall pay to the second claimant damages for breach

of contract (uplifted pursuant to section 207A Trade Union and Labour Relations (Consolidation) Act 1992) assessed at £26.39.

9. All the second claimant's complaints of unlawful discrimination (save for the complaint of discriminatory dismissal) were presented out of time and the tribunal has no jurisdiction to consider those complaints save that the tribunal determines that it is just and equitable to hear the second claimant's complaints of harassment out of time.
10. The respondent did not discriminate against the second claimant on grounds of her age and/or disability.

## REASONS

### Introduction

1. These reasons relate to the tribunal's decision on issues of remedy only (i.e. to paragraphs 2, 4, 6 and 8 of the judgement set out above).
2. Judgment and reasons for our decisions on liability were given orally on the morning of the final day of the hearing. After judgment was given on liability, we heard further evidence and submissions concerning remedy.
3. Both claimants were successful in their complaints of unfair dismissal and breach of contract/wrongful dismissal.
4. We have adopted the figures set out in the claimant's updated schedules of loss concerning their gross and net earnings and earnings received since dismissal. These figures were not challenged by the respondent.

### WRONGFUL DISMISSAL

5. Both claimants were dismissed by the respondent in breach of contract. In particular both claimants were entitled to a statutory minimum period of notice of termination of employment. However, in breach of contract, the respondent dismissed both claimants without notice or payment in lieu notice.
6. Neither claimant had a written contract of employment which contained any agreed period of notice. Furthermore, there was no oral agreement between the parties as to the period of notice that the respondents would need to give to terminate the claimant's employment. In the circumstances, both claimants were entitled to the statutory minimum period of notice prescribed by s86 of the Employment Rights Act 1996 (ERA).
7. The first claimant Matthew Blanche had a period of continuous service of more than 30 years as at the date of termination of his employment. As such he had accrued an entitlement to the maximum 12-week period of notice of termination provided for in section 86 ERA.
8. The second claimant, Jasia Blanche, had a period of continuous service of two years as at the date of termination of her employment. As such she had

accrued an entitlement to be given a minimum of two week's notice of termination pursuant to section 86 ERA.

9. Both claimants are entitled to damages for breach of contract. The aim when assessing damages is to put the claimant (i.e. the innocent party) into the position he or she would have been in had both parties to the contract performed their obligations according to that contract. This entails compensating a wrongfully dismissed employee by an amount of money equivalent to that which he or she would have earned had the contract not been wrongfully terminated. Thus, damages are assessed by reference to the net pay each claimant would have received had they been given the appropriate notice of dismissal. Credit should be given for any earnings received by either claimant in the appropriate period. Although, net weekly pay is the figure used for calculation of damages, the net award will be taxable in the hands of the claimants as "post-employment notice pay" as a result of changes to the taxation regime introduced by the Finance (No.2) Act 2017 with effect from April 2018. In the circumstances we must "gross up" the award to each claimant to reflect the fact that they will suffer tax and national insurance deductions from the awards with the aim of leaving the net sums in the hands of the claimant after deduction of such tax. We do so by using the gross weekly pay figure.

10. In the case of the first claimant, Matthew Blanche, the calculation for his loss of earnings in the 12-week period from 18 November 2020 to 10 February 2021 is £8820 (net) or £11,769.24 (grossed up) calculated as follows:

Net pay of £735 per week x 12 weeks = £8820  
Gross pay of £980.77 per week x 12 weeks = £11,769.24

11. In the case of the second claimant, Jasia Blanche, the calculation for her loss of earnings in the two-week period from 18 November 2020 to 2 December 2020 is £815.80 (net) or £879.18 (grossed up) calculated as follows:

Net pay of £407.90 per week x 2 weeks = £815.80  
Gross pay of £439.59 per week x 2 weeks = £879.18

12. However, the second claimant commenced employment elsewhere at the beginning of November 2020 at net pay of £400 per week. Thus, she earned a total of £800 (net) in the two-week notice period. This sum must be credited against her loss giving a net loss of only £15.80. Grossing up this sum for tax at 20% and National Insurance at 12% would give a grossed-up award of £23.23.

13. We were invited by both claimants to increase the award for the respondent's failure to comply with the ACAS Code of Practice 1: Disciplinary and Grievance Procedures. Both claimants sought an uplift to the awards pursuant to section 207A Trade Union and Labour Relations (Consolidation) Act 1992 ("TULCRA"). That section applies in this case as the claim for breach of contract is a claim under a jurisdiction listed in schedule A2 of TULCRA.

14. Under section 207A(2) of TULCRA certain conditions must be met before the tribunal has a discretion to make an uplift to the award. Taking those conditions in turn :

14.1 the ACAS code of practice applied to the claim for wrongful dismissal. The dismissal was by reason of the claimant's conduct. As such it was a disciplinary matter to which the ACAS code applied.

14.2 we found that the respondent wholly failed to comply with the ACAS Code.

14.3 That failure was unreasonable. Despite the respondent being a small family-owned business there was no good reason for them failing to make any attempts to comply with the Code before resorting to dismissal.

15. In the circumstances, all three conditions for an uplift to the award are met. We considered it to be just and equitable to make such an uplift. In the circumstances, we have a discretion to uplift the award by no more than 25%. In this case we consider that a 20% uplift is appropriate. We take into account the fact that the respondent was a small family run business with limited resources. However, they took advice from an accountant and had the opportunity to take employment advice either from ACAS or from a lawyer. They failed to do so. Furthermore, Carla Blanche, was a director of the company at the relevant time. She had worked for a long period of time in a large organisation and should have been aware that employment procedures should have been followed. Furthermore, this is not an example of a case where the respondent made some minor failure to follow the appropriate procedure. There was a wholesale failure on the part of the respondent to comply with any aspect of the ACAS code. In the circumstances we considered that an uplift toward the higher end of the discretion is warranted and uplift the award by 20% for those reasons.

16. It is not appropriate to calculate the uplift element on the grossed-up award of damages or to gross up the uplift element to account for tax as our understanding is that the additional award under s207A should not attract a charge for tax and national insurance as it does not represent earnings.

17. Uplifting each award by 20% gives final awards as follows: –

Matthew Blanche:

Damages (as grossed up):	£11,769.24
Award pursuant to s207A (20% of £8820):	<u>£1,764.00</u>
Total award:	£13,533.24

Jaisa Blanche:

Damages (as grossed up):	£23.23
Award pursuant to s207A(20% of £15.80):	<u>£3.16</u>
Total award:	£26.39

**UNFAIR DISMISSAL**

18. compensation for unfair dismissal will normally consists of two elements: –

18.1 A basic award assessed in accordance with section 119 ERA; and

18.2 A compensatory award assessed in accordance with section 123 ERA.

19. We deal separately with each element for each claimant as follows: –

**Basic Award**

20. Each claimant's basic award of compensation calculated in accordance with section 119 ERA is:

Matthew Blanche: £12,643.

Jasia Blanche: £439.59

21. The appropriate calculations are set out in each claimant's updated schedule of loss were not challenged by the respondent .

22. We were invited by the respondent to make a reduction to the basic award on the grounds of contributory conduct pursuant to s122(2) ERA.

23. We considered whether Matthew Blanche's conduct was culpable or blameworthy. We have already made findings that he behaved poorly towards Carla Blanche. This behaviour aggravated was already a very acrimonious situation. Matthew Blanche's behaviour contributed towards the situation becoming toxic. Matthew Blanche was, at the material times, a director of the company and as such owed the fiduciary and other duties to the company resulting from that position. Further. We find that Matthew Blanche's conduct in failing to turn up for work after 9 October 2020 and not seeking to resolve matters was also culpable and blameworthy. Furthermore, his conduct contributed towards the dismissal. In the circumstances we find that it is just and equitable to make a reduction to Matthew Blanche's basic award. We assess the appropriate deduction of 25%. This reflects the fact that whilst Matthew Blanche's conduct was culpable and blameworthy, the majority of the blameworthy conduct lay on the side of the respondent.

24. Applying a deduction of 25% to Matthew Blanche's basic award of £12,643 gives a reduced basic award(after adjustment) of £9,482.25.

25. Jasia Blanche's conduct was also blameworthy and culpable in similar ways. However, we consider her to be less culpable than Matthew Blanche, particularly as she was a more junior employee and was not a director of the company. Her poor conduct towards Carla Blanche was also less extensive. In the circumstances we apply the lesser percentage of 15% as a reduction to Jasia Blanche's compensatory award.

26. Applying a deduction of 15% to Jasia Blanche's basic award of £439.59 gives a reduced basic award(after adjustment) of £373.65.

Compensatory Award

27. The calculation of the compensatory award in this case is complex. There are a number of different deductions and enhancements to the award . The order in which those enhancements/deductions are applied will affect the overall level of award. Our approach and the order in which such deductions and enhancements are applied is follows:

23.1 We began by ascertaining each claimant's total loss in consequence of the dismissal, in so far as that loss is attributable to the employer's actions (s123(1) ERA).

23.2 Deductions and adjustments were then made in the following order:

(a) Deducting sums earned by way of mitigation or to reflect the claimant's failure to take reasonable steps in mitigation (S123(4) ERA);

(b) "Just and equitable" reductions based on s123(1) ERA including reductions in accordance with the principle in Polkey v AE Dayton Services Limited 1988 ICR 142 HL;

(c) Adjustment for unreasonable failure to comply with a material provision of the ACAS Code of Practice on Disciplinary and Grievance Procedures (s2017A TULRCA);

(d) Adjustment of up to four weeks pay in respect of the employer's failure to provide full and accurate written particulars (s38 Employment Act 2002);

(e) Percentage reduction for the employee's contributory fault (s123(6) ERA);

28. We set out our conclusions on each of the steps set out at paragraph 23 above as follows and refer to the table which appears after paragraph XX which summarises the resulting calculations and figures.

29. Taking each those steps in turn:

Ascertaining loss and deducting sums for mitigating earnings/failure to mitigate loss.

30. We calculated losses from dismissal on 18 November 2020 to 3 July 2022. This is a period of 84.57 weeks as per the first claimant's schedule of loss. We calculated the net loss of earnings in the period before making deductions for the mitigating earnings achieved by the claimants. Furthermore we deducted the sums awarded for notice pay to avoid double counting. The relevant calculation for each claimant is as follows:

**Matthew Blanche**

Past loss (from 18.11.20 to 03.07.22):

Net Weekly Pay of  
£735 x 84.57 weeks = £62,158.95

Deduct:  
Earnings from MJ Warner £13,630.87  
Earnings from Pat Taylor £2550  
Notice pay: £8820

Gives a Net loss of : £37,158.08

**Jasia Blanche**

Past loss (from 18.11.20 to 03.07.22):

Net weekly Pay of  
£407.90 x 84.57 weeks = £34,496,10

Deduct:  
Mitigating earnings £32400.00  
Notice pay: £15.80

Gives a Net loss of : £2,080.30

31. We were invited by the respondent to make a deduction to the award for the first claimant to reflect a failure to mitigate loss.

32. A claimant has a duty to take reasonable steps to reduce his or her losses by actively seeking other work. The first claimant made no significant efforts to find alternative work until he sought and started alternative work at the end of September 2021. We consider it to be reasonable for the claimant to take some time to get over the shock of losing his job particularly as he had worked for the respondent for such a long period of time and had only ever worked within the family business. We also take into account that the employment market was considerably disrupted as a result of the Covid pandemic and that much of the country was in and out of lockdown until about April 2021. However we consider that the first claimant should have actively sought work by April 2021 at the very latest and failed to do so. In the circumstances we accept the respondent's submission that there has been a failure on the part of the first claimant to mitigate his loss and consider it to be just and equitable to reduce the award for past losses by the equivalent of 16 weeks net pay (i.e. 16 weeks x £735 per week = £11,760). This reduces the final figure for the past losses of the first claimant to £25,398.08.

33. We make no such deduction to the award to the second claimant. She found alternative work very quickly and has not failed to mitigate her loss.

Future Losses

34. The first claimant invited us to make an award for future loss from the date of the hearing onward for a two-year period.
35. The first claimant currently works for about two or three days a week. His working days vary. He earns a higher hourly rate than he achieved with the respondent. However, because he is working only part-time this results in a lower net weekly pay from his new employment than he was achieving with the respondent.
36. The claimant is a highly skilled paint sprayer. He is not taking steps to increase his working hours to full-time levels. We consider that a further six months is a reasonable period within which the claimant should be able to find additional part time work or a full-time job to bring his total pay to a level equivalent to that he received from the respondent.
37. In the circumstances, we assess the figure for future loss for the first claimant at £5,928 (i.e. one quarter the figure for 24 months contained within the claimant's schedule of loss).
38. In respect of the second claimant we were invited to award future loss for a 12-month period. The net difference in pay between the second claimant's pay with the respondent as compared with her current employment is only £7.90 per week. We consider that in a further 6 months the second claimant's pay in her new job will have reached or exceeded her pay from the respondent. We award the second claimant £205.40 for future loss (i.e. 26 weeks at £7.90 per week).

Loss of Statutory Rights

39. The first claimant was continuously employed by the respondent for a period in excess of 30 years. Many employment rights do not accrue until an employee has achieved a minimum period of service. Furthermore other employment rights gradually accrue over time to become more valuable. It is right, in principle, to make an award of compensation as part of the compensatory award to compensate the employee for losing those accrued rights. As a long-standing employee the value of those accrued rights to the first claimant were greater than most employees. In the circumstances we make an award for loss of statutory rights in the sum of £600.
40. We make an award of £400 to the second claimant to reflect the fact that she had much shorter length of continuous service. As such the rights she had accrued with the respondent were less valuable.
41. The first claimant also invited us to make an additional award for what is described in his schedule of loss as "loss of the right to long notice" to reflect the fact that the claimant had an unusually lengthy statutory minimum notice period and that he had lost this valuable right as a result of his dismissal. Whilst that is undoubtedly correct, we do not consider it be just and equitable to make such an additional award given that the claimant is receiving the full benefit of that notice period by way of the award we make for wrongful dismissal. We therefore limit the award for loss of statutory



rights to £600 for the first claimant.

42. Bringing these figures together the total compensatory awards made to each claimant before any further adjustments are:

Matthew Blanche

Past loss:	£25,398.08
Future loss:	£5,928.00
Loss of Statutory Rights:	£600.00
Total:	£31,926.08

Jasia Blanche

Past Loss:	£2,080.30
Future Loss:	£205.40
Loss of Statutory Rights:	£400.00
Total:	£2,685.70

We go on to address the various adjustments to those awards below.

“Just and equitable” reductions based on s123(1) ERA including “Polkey deduction”.

43. The respondent also invited us to make a deduction from the compensatory award pursuant to s123(1) ERA on the basis of a so-called “Polkey deduction”. There were two potential arguments. Firstly it was asserted that the respondent could and would have fairly dismissed the claimants shortly after 18 November 2020 had they not been unfairly dismissed at that point. Secondly, we considered whether the claimant’s employment would have ended anyway due to the underlying and unresolved family dispute. We do not consider that there was any realistic prospect of either claimant having been fairly dismissed by the respondent even if they had followed a fair procedure. Neither claimants conduct would have justified dismissal in the circumstances.
44. We do consider that there was a prospect of both claimant’s employment having ended in any event due to the family dispute. The dispute had reached the stage where the working environment and the relations between the family members were toxic. We understand that since the claimant’s dismissal that dispute has continued and has also spilled over into other legal disputes. For example, we understand that there is an ongoing dispute concerning the business and that the parties are due to attend mediation later this year to seek to resolve their dispute. We find that there was a real prospect that both claimant’s employment would have ended in any event. However, both claimants would clearly have been very reluctant to leave the family business. The business had been their only employer since leaving school. It was their family company. They would both have been reluctant to simply walking away from the business. In the circumstances we assess the percentage chance of both claimant’s employment having ended in any event at 20%. The compensatory award

for each claimant will be reduced by 20% accordingly.

Adjustment for unreasonable failure to comply with a material provision of the ACAS Code of Practice on Disciplinary and Grievance Procedures (s207A TULRCA):

45. We repeat our conclusions at paragraphs 13 to 15 above. We consider it to be just and equitable to increase the compensatory award for each claimant by 20% for the same reasons.

Adjustment of up to four weeks' pay in respect of the employer's failure to provide full and accurate written particulars (s38 Employment Act 2002):

46. Section 38 empowers the tribunal to make an additional award in certain circumstances where the tribunal upholds a complaint under any of the jurisdictions listed in Schedule 5 of the Act. Those jurisdictions include complaints of unfair dismissal.

47. The tribunal must such an award as the tribunal has found in favour of the claimants and when the proceedings were begun the respondent was in breach of the duty to both claimants to provide a statement of main the terms and conditions of employment under section 1(1) ERA.

48. In the circumstances, the tribunal must increase the award by the minimum amount of two weeks' pay and, if it considers just and equitable in all the circumstances, increase the award by the higher amount of four weeks' pay.

49. We were invited to make an award of the higher amount. We do not consider it to be just and equitable to do so. We make an award limited to the two-week minimum sum given that the first claimant was responsible for managing the business for many years and latterly was also a director and shareholder of the company. He was partly responsible for the failure to provide written terms and conditions. In the circumstances, we consider it would be inequitable to award the higher sum. Further, there are no factors that make it just and equitable to make the higher award in favour of the second claimant.

Percentage reduction for the employee's contributory fault (s123(6) ERA):

50. We were also invited by the respondent to reduce the compensatory award by a sum to reflect both claimant's contributory conduct. We considered to be just and equitable to make such a reduction to the compensatory award of 25% (first claimant) and 15% (second claimant) for the same reasons as we applied those deductions to the basic award (see paragraphs 22 to 25 above).

51. The conclusions set out above result in total awards for unfair dismissal to each claimant calculated as follows:

Matthew Blanche:

Basic Award:	£9,482.25
Compensatory Award:	£23,793.77

Total award (unfair dismissal): £33,276.02

Jasia Blanche:

Basic Award: £373.65  
Compensatory Award: £2,938.83

Total award (unfair dismissal): £3,312.48

52. These awards are calculated in accordance with the table set out below.

First Claimant (Matthew Blanche)	Second Claimant (Jasia Blanche)
<b>Breach of Contract/Wrongful dismissal</b>	<b>Breach of Contract/Wrongful dismissal</b>
Damages (as grossed up): £11,769.24 Award pursuant to s207A (20% of £8820): £1,764.00 Total award: £13,533.24	Damages (as grossed up): £23.23 Award pursuant to s207A (20% of £15.80): £3.16 Total award: £26.39
<b>Unfair Dismissal (Basic Award)</b>	<b>Unfair Dismissal (Basic Award)</b>
Basic Award: £12,643 Less 25% deduction: £3,160.075 Total award: £9,482.25	Basic award: £439.59 Less 15% deduction: £65.94 Total award: £373.65
<b><u>Unfair Dismissal (Compensatory Award)</u></b>	<b><u>Unfair Dismissal (Compensatory Award)</u></b>
<i><u>Past loss (from 18.11.20 to 03.07.22):</u></i>	<i><u>Past loss (from 18.11.20 to 03.07.22):</u></i>
Net Weekly Pay of £735 x 84.57 weeks = £62,158.95	Net weekly Pay of £407.90 x 84.57 weeks = £34,496.10
Deduct: Earnings from MJ Warner £13,630.87 Earnings from Pat Taylor £2550 Notice pay: £8820	Deduct: Mitigating earnings £32400.00 Notice pay: £15.80
Gives a Net loss of : £37,158.08	Gives a Net loss of : £2,080.30
Deduction for failure to mitigate loss: £11,760.00	Deduction for failure to mitigate loss: £nil
Final past loss: £25,398.08	Final past loss: £2,080.30
Future Loss: £5,928.00	Future Loss: £205.40
Loss of Statutory Rights: £600.00	Loss of Statutory Rights: £400.00
<b>Total Compensatory Award (before adjustment):</b>	<b>Total Compensatory Award (before adjustment):</b>

**Case No: 3301247/2021 & 3301248/2021**

Past loss: £25,398.08	Past Loss: £2,080.30
Future loss: £5,928.00	Future Loss: £205.40
Loss of Statutory Rights: £600.00	Loss of Statutory Rights: £400.00
<b>Total: £31,926.08</b>	<b>Total: £2,685.70</b>
<b>Adjustments:</b>	Adjustments:
Total compensatory award: £31,926.08	Total compensatory award: £2,685.70
<u>Less</u> "Polkey Deduction" of 20%: £6,385.22	<u>Less</u> "Polkey Deduction" of 20%: £537.14
Award after "Polkey": £25,540.86	Award after "Polkey": £2,148.56
Increase under s207A Of TULRCA (20%): £5,108.17	Increase under s207A Of TULRCA (20%): £429.71
Award after s207A increase: £30,649.03	Award after s207A increase: £2,578.27
Add additional award Under s38 EA 2002 (2 x £538): £1076	Add additional award Under s38 EA 2002 (2 x £439.59): £879.18
Total after adding s38 award: £31,725.03	Total after adding s38 award: £3,457.45
Reduction for contributory fault of 25%; £7,931.25	Reduction for contributory fault of 15%; £518.62
<b>Total after 25% deduction (and final award sum): £23,793.77</b>	<b>Total after 15% deduction (and final award sum): £2,938.83</b>

Employment Judge: Mr. A Spencer

Date: 11<sup>th</sup> July 2022

Judgment sent to the parties on

11 August 2022

N Gotecha

For the Tribunal office