



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Walrond  
**Respondent:** Bermondsey Central Hall Methodist Church  
**Heard at:** London South Employment Tribunal (in person)  
**On:** 25.05.2023  
**Before:** Employment Judge Dyal  
**Representation:**  
**Claimant:** in person  
**Respondent:** Ms Veimou, Consultant

## REMEDY REASONS

### Introduction

1. By an application dated 23 June 2023 the Claimant requested written reasons in respect of the remedy judgment.
2. The matter came before me to assess the remaining remedy issues on 25 May 2023. These reasons should be read together with the judgment and reasons of 29 April 2022 and the judgment on remedy.

### The hearing

3. It had been my intention, and was my order, this hearing take place in person as there were technology problems when, in March 2023, the matter was first listed for remedy. However, the hearing was in the event listed by CVP by the tribunal's administration. Happily, the Claimant had resolved the technology problems that previously thwarted a remote hearing. All parties were happy to proceed by video hearing and so we did.
4. Documents:
  - a. There was some confusion about documentation. The Respondent prepared a remedy bundle which ran to 155 pages.
  - b. For reasons that are unclear the Claimant's version of it ran to only 92 pages.

- c. However, we established that the Claimant had the documents that were missing from her copy, albeit under separate cover.
- d. The Claimant also wished to rely upon two further mini-bundles that she had sent to the Respondent and the tribunal. I was content to allow her to do so. They ran to 9 and 22 pages respectively.

5. Witness evidence:

- a. The Claimant had a remedy witness statement that ran to 7 pages.
- b. The Claimant gave oral evidence under oath and was cross-examined. I also asked her some questions. Both sides made short closing submissions.

**How much was the Claimant's paid at the time of her dismissal?**

6. There was a dispute about this and I make the following findings.
7. The Claimant's starting salary at the outset of her employment was £24,000 p/a pro-rata. She received modest annual increments thereafter. By the time of her dismissal the Claimant was working 4 days per week which in this workplace was 4/5 of full-time.
8. On 28 August 2018, the Respondent sent the Claimant a letter stating that her pay had increased by 2% to £22,733. The Claimant thinks this is a reference to her net pay. However, I do not agree. It would be very unusual for the employer to express pay net in a letter of this kind. That is because, among other things, net pay depends on variables that are changeable and unknown such as the amount of the personal allowance in each tax year and the employee's other taxable income if any. In my view, the sum stated in that letter reflected the Claimant's gross salary as pro-rated down to reflect the fact she worked a 4 day week. Thus the full time equivalent would be £28,416.25. That is also consistent with salary that had grown incrementally over the course of the Claimant's employment. Further, such payslips as I had before me supported my analysis.
9. The Claimant had the benefit of 6% employer pension contributions, thus £1,363.98 per annum.
10. I can say, then, as follows:
  - a. Gross annual pay excluding employer pension contributions = £22,733
  - b. Gross annual pay including employer pension contributions = £24,096.98
  - c. gross weekly pay without pension contributions = £437.17
  - d. Pension contributions weekly = £26.32
  - e. The Claimant's gross weekly pay including employer pension contributions = £463.40
  - f. Annual net pay = £18,551.43
  - g. Net monthly pay = £1545.95

h. Net weekly pay = £356.76

11. NB, I used *Fact and Figures 202/23*, the well-known publication, to calculate the net equivalent of the Claimant's gross salary.

### **Continuous employment**

12. The Claimant was continuously employed from 4 October 2010 – 9 October 2018. She had 8 years service and was aged 56 on the effective date of termination. The Respondent seems to suggest the Claimant's continuous employment was 7 years. That is wrong. I have already found (paragraph 33 on p27 liability judgment) that it was 8 years and that was based on findings of fact that there was no gap of a week or more between the Claimant's two contracts with the Respondent (paragraph 54 and 55 liability judgment).

### **Wrongful dismissal**

13. The Claimant is entitled to 8 weeks notice pay plus 8 weeks pension contributions:

a. 8 weeks x £463.40 (gross pay plus pension contributions) = £3,707.20

14. As set out below this is uplifted by 20% by reason of s.207A TULRCA and thus the total is: £4,448.64.

### **Basic award for unfair dismissal**

15. The basic award falls to be calculated in accordance with s.119 Employment Rights Act 1996 (I have reminded myself of its terms but for economy do not quote it).

16. The Claimant was continuously for 8 years and was aged 56 on the effective date of termination. She is entitled to 12 weeks gross pay (which should include employer pension contributions): 12 x £463.40 = £5,560.80

### **Compensatory award**

17. The compensatory award falls to be assessed in accordance with s.123 Employment Rights Act 1996 (I have reminded myself of its terms but for economy do not quote it).

18. The compensatory award is subject to the statutory caps in s.124 Employment Rights Act 1996. In this case the relevant cap is 52 week's pay.

19. In *Wilding v British Telecommunications plc* [2002] ICR 1079, Potter LJ:

*"(i) It was the duty of Mr Wilding [the former employee] to act in mitigation of his loss as a reasonable man unaffected by the hope of compensation from BT as his former employer; (ii) the onus was on BT as the wrongdoer to show that Mr Wilding had failed in his duty to mitigate his loss by unreasonably*

*refusing the offer of re-employment; (iii) the test of unreasonableness is an objective one based on the totality of the evidence; (iv) in applying the test, the circumstances in which the offer was made and refused, the attitude of BT, the way in which Mr Wilding had been treated and all the surrounding circumstances should be taken into account; and (v) the court or tribunal should not be too stringent in its expectations of the injured party.'*

*"It is not enough for the wrongdoer to show that it would have been reasonable to take the steps he has proposed: he must show that it was unreasonable of the innocent party not to take them. This is a real distinction. It reflects the fact that if there is more than one reasonable response open to the wronged party the wrongdoer has no right to determine his choice. It is where and only where the wrongdoer can show affirmatively that the other party has acted unreasonably in his duty to mitigate that the defence will succeed'."*

#### Establishing the period of loss

20. The Claimant has been out of work since her dismissal. Her evidence is that:

- a. Between her dismissal and the present, save for a period of ill health she has actively looked for work. She joined some agencies and applied for jobs regularly. She also sought work through the Job Centre. She had to decline some job offers because they were too far away and she could not afford to travel to them and/or because her arthritis precluded the length of the commute. She has, however, now got a job offer with a local authority. Her evidence is that she is due to start imminently.
- b. There was a period between June 2019 and December 2019 when the Claimant was unfit for work. There are two fit notes. The first that applies for 2 months says a stress related problem and right lower limb pain, difficulty walking. The second which covers the rest of the period says only stress. The Claimant's evidence is that the issue was stress arising from her dismissal and the litigation about it, which in turn aggravated her arthritis. I accept her evidence and I find that the period of sickness was a direct consequence of the dismissal and the (reasonable) decision to litigate it.

21. I accept all of the Claimant's evidence on these matters and find that she gave an honest account.

22. The Respondent says the Claimant failed to mitigate her loss by declining job offers. I do not accept that. The jobs were declined because the Claimant could not afford to travel to them and/or because it was hard for her to get to them because of arthritis. She has been impecunious in this period and I accept her arthritis limited how far/much she can travel. She did not act unreasonably. I also accept the incapacity for work during the period of illness flowed directly and naturally from the dismissal. I note also that there was a period of time during the

pandemic, roughly from March 2020 to the summer of 2021 when it was particularly difficult to look for/find work.

23. The Claimant was not cross-examined on her efforts to find alternative employment and the Respondent did not lead any counter-mitigation evidence. I find that the Claimant has not failed to mitigate her loss. However, she happily now found what high quality fresh employment to go to so her losses are now at an end.

24. The Claimant's dismissal was on 9 October 2018. The first 8 weeks are compensated by the award for wrongful dismissal.

25. The period of loss for unfair dismissal, then, commences at the end of the notice period and ends with the present: 4 December 2018 to 25 May 2023. That is 233.29 weeks.

*Loss of earnings*

26. The Claimant is entitled to loss of earnings in the period of loss subject to *Polkey* and the statutory cap.

*Pension loss*

27. The Claimant is he entitled to the loss of employer's pension contributions at the rate of 6% of gross pay in the period of loss again subject to *Polkey* and the statutory cap.

28. The Claimant drew around £6,000 of her pension in December 2018. She claims two losses in relation to that:

- a. The loss of growth of that sum as a result of drawing it in 2018 rather than at the age of 65. There is almost no evidence before the tribunal for it to estimate how much the fund would have and would now grow if left in the pension fund. There is a table at p89 that indicates target growth rates of in the region 3.5 – 5.5%. Those are relatively low growth rates. I am not satisfied that the rate of growth is greater than the rate of inflation and therefore I am not satisfied that the sum drawn in 2018 would be worth less in real terms if drawn when the Claimant is 65. I make no award under this head.
- b. Payment of taxation on 75% of the lump sum drawn down in December 2018. It is not clear to me that there is any loss here. Taking a lump sum is often a relatively tax efficient way of drawing pension. There is no evidence about the manner in which the Claimant would have drawn her pension at retirement age but for her dismissal so no sensible comparison can be made.

29. The Claimant also claims a state pension loss arising from loss of employer national insurance contributions. I am not satisfied that there is any loss here:

- a. The Claimant says she has never previously been unemployed so I infer she has already had a long working life. She still has a significant chunk of her career ahead of her. There is no good reason to think she will not accrue 35 years of NI contributions.
- b. The Claimant has not provided the information that needs to be provided as set out at paragraph 3.44 of *Employment Tribunals: Principles for Compensating Pension Loss*.

*Expenses*

30. There were some very minor expenses claims on the schedule of loss which were not evidenced by documents and which the Claimant did not give evidence about so I make no award.

*Loss of statutory rights:*

31. I award the sum of £500.

*ACAS Code:*

32. Section 207A TULR(C)A says as follows:

*207A Effect of failure to comply with Code: adjustment of awards*

*(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.*

*(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—*

*(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*

*(b) the employer has failed to comply with that Code in relation to that matter, and*

*(c) that failure was unreasonable,*  
*the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.*

*(3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—*

*(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*

*(b) the employee has failed to comply with that Code in relation to that matter, and*

*(c) that failure was unreasonable,*  
*the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.*

*(4) In subsections (2) and (3), “relevant Code of Practice” means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes.*

33. I specifically invited the parties to address me on whether the ACAS code applied at all to the dismissal in this case as well as to the issues of whether it was

unreasonably breached if did apply and whether any upward or downward adjustment should be made.

34. The application of the ACAS code in a case in which there is a breakdown of relations is something of a moot point. I gave the parties time to consider the point before addressing me. Ultimately, the Respondent did not dispute that the ACAS code applied in principle to a dismissal of this kind. Its submission was simply that an uplift should not be made on the facts because the Claimant had been uncooperative.
35. I find that the ACAS code did apply in this case. In short that is because there was a significant conduct element to the breakdown of relations at least as the Respondent contemporaneously perceived it.
36. Claimant was dismissed without the Respondent following the process set out in the ACAS code or some semblance of it. The main breaches were of paragraphs 9, 10, 11, 12, 14 of the code. In my view the breaches were unreasonable. The Respondent proceeded in a curiously summary and sudden fashion at the point of dismissal and there was no good reason to do so.
37. In my view it would be just and equitable to uplift the Claimant's awards. In fixing the amount of the uplift I have regard to the nature and extent of the default. I also have regard to the fact that the Respondent did make some significant efforts to ventilate and resolve the underlying points of dispute (the contractual/JD issues) prior to dismissal. I have regard also to the amount of the two awards I am uplifting and in order to keep a proper sense of proportion and justice and equity I uplift them by different amounts:
  - a. 20% uplift for wrongful dismissal
  - b. 5% uplift for UD.

Employment Protection (Recoupment of Benefits) Regulations 1996

38. This is a case in which the *Employment Protection (Recoupment of Benefits) Regulations 1996* apply. In light of regulation 4(2) and the fact that the Claimant's overall losses flowing from his dismissal exceed the statutory cap, it is necessary to calculation and state what would be awarded were it not for the statutory cap.

Table of calculations for compensatory award and recoupment

<b><i>Compensatory award calculations</i></b>	
<b>Period 1: 4 December 2018 – 29 January 2019 (no Polkey reduction)</b>	£3,064.64
Loss of earnings 8 weeks x £356.76 (net weekly pay) = £2,854.08 8 weeks x 26.32 = £210.56	
<b>Period 2: 30 January 2019 – 25 May 2023 (60% Polkey reduction)</b>	£86,304.09
Loss of earnings 225.29 weeks x £356.76 (net weekly pay) = £80,374.46 225.29 x 26.32 = £5,929.63	
<b>Loss of statutory rights</b>	£500
<b>Total before ACAS uplift</b>	£89,868.73
<b>Plus ACAS uplift: 5%</b>	£94,362.17
<b>Application of statutory cap</b> 52 weeks gross pay including employer pension contributions £24,096.98	£24,096.98
<b><i>Recoupment calculations</i></b>	
<b>Monetary award</b>	£24,096.98
<b>Factor by which prescribed element must be reduced</b>  £24,096.98 / £94,362.17 = 0.255	0.255
<b>Prescribed element</b>  £83,228.54 (loss of wages in period of loss) x 0.255 = £21,223.28	£21,223.28



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Employment Judge Dyal  
Date: 10 July 2023

**Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**

**Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.**