EMPLOYMENT TRIBUNALS

Claimants: **Mr C Archibold and others**

Respondents: **(1) Norwegian Air Resources UK Limited (in liquidation)**
(2) Secretary of State for Business, Energy and Industrial Strategy

Heard at: **East London Hearing Centre**

On: **10 January 2023**

Before: **Tribunal Judge D Brannan, acting as an Employment Judge**

Representation
For the Claimant: Ms C Urquhart
For the 1st Respondent: No attendance
For the 2nd Respondent: Mr P Soni

JUDGMENT

1. The Second Respondent has failed to make a payment to Mr Archibold under section 182 of the Employment Rights Act 1996.

2. The Second Respondent has paid the remaining Claimants less than they were entitled to under section 182 of the Employment Rights Act 1996.

3. The Second Respondent is ordered to pay the outstanding sums to the Claimants, to be calculated in accordance with the legal approach set out in the reasons below.

4. Consequently, the proceedings against the First Respondent are dismissed following withdrawal by the Claimants.

REASONS

Agreed Facts

1. The Claimants, members of Unite the Union, were all employed as short-haul cabin crew by the First Respondent ("R1") from various dates until R1

went into liquidation in January 2021. R1 was the operating company for Norwegian Airlines in the UK, based at London Gatwick Airport.

2. The Claimants were dismissed by reason of redundancy on 29 January 2021, as notified by the liquidators of R1 in a letter of that date. The letter also gave the Claimants some information about applying to the Insolvency Service for monies that were unpaid at the point of the insolvency, including statutory notice pay.

3. In circumstances where an employer becomes insolvent, employees whose employment has been terminated can apply for certain payments, known as 'guaranteed debts' and including statutory notice pay, from the National Insurance Fund. Such claims are administered through the Redundancy Payments Service ("RPS"), part of the Insolvency Service which is an executive agency sponsored by the Second Respondent ("R2").

4. On 15 February 2021, Unite representative Neil Vernon wrote to Jehal Chand of R2 asking if members who already had a second job prior to being made redundant, due to being on furlough, would have earnings from the second job deducted from their notice pay.

5. On 22 February 2021, Mr Chand replied:

> We ask claimants to mitigate their loss by claiming any benefits they may be entitled to or by finding alternative employment. If the individual already had a second job prior to their redundancy this would not be treated as new income. However, if the individual increased their salary by being available to take on more hours following their redundancy we would ask them to declare the increase in gross income received in their statutory notice period when claiming their compensatory notice pay

6. All the Claimants had been furloughed in or around March/April 2020 when, due to the coronavirus pandemic, R1 grounded its operations.

7. All the Claimants then found secondary employment whilst continuing to work for R1, as was permitted under the Coronavirus Job Retention Scheme.

8. Upon R1's insolvency and their dismissal, the Claimants claimed statutory notice pay from R2. Mr Archibold did not receive any payment for notice pay. All the other Claimants received some notice pay, but not the full amount to which they say they are entitled.

Illustrative Claimants

9. At a preliminary hearing before me on 6 July 2022 (the "PH") it was agreed that the Claimants would identify three "Illustrative Claimants" who they consider to be illustrative of the factual matrices which require legal analysis in this claim. There circumstances are set out here.

10. Mr Archibold seeks two weeks' notice pay in respect of 30 January to 12 February 2021. He started work at Sainsbury's as a delivery driver on 28 March 2020 on a 12-hour per week fixed-term contract.

11. He could also pick up overtime, but this was variable and uncertain. After he was made redundant, he requested more contractual hours from Sainsbury's, but it did not increase his hours and overtime remained ad hoc.

12. R2 failed to pay him his full notice pay and Mr Archibold raised a series of complaints. R2's response on 15 July 2021 confirmed that it had reduced his notice pay because Mr Archibold had received income from his work for Sainsbury's during the notice period.

13. Mr Archibold did not claim benefits because he did not think he was entitled to them. It is unclear whether he was in fact entitled to them, as there are contradictory statements on this point in a letter from the Respondent dated 15 July 2021 at page 124 in the bundle.

14. Ms Lukasik seeks eight weeks' notice pay, in respect of 30 January to 26 March 2021. She started work for Angard Staffing Solutions Limited on 29 May 2020 on a zero-hours contract. After she was made redundant, Ms Lukasik asked for more contractual hours from Angard but these were not increased, and overtime was not available either. Her payslips show that after she was made redundant by R1 on 29 January 2021, her income from Angard did not increase.

15. Ms Lukasik currently has a full-time job (with easyJet) and continues to work for Angard on a zero-hours casual contract.

16. She also challenged R2 about its failure to pay her statutory notice pay. On 2 July 2021, R2 wrote to her and stated, inter alia:

> Ordinarily, any new employment that started prior to dismissal from the job for which you are claiming loss of notice, would not be deducted from your payment as it would not be classed as new income. This was the initial advice given by the RPS to the union.
>
> However, the government's furlough scheme introduced new considerations regarding the deduction of earnings from employment that commenced prior to dismissal. The RPS was required to obtain legal advice regarding this matter…
>
> The advice received was that new employment which commenced during the furlough period should be considered when calculating loss of notice claims…

17. In a further letter dated 28 July 2021, R2 set out its view that in "normal circumstances" income from a second job that had been obtained prior to the redundancy would not be treated as new income and so not taken into consideration with regard to mitigation: only any increase in salary post-redundancy would be declarable. However, new legal advice given to R2 was that new employment which commenced during furlough should be considered when calculating statutory notice pay claims.

18. R2 stated:

Furlough has allowed you to obtain new employment earlier than other insolvency scenarios, which has presented the opportunity for the new jobs to be 'pre-existing' prior to redundancy.

19. Ms Lukasik claimed Jobseeker's Allowance and was paid £221.75 in respect of the period 30 January to 26 March 2021.

20. Mr Ruiz seeks two weeks' notice pay in respect of 30 January to 12 February 2021. He started work for Just Eat on 9 November 2020. He worked full-time (37.5 hours per week) on a fixed-term contract until 9 February 2021. After he was made redundant from R1, he asked for more contractual hours from Just Eat but was not offered them and was not able to obtain overtime either.

21. He did not claim benefits while working for Just Eat as he was not entitled to them at that time but he claimed JSA after his contract ended.

Issues

22. At the PH the parties had an agreed list of issues. Those are set out in a case management order of 6 July 2022. Paragraphs 5 to 7 are those requiring determination of the Tribunal. They are:

    5. When considering how much notice pay the Second Respondent is obliged to pay to each Claimant pursuant to s184(1)(b) ERA 1996, what if any deductions can be made from such payments in respect of mitigation of loss? In particular is the Second Respondent entitled to deduct:

        a. Income from alternative work found by the Claimants during the notice period and as a result of the dismissal?

        b. Income from pre-existing alternative work obtained before the Claimants knew they would be dismissed?

        c. Income from pre-existing alternative work obtained whilst on furlough under the CJRS and the Claimants having been told that they would be given notice of dismissal?

        d. Income from pre-existing alternative work obtained whilst on furlough under the CJRS but before the Claimants had been told they would be given notice of dismissal?

        e. Income from pre-existing employment in circumstances where the Claimants were not able to increase the amount of the pre-existing employment upon learning of the dismissal?

    6. It is agreed that the Second Respondent is entitled to deduct the value of employment-related benefits received in the notice period. Is the Second Respondent also entitled to deduct the value of employment-related benefits that the Claimants may have been entitled to, but did not apply for, during the notice period?

7. If so, is the Second Respondent entitled to deduct the value of unclaimed benefits if the failure to claim those benefits was reasonable?

23. The parties agreed at the PH that the Tribunal would not be required to apply the answers to these questions to the individual circumstances of the Claimants. The parties expected, and continue to expect, to be able to agree this once the legal approach has been clarified.

24. Furthermore, the parties also agreed at the substantive hearing that the answer to issue 6 is yes: R2 is entitled to deduct the value of employment-related benefits that the Claimants may have been entitled to, but did not apply for, during the notice period. However, that is qualified by the answer to issue 7.

25. Turning to issue 7, during the substantive hearing it became apparent that a subsidiary issue to 7 above is whether individual Claimants did or did not act reasonably in failing to claim benefits to which they were entitled. While the principles for determining this are set out below, it is possible that a dispute could remain, within these proceedings, regarding whether an individual Claimant's failure to claim benefits was in fact reasonable. That is not an issue I am able to resolve without evidence from the Claimant concerned and the opportunity for the R2 to cross-examine that person.

26. It should be noted that the parties agree that a person who succeeded in increasing their earnings after dismissal from a second job that they had before dismissal would correctly have such increased earnings deducted from their notice pay.

Legal Framework

27. By s86 Employment Rights Act 1996 ("ERA"), employees who have been employed for between one month and two years are entitled to one week's notice pay. They are entitled to a further week for each subsequent year of service, up to a total of 12 weeks.

28. If an employer is insolvent, employees may claim a number of payments from the RPS. The employee must satisfy the Secretary of State that the employer has become insolvent, the employee's employment has terminated, and on the appropriate date the employee was entitled to be paid one of the relevant debts (s182 ERA). These debts include notice pay (s184(1)(b) ERA).

29. The appropriate date, as regards notice pay, is the latest of the date the employer became insolvent and the date of the employee's termination of employment (s185 ERA).

30. In the instant case, the appropriate date was 29 January 2021, and on that date the maximum amount payable was £538 per week (s186(1)(a) ERA, as amended by SI 2020/205 with effect from 6 April 2020).

31. Employees who make a claim under s182 ERA and contend that the Secretary of State has not made a payment to which they were entitled, or has not paid the full amount, can present a complaint to an Employment

Tribunal (s188(1) ERA). They should do so within three months of the date the Secretary of State's decision was communicated to them, or such further period as the Tribunal considers reasonable where it had not been reasonably practicable to bring the claim in time (s188(2) ERA).

32. Any remaining debts which fall outside the scope of these statutory provisions can be claimed by the employee as a creditor in his employer's insolvency.

33. The authorities make clear that in cases where an employee was unlawfully dismissed without notice, the cause of action is one for breach of contract, and the usual principles in a wrongful dismissal claim arise. That is, the arrears of pay take the form of unliquidated damages and the duty to mitigate the loss applies: *Westwood v Secretary of State for Employment* [1984] IRLR 209 at [219C] and [291H-220A].

34. *Westwood* is also authority for the principle that state benefits received by the employee must be deducted from damages for wrongful dismissal to the extent that they result in a net gain for the employee: [220B, 221E], approving *Parsons v BNM Laboratories Ltd* [1964] 1 QB 95.

35. In *Secretary of State for Employment v Stewart* [1996] IRLR 334, Lord Coulsfield held (at paragraph 5):

> it is in our view clear that, at common law, there is a duty to mitigate loss by reasonable means, and accordingly what has to be taken into account is not merely any sum which the employee has actually recovered under the head of, for example, unemployment benefit, but any sum which would have been recovered if reasonable steps had been taken.

36. However, the EAT accepted that applicants may be confused as to whether they would be entitled to benefits, and in such circumstances a failure to apply for them may be considered reasonable, and so would not count against the employee as a failure to mitigate (paragraphs 8-9).

37. In *Cooper Contracting Ltd v Lindsey* (UKEAT/0184/15/JOJ), Langstaff P set out the principles that apply to mitigation of loss at paragraph 16. In summary:

    (1) The burden of proof is on the wrongdoer; a Claimant does not have to prove that he has mitigated loss.

    (2) It is not some broad assessment on which the burden of proof is neutral. I was referred in written submission but not orally to the case of *Tandem Bars Ltd v Pilloni* UKEAT/0050/12, Judgment in which was given on 21 May 2012. It follows from the principle - which itself follows from the cases I have already cited - that the decision in *Pilloni* itself, which was to the effect that the Employment Tribunal should have investigated the question of mitigation, is to my mind doubtful. If evidence as to mitigation is not put before the Employment Tribunal by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works: providing the information is the task of the employer.

(3) What has to be proved is that the Claimant acted unreasonably; he does not have to show that what he did was reasonable (see *Waterlow*, *Wilding* and *Mutton*).

(4) There is a difference between acting reasonably and not acting unreasonably (see *Wilding*).

(5) What is reasonable or unreasonable is a matter of fact.

(6) It is to be determined, taking into account the views and wishes of the Claimant as one of the circumstances, though it is the Tribunal's assessment of reasonableness and not the Claimant's that counts.

(7) The Tribunal is not to apply too demanding a standard to the victim; after all, he is the victim of a wrong. He is not to be put on trial as if the losses were his fault when the central cause is the act of the wrongdoer (see *Waterlow*, *Fyfe* and Potter LJ's observations in *Wilding*).

(8) The test may be summarised by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.

(9) In a case in which it may be perfectly reasonable for a Claimant to have taken on a better paid job that fact does not necessarily satisfy the test. It will be important evidence that may assist the Tribunal to conclude that the employee has acted unreasonably, but it is not in itself sufficient.

38. In *Savoia v Chiltern Herb Farms Ltd* [1981] IRLR 65, EAT, Slynn P considered an argument about a failure to mitigate and noted that “A complainant before an Industrial Tribunal does not have to show that he took steps in mitigation before he was actually dismissed” (paragraph 16). In that case, the claimant’s refusal to accept an alternative job before he was dismissed was therefore not a failure to mitigate.

Analysis

39. The Claimants characterise their claims as effectively in keeping with the common law regarding wrongful dismissal. The key point is that the income from their second jobs could not count against their entitlement to notice pay as those jobs were obtained before they were dismissed.

40. R2’s position is set out in its ET3 and was expanded upon by Mr Soni in response to Ms Urquhart’s skeleton argument. The key point in the ET3 is:

10. Where an employee finds alternative work after being given notice of dismissal, any new earnings, which are received in reference to the notice period, can be taken to have fulfilled their duty to mitigate their losses so that money can be offset against notice pay due in accordance with the principle in *Westwood*. Typically, this occurs once the employee has been dismissed and starts another job. Where an employee finds and starts alternative work (i) before they are given notice of dismissal but (ii) whilst on furlough and (iii) having been told that they would be given notice of dismissal (i.e. the

employer's ability to claim back wages under the CJRS was the thread holding their job in place), then in this case the employee is also fulfilling their mitigation duty so that the gains from the new job can be offset in accordance with *Westwood*.

11. Essentially the mitigation and damages principle means that an individual is no better off, than if they had worked their notice period. If the employees had worked up to the insolvency date (rather than be furloughed), they would not have been available to work for the second employer. Furlough has allowed the individuals to obtain new employment earlier than other insolvency scenarios, which has presented the opportunity for the new jobs to be 'pre-existing'.

41. R2 goes on to say:

15. As any failure to give statutory notice is classed as a breach of contract, the compensatory notice payment is akin to common law damages. The Secretary of State relies on the principles set out in *Westwood v The Secretary of State for Employment* [1984] IRLR 209 and *The Secretary of State for Employment v Cooper* [1987] ICR 766 and *Secretary of State for Employment v Stewart* [1996] IRLR 334 in which the Employment Appeal Tribunal confirmed that the Secretary of State was correct to deduct, by way of mitigation:

- wages received from the new employment in the notice period.

- any benefit received in that period or any benefit entitled to be claimed

- income tax payable on the amount due

16. This means that any payment is reduced by income paid or payable for the period to which it relates. The Department can therefore only compensate a person for the actual loss suffered during the notice period, subject to the statutory limits. The general principles are that the applicant should not be any better off than if he or she had not suffered damages. Losses should therefore be kept to a minimum and the claimant is under a duty to mitigate this loss. The claimant should seek new employment or apply for any benefits that he/she may be entitled to during the notice period. This mitigation means that the compensatory notice payment should be reduced by amounts received or payable.

42. My first observation is that R2 identifies three points (Roman numbers (i) to (iii)) in its paragraph 10. The third is that the person should be obtaining the additional job "having been told that they would be given notice of dismissal". That does not appear to be the applicable to Mr Archibold or Ms +Lukasik in that they obtained their second jobs while on furlough to make up for the reduction in earnings and, no doubt, to maximise their earnings. There is no evidence that they knew when taking these jobs that they would ultimately be dismissed by R1. This means that on R2s own case, at least as described in paragraph 10 of the ET3, people in the circumstances described in categories b and d under paragraph 5 of the list

of issues do not face deduction of income from a second job from their notice pay, namely:

b. Income from pre-existing alternative work obtained before the Claimants knew they would be dismissed

d. Income from pre-existing alternative work obtained whilst on furlough under the CJRS but before the Claimants had been told they would be given notice of dismissal

43. R2 also ignores the difference between being given notice of dismissal and being dismissed in breach of contract. If the Claimants had been given notice of dismissal and then worked a notice period then there would be no dispute before me. The point in this case is that the Claimants were not given the notice to which they were entitled. The question is the quantum of damages they get as a result.

44. Mr Soni accepted (in my view rightly) that if the Claimants had obtained second jobs while working for R1 without there having been any furlough, and had then been dismissed, the income from the second jobs would not be deductible from their notice pay. The complaint of R2 appears therefore to be that furlough afforded the Claimants the opportunity to obtain second jobs that they otherwise would never have had.

45. That is no doubt true. However it does not mean that those jobs affect the notice pay due to the Claimants. The claims of the Claimants are contractual claims that parliament has decided in Part XII of the ERA that R2 must pay due to insolvency of R1. The question is therefore first what contractual entitlement the Claimants have from R1. The argument concerning furlough shows reasons of public finances why R2 might wish the Claimants not to get the windfall of both furlough pay and notice pay from the public purse, while being employed elsewhere. But there is no legal basis for it affecting the amount due under the contracts of employment and statutory notice periods.

46. I recognise the general principle that a claimant should not be put in a better position that they would have been had they not suffered the breach of contract. If anything has caused this, it is a furlough scheme that allowed the taking of alternative employment. That would have continued if the employment had continued. Therefore, it is not clear to me that the principle is even offended in this case. But in any case, *Savoia* is clear that a claimant does not need to show he took steps in mitigation before he was actually dismissed. The converse is that actions taken before dismissal cannot be relied on as mitigation. It is only because of this that R2 is concerned with whether the Claimants sought to increase their earnings after dismissal. If the pre-dismissal employment were mitigation, it is hard to see how there could be a duty to do even more mitigation after dismissal. The answer to the spectre of a ratcheting requirement to mitigate, is simple: what steps were taken before dismissal is normally irrelevant to the question.

47. For these reasons, in relation to 5 in the list of issues, R2 is only entitled to deduct income from alternative work found by the Claimants during the notice period and as a result of the dismissal.

Benefits Claims

48. It common ground that the issue of claiming benefits only arose after dismissal. The question is whether R2 is entitled to deduct the value of unclaimed benefits if the failure to claim those benefits was reasonable.

49. The Respondent's approach to this is set out in a document in the authorities bundle called "Explaining your redundancy payments" Updated 12 October 2022. As relevant this says:

> **4.5 Loss of notice compensation, also known as statutory notice pay and pay in lieu of notice**
>
> This is compensation for not being given all of your statutory notice entitlement.
>
> - we can pay you one week's notice for every full year you were employed. We can pay up to a maximum of 12 weeks. If your contract entitled you to a longer notice period we will cap your payment at 12 weeks
>
> - we are required to deduct the value of any income-related benefits you were entitled to claim during your notice period from your payment. We will do this whether or not you actually claimed them. If you start a new job we must also deduct the value of any wages you've earned during this period
>
> - if you believe you were not entitled to claim benefits, you should contact your local Jobcentre and ask for a letter to confirm this. If you send a copy of this confirmation letter to us, we will reassess your payment
>
> - most payments are taxed at a standard rate of 20%. National Insurance is deducted at a rate of 13.25% from payments calculated between 6 April 2022 and 5 November 2022, unless the Lower Earning Limit applies to you. Payments calculated before 6 April 2022, or after 6 November 2022 will have NI deducted at a rate of 12%.

50. Mr Soni was clear before me that this is intended to be a process by which R2 can determine what is payable. It is not intended to be a summary of the law of mitigation in relation to benefits claims.

51. For the purposes of the Tribunal the first question must be whether a Claimant was in fact entitled to any benefits. Following *Cooper*, the burden is on the employer (into whose shoes R2 stands before me) to show that a Claimant was entitled to benefits and did not claim them. R2 has not satisfied this burden on the evidence before me, but as I say above, it was not an issue which the parties prepared for.

52. If that fact is proved, the next question is whether the failure to claim such benefits was reasonable. Again, following *Cooper*, the burden is on the employer (into whose shoes R2 stands before me) to show that the failure

to claim was unreasonable. This is a question of fact which, ultimately, the Tribunal can determine for itself.

53. It is worth noting that what was reasonable or unreasonable depends on the circumstances. There is clear evidence that the Claimants were told early on about the possibility of claiming benefits, the earliest such reference being on 11 November 2020 at page 64 of the bundle. This was mentioned again in the factsheet at page 72 provided with the letter from the liquidators on 29 January 2021. Mr Archibold's primary position in his witness statement was that he did not apply for benefits because he was not entitled to them. If the Respondent maintains and proves that he was in fact entitled to them, Mr Archibold (and any other Claimant in similar circumstances) will need to address their reasons for not making a claim.

Claim Against R1

54. In light of these findings, the Claimants said at the hearing that they were willing to withdraw their claim against R1 as they have been found to be entitled to payment from R2.

Tribunal Judge D Brannan acting as an Employment Judge
Dated: 11 January 2023