



EMPLOYMENT TRIBUNALS

Claimant: Miss G M Edwards

Respondent: Jam'n'vegan

Heard at: Birmingham (via CVP) **On:** 11 December 2023

Before: Employment Judge Edmonds

Representation

Claimant: In person

Respondent: Did not attend

JUDGMENT having been sent to the parties on 12 December 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant was employed by the respondent, a food manufacturing business which produced vegan frozen meals for distribution across the UK, between 9 November 2020 and 1 February 2023. ACAS early conciliation started on 6 April 2023 and ended on 18 May 2023, and the claimant submitted her claim on 18 May 2023. As set out in more detail below, the respondent failed to file a response to the claim, and did not attend this hearing.
2. The claim is essentially about whether the claimant was dismissed and if so the reason why (the claimant saying that it was due to redundancy), and whether such dismissal was unfair both substantively and in terms of procedure followed. The claimant also seeks notice pay, holiday pay and redundancy pay.

Claims and Issues

3. This is a claim for unfair dismissal, notice pay, holiday pay and redundancy pay. As the issues had not been set out in advance of the final hearing, we

spent time at the start of the hearing clarifying the issues which were as follows:

Unfair dismissal

- a) *Did the claimant have two years' service at the effective date of termination, as required by s108 Employment Rights Act 1996?*
- b) *Was the claimant dismissed?*
- c) *What was the reason or principal reason for dismissal?*
- d) *Was it a potentially fair reason?*
- e) *Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?*
- f) *If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:*
 - i. *The respondent adequately warned and consulted the claimant;*
 - ii. *The respondent adopted a reasonable selection decision, including its approach to a selection pool;*
 - iii. *The respondent took reasonable steps to find the claimant suitable alternative employment;*
 - iv. *Dismissal was within the range of reasonable responses.*
- g) *If the reason was performance/capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:*
 - i. *The respondent adequately warned the claimant and gave the claimant a chance to improve;*
 - ii. *Dismissal was within the range of reasonable responses.*
- h) *If the claimant was unfairly dismissed, what award should be made to her (the claimant having confirmed she did not wish to be re-instated or re-engaged):*
 - i. *What financial losses has the dismissal caused the claimant?*
 - ii. *Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?*
 - iii. *If not, for what period of loss should the claimant be compensated?*
 - iv. *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?*
 - v. *If so, should the claimant's compensation be reduced? By how much?*
 - vi. *Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did the respondent or the claimant unreasonably fail to comply with it?*

- vii. *If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?*
- viii. *If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?*
- ix. *If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?*
- x. *Does the statutory cap of fifty-two weeks' pay or £93,878 apply?*

Redundancy payment

- i) *Was the claimant dismissed by reason of redundancy?*
- j) *If so:*
 - i. *How many complete years' service did the claimant have at the date of dismissal?*
 - ii. *What was the claimant's age at the date of dismissal?*
 - iii. *What was the claimant's weekly pay?*
- k) *What is the redundancy payment owed to the claimant applying the statutory formula?*

Holiday pay

- l) *What was the claimant's leave year?*
- m) *How much of the leave year had passed when the claimant's employment ended?*
- n) *How much leave had accrued for the year by that date?*
- o) *How much paid leave had the claimant taken in the year?*
- p) *Were any days carried over from previous holiday years?*
- q) *How many days remain unpaid?*
- r) *What is the relevant daily rate of pay?*

Notice pay

- s) *What was the claimant's notice period?*
- t) *Was the claimant paid for that notice period?*
- u) *If not, was the claimant guilty of gross misconduct / did the claimant do something so serious that the respondent was entitled to dismiss without notice?*
- v) *What notice pay is owed to the claimant?*

Procedure, Documents and Evidence Heard

- 4. ACAS early conciliation started on 6 April 2023, and ended on 18 May 2023. The claimant served her claim form on 18 May 2023 and this was sent to the respondent on 25 May 2023, informing the respondent that the deadline for replying was 22 June 2023. The respondent failed to serve a response to the claim and therefore the Tribunal wrote to the respondent on 27 October 2023 explaining to the respondent that under rule 21 of the

ET Rules, because the respondent had not entered a response to the claim, it was entitled to receive notice of hearing but may only participate in any hearing to the extent permitted by the Employment Judge who hears the case.

5. Given that the respondent had not filed a response to the claim, I verified the respondent's current status on Companies House. I could see that it remains active, although there is was a change of registered address in November 2023.
6. No bundle had been prepared for use at the hearing, although the claimant had sent a number of documents individually by email and referred to these whilst giving evidence.
7. The respondent did not attend the hearing and the claimant represented herself and gave evidence on her own behalf. The claimant had not prepared a specific witness statement for the hearing (having not fully understood what was required for the hearing) and therefore we agreed to use the contents of her claim form as her evidence, supplemented by the responses to some additional questions which I asked her under oath.
8. Following the hearing, the respondent wrote to request written reasons (alongside a request for reconsideration and application for extension of time in which to submit their ET3, which will be addressed by way of separate correspondence once it has been considered). However, in the course of reviewing the file for these purposes, it came to my attention that I had made an error in the calculation of the compensatory award for unfair dismissal, in that certain figures had been calculated gross when they should have been calculated on a net basis. A Certificate of Correction and Corrected Judgment have therefore been issued (along with an updated Recoupment Notice to the Department for Work and Pensions), and in these Reasons I set out in the Conclusions sections an explanation of both how the original (incorrect) figures and the revised corrected figures were calculated for completeness.

Facts

9. The claimant was employed by the respondent from 9 November 2020 to 1 February 2023, at which time she was dismissed without notice. The respondent is a small employer with a handful of employees.
10. The claimant started working for the respondent on 9 November 2020. The claimant's contract of employment which I was provided with stated that her employment in fact started in June 2022, however the claimant explained that this was simply her latest role and showed me a page from her original contract of employment which showed that her employment started in November 2020. I therefore find that her more recent contract incorrectly recorded her start date.
11. She subsequently changed roles in June 2022 to Kitchen/Production Manager, with an annual salary of £26,000 gross per annum.

12. Under the terms of that contract of employment, the claimant was entitled to 20 days' holiday plus bank holidays in each holiday year (making a total of 28 days), with no ability to carry forward holiday from one year to the next. The contract says that if she left part way through a holiday year then pro rata holiday would be paid to her rounded up to the nearest half day. She was required to give 12 weeks' notice to end her employment and the employer was required to give statutory notice to her if she was dismissed.
13. Her contract set out that the respondent would comply with employer pension duties. The claimant said that a NEST scheme had been set up but was not clear as to what her pension entitlement actually was and/or whether the respondent had in fact been paying it as she indicated that there was a separate concern that the respondent may not have been making the contributions it ought to have been making. The claimant did indicate that the respondent, through Kyle Parchment, had said that the respondent would match the employee contributions, however I have seen nothing to verify this and the claimant is unable to show me that this was the case. I therefore consider that the pension to which the claimant was entitled was the statutory auto-enrolment scheme : this would have resulted in employer contributions of 3% of salary.
14. Although the claimant's official job role was Kitchen/Production Manager she was asked to carry out a wide range of duties throughout her employment. I accept the claimant's evidence that a lot was asked of her and that it was hard to complete her allocated duties within the time available to her.
15. In October 2022 the claimant's best friend had a baby and encountered very serious health issues, resulting in her being in intensive care. The claimant was given her friend's baby to look after for an initial two week period. The claimant took annual leave and requested that the respondent consider allowing her to do some work from home so that she could also help support that baby during this period. It was agreed that she could work from home for an interim period on Thursdays and Fridays, however during the course of December 2022 Kyle Parchment told her that he would need her to come back to the workplace from early December.
16. Around this time another lady, Nitisha Patel, started managing the claimant and the claimant agreed with her that she could delay her return to the workplace by one further week to support her friend who was in intensive care.
17. Around this time Mr Parchment was also asking the claimant to make changes to recipes and work on recipe development as well as restocking which created additional workload. He was carrying out separate marketing campaigns which resulted in increased production requirements which again impacted the claimant's workload.
18. As a result the claimant asked Mr Parchment to look at her pay, as he had been indicating that she would receive a pay rise for 2 years but this had not been done. Following the claimant's request, Mr Parchment then told the claimant that she had not been doing what she was supposed to be doing in relation to her performance. The claimant indicated to him that he

needed to explain to her what the issues were through a performance process and she felt that she was being underpaid compared to what a production manager should be paid. Mr Parchment had also hired two new employees for logistics and marketing on a higher salary to the claimant's which she found demoralising.

19. Mr Parchment then informed the claimant in December 2022 that she would be demoted to a chef position (although he did not change her salary). This ultimately resulted in the claimant being signed off sick from work with stress for the last two weeks of December 2022.
20. During that time she asked Mr Parchment to put HR support in place and, after he failed to do so or take any action to clarify her situation, her sick note was then extended into January. The claimant did not in fact return to work before the end of her employment. She did not take any annual leave during her sickness absence and did not carry forward any leave from one year to the next.
21. In January 2023 the claimant attended a meeting at which someone from HR was present (this individual having been sourced by another member of staff from their former employer) and the claimant was informed that the company was no longer in a position to afford her salary and therefore she would either be demoted to a zero hours contract (as a chef) or take a redundancy package. There was no process followed by the respondent in getting to that position.
22. Although there was no process followed and the timing of this discussion is rather questionable, being around the same time that the respondent had also raised purported performance concerns and that the claimant had raised concerns about her own role and pay, I do find that the respondent did have a genuine need to find ways to save costs at that time. The claimant explained that, whilst the respondent had a number of investors, the money was not always invested in her view wisely.
23. The claimant said that she would need to take time to consider her position. Then, at the end of February she noticed that she had not been paid sick pay and after contacting HMRC she discovered that her employment had in fact been ended by the respondent on 1 February 2023. Again, no process was followed by the respondent in relation to this dismissal.
24. The claimant's duties were given to another individual who was already working for the respondent after her dismissal: this individual was employed initially as a chef, then became Head Chef but with additional responsibilities for kitchen manager duties.
25. Although the claimant's sick note ran beyond the end of her employment (and she was only entitled to SSP during sickness absence), I find that, had the respondent resolved the matter and not dismissed the claimant, she would have returned to work as soon as that had been done.
26. After her dismissal, the claimant received universal credit. She had also received universal credit whilst employed by the respondent but the amount was increased during her period of unemployment. She searched hard for a

new role, and ultimately found a role in health and social care (which is what she was originally qualified in) from 24 July 2023. This role is on a lower salary of £21,715 per annum with no additional benefits other than pension (and she was not permitted to join the pension scheme until she had been employed for 3 months). Although the claimant's salary is lower, she has indicated that in the long term she believes there will be opportunities for growth.

Law

Unfair dismissal

27. **Section 94 of the Employment Rights Act 1996** ("ERA 1996") provides:

(1) An employee has the right not to be unfairly dismissed by his employer.

28. **Section 95 of the ERA** goes on to state (in so far as relevant to these proceedings):

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ...only if) –

- a) the contract under which he is employed is terminated by the employee (whether with or without notice),*
- b)*
- c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*

29. **Section 98 of the ERA** states (again, so far as relevant to these proceedings):

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

- a) the reason (or, if more than one, the principal reason) for the dismissal; and*
- b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(2) A reason falls within this subsection if it –

- a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do*
- b) relates to the conduct of the employee*

- c) *is that the employee was redundant, or*
- d) *is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*

(3)

(4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

- a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
- b) *shall be determined in accordance with equity and the substantial merits of the case.*

30. This means that, for a dismissal to be fair, it must be for a potentially fair reason as set out above. The burden is on the employer to show what the reason for the dismissal was and that it was a potentially fair reason. However, where there is a dispute as to whether the employee was in fact dismissed at all, it is for the employee first of all to show, on the balance of probabilities, that they were dismissed.

31. Once a potentially fair reason has been established, the burden of proof as to whether or not the dismissal was fair or unfair under section 98(4) is neutral.

32. The definition of redundancy is set out in **section 139 of the ERA** as follows:

(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 his 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.

33. In ***Murray v Foyle Meats [1999] IRLR 562 HL***, Lord Irvine explained the definition of redundancy as follows:

“My Lords, the language of para (b) is in my view simplicity itself. It asks two questions of fact. The first is whether one or other of various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation.”

34. The leading case on the steps an employer might be expected to take when considering redundancy is ***Williams and ors v CompareMaxam Ltd 1982 ICR 156, EAT***. In this case the Employment Appeal Tribunal gave guidance on what those steps might be. The Tribunal must ask itself whether the dismissal *“lay within the range of conduct which a reasonable employer could have adopted”*. A reasonable employer might be expected to consider the following factors:

- a. whether the selection criteria were objectively chosen and fairly applied;
- b. whether employees were warned and consulted about the redundancy;
- c. whether, if there was a union, the union’s view was sought, and
- d. whether there was any alternative work available.

It is however important to note that these are guidelines and the relevant factors will vary from case to case.

35. The question is not whether the Tribunal would have taken the same action as the employer, but whether what occurred fell within the range of reasonable responses of a reasonable employer, both in relation to the decision itself and the procedure followed (***J Sainsbury plc v Hitt 2003 ICR 111***, and ***Iceland Frozen Foods Ltd v Jones 1982 IRLR 439***). The Tribunal must not substitute its own decision about what the employer should have done, and in many cases there is a band of reasonable responses that the employer could reasonably take. The band of reasonable responses test applies to the employer’s decision as to the pool of employees for selection.
36. Sometimes, an employee can be dismissed fairly for redundancy even where the reduced requirement for work is in a different role. This is known as “bumping” and often occurs where an employee whose role is no longer required is moved to another role, displacing the employee who undertook that role instead (***W Gimber and Sons Ltd v Spurrett 1967 ITR 208, Div Ct***).

Recoupment

37. Under **Regulation 3(1)(a) of the Employment Protection (Recoupment of Benefits) Regulations 1996 Recoupment Regulations**, accompanied by the Schedule to those Regulations, compensatory awards covering immediate losses are subject to recoupment. Recoupment is a process whereby the respondent is required to pay some of the compensation awarded to the Secretary of State in order to offset the sums spent by the employee on social security benefits relating to their unemployment following their dismissal.
38. Where recoupment applies, it is necessary to calculate the prescribed element of the monetary award: this is the period of loss up to the date of the Tribunal's Judgment on remedy (but excluding any notice period which is recovered separately as a breach of contract). It does not include any award for loss of statutory rights or loss of pension. The prescribed element is not immediately payable to the claimant. Instead, the Secretary of State will first serve a notice on the employer (or a notification that it does not intend to serve such notice) to pay the recoupable amount to the Secretary of State from the prescribed element. The remainder of the prescribed element is then payable by the respondent to the claimant.

Redundancy payment

39. **Section 163(2) of the ERA** states, in relation to the statutory right to a redundancy payment, that:
- (2) *...an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy.*
40. The methodology for calculating redundancy payments is set out in section **162 of the ERA**, and sets out a specific formula to be used as follows:
- a. One and a half weeks' pay for each complete year of employment from age 41;
 - b. One week's pay for each complete year of employment between the ages of 22 and 40; and
 - c. Half a week's pay for each complete year of employment below age 22.

This is up to a maximum of 20 years' service, and a "week's pay" is subject to a cap, which at the relevant time for the purposes of this claim was £571 per week.

Breach of Contract / Wrongful Dismissal

41. **Section 86 of the ERA** provides that:
- (1) *The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more –*

- a) *is not less than one week's notice if his period of continuous employment is less than two years;*
- b) *is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years;*
- c)

Holiday Pay

42. Statutory annual leave entitlements are set out in the Working Time Regulations 1998. **Regulation 13** provides for four weeks' leave in each leave year and **Regulation 13A** provides for an additional 1.6 weeks. This is inclusive of bank holidays and therefore a worker is entitled to 5.6 weeks' leave in any leave year. For a worker who works a 5 day week, this equates to 28 days.

43. **Regulation 14 of the Working Time Regulations** provides:

(1) *Paragraphs (1) to (4) of this regulation apply where –*

- a) *a worker's employment is terminated during the course of his leave year, and*
- b) *on the date on which the termination takes effect ("the termination date", the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.*

(2) *Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, the employer shall make him a payment in lieu of leave in accordance with paragraph (3).*

Conclusions

Unfair dismissal

44. The first question to consider is whether the claimant had 2 years' service at the effective date of termination, as required by section 108 of the Employment Rights Act 1996? I conclude that she did. Although her contract stated that her employment commenced in June 2022 this was clearly an error and it in fact commenced on 9 November 2020 so had 2 years' service at the time of dismissal.

45. The next question is whether the claimant was dismissed by the respondent, and I conclude that she was. She was told that her role was no longer available to her and then the respondent informed HMRC that her employment had ended.

46. The principal reason for that dismissal was redundancy. The respondent had a need to cut costs at that time, and the claimant's duties were subsequently carried out by another existing employee. Therefore the

respondent had a reduced requirement for employees to carry out work of a particular kind: this may have largely been the kind of work that another employee had previously been carrying out rather than the claimant's work specifically but there was still a redundancy situation overall. Although there was clearly a dispute with the claimant about other matters at the time of her dismissal, I conclude that those factors played a role in why it was the claimant who was selected to be made redundant, rather than that no redundancy situation existed at all. Her dismissal was wholly or mainly attributable to the reduced requirement for work of a particular kind. Redundancy is a potentially fair reason for dismissal.

47. The next issue is whether the respondent acted reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that reason as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. This requires consideration of both the reason for dismissal itself and the procedure followed, including whether the respondent adequately warned and consulted the claimant. whether the respondent adopted a reasonable selection decision, including its approach to a selection pool, whether the respondent took reasonable steps to find the claimant suitable alternative employment, and whether dismissal was in the range of reasonable responses.
48. I have no hesitation in finding that the respondent acted unreasonably in all the circumstances, even taking into account the respondent's small size and administrative resources, in treating that as a sufficient reason to dismiss the claimant. The dismissal was unfair both in relation to the procedure followed and the decision more generally to make the claimant redundant.
49. In particular:
 - a. There was no consultation process with the claimant about her proposed dismissal by reason of redundancy;
 - b. The claimant was given no warning of the decision to remove her role or opportunity to challenge the proposal to do so. There does not appear to have been any consideration of whether to "pool" her with any other employee;
 - c. Whilst the respondent did offer the claimant a zero hours contract with the respondent, it did not take suitable steps to find the claimant suitable alternative employment more generally. For example, there was no discussion about whether the claimant could have remained in employment and the chef (who became Head Chef) made redundant instead.
 - d. The claimant was not even informed of the final decision to dismiss her: this was simply processed by the respondent and submitted to HMRC.

- e. I conclude that in reality the respondent found it convenient to remove the claimant and to select her for redundancy in place of any other employee, because that also removed the need to deal with the ongoing dispute regarding her terms of employment.
 - f. Dismissal was not within the range of reasonable responses which the employer could reasonably take.
50. Having found that the claimant was unfairly dismissed, I turn to the question of compensation. The claimant has confirmed that she does not want me to consider reinstatement or reengagement within the respondent's employment.
51. In calculating the compensatory award, its purpose is to put the claimant back into the position that she would have been in had she not been unfairly dismissed as far as possible. The claimant is under a duty to seek to mitigate her losses and the burden of proof is on the respondent to show that she has not. In the absence of any evidence from the respondent to suggest that she has not mitigated her losses (and noting that the claimant did find alternative employment less than six months after dismissal, albeit on slightly lower pay), I make no deduction for failure to mitigate losses. Notice pay has been addressed separately below. I have also not taken into account the universal credit payments which the claimant received as that will be subject to the recoupment provisions.
52. As set out in paragraph 8 above, since the hearing took place and Judgment given, I became aware of an error in my calculations given at the hearing, in that I had inadvertently used gross figures instead of net figures. In the below I therefore include both the figures I originally provided at the hearing and the recalculated figures, for completeness. The net figures have been calculated using www.thesalarycalculator.co.uk.
53. I have separated compensation into three distinct periods of time:
- a. Period A: the unemployed period between 1 February 2023 to 23 July 2023;
 - b. Period B: 24 July 2023 to 11 December 2023, being the period prior to the Tribunal hearing during which the claimant had some income, but lower than her earnings at the respondent; and
 - c. Period C: 12 December 2023 onwards, being her future losses from the date of the Employment Tribunal hearing.
54. Period A is 5 months (February, March, April, May and June) plus three working weeks of July (24th July 2023 was a Monday). However, her notice period of two weeks is addressed separately in the breach of contract section below, therefore the total to be calculated for Period A is 5 months and one week. Her gross loss of earnings are calculated as follows:
- a. Annual salary of £26,000 per annum
 - b. Monthly salary of $26,000 / 12 = £2,167$ per month

- c. Weekly salary of $\text{£}26,000 / 52 = \text{£}500$ per week
55. Therefore Period A gross loss of salary is $(5 \times \text{£}2,167) + (1 \times \text{£}500) = \text{£}11,335$. In addition the claimant was eligible for a 3% employer contribution into her pension, which amounts to $\text{£}370.05$ ($0.03 \times \text{£}12,335$). Therefore her total lost gross income in this period is $\text{£}11,705.05$.
56. Her net salary (using her gross salary of $\text{£}26,000$) was:
- a. Annual net salary of $\text{£}21,971$
- b. Monthly net salary of $\text{£}21,971 / 12 = \text{£}1,830.92$
- c. Weekly net salary of $\text{£}21,971 / 52 = \text{£}422.52$
57. Therefore Period A net loss of salary, excluding the notice period, is $(5 \times \text{£}1,830.92) + (1 \times \text{£}422.52) = \text{£}9,577.12$. Adding the $\text{£}370.05$ pension contribution, this then totals net losses of **£9,947.17**
58. Period B runs from 24 July 2023 to 11 December 2023, a total of 20 weeks. During this period, using the weekly salary figures above, the claimant would have earned gross earnings of $\text{£}10,000$ ($20 \times \text{£}500$) plus 3% employer pension contribution of $\text{£}300$, resulting in a total of $\text{£}10,300$. I must subtract from this her actual earnings in her new employment which, based on a salary of $\text{£}21,715$ per annum gross gives a weekly gross salary of $\text{£}417.60$. Her pay during that period was therefore $\text{£}417.60 \times 20 = \text{£}8,352$. In addition, she was eligible to join the new employer's pension scheme after three months, which meant that she received 7 weeks pension contributions at 3% during that period: $0.03 \times \text{£}417.60 \times 7 = \text{£}87.71$. Therefore her total gross earnings in her new employment during that period are $\text{£}8,352 + \text{£}87.71 = \text{£}8,439.71$. Her total gross losses during Period B are therefore $\text{£}10,300 - \text{£}8,439.71 = \text{£}1,860.29$.
59. Her Period B net losses are calculated as follows. During this period she would have earned net earnings of $(20 \times \text{£}422.52) = \text{£}8,450.40$, and employer pension contributions of $\text{£}300$. The weekly net earnings in her new employment were $\text{£}364.84$. Therefore she did earn $(20 \times \text{£}364.84) = \text{£}7,296.80$ plus employer pension contributions of $\text{£}87.71$ during this period. Her net loss of earnings during this period was therefore $\text{£}8,750.40 - \text{£}7,384.51 = \text{£}1,365.94$.
60. Period C runs from 12 December 2023 onwards. I award the claimant a further six months of ongoing losses. I accept that she genuinely could not find another role on the same salary as before and therefore that she should be compensated for some future losses, however the claimant said in evidence that there was growth potential in her new role and that she has made a choice to return to that career rather than to keep searching for a similar role to the one she did for the respondent. Taking all of that into account, I find that six further months is the appropriate period. She is now a member of her new employer's pension scheme and so has no ongoing pension losses. Her gross monthly pay in her new employment is $\text{£}1,809.58$ and therefore her gross monthly losses are $\text{£}2,167 - \text{£}1,809.58$ per month, which amounts to $\text{£}357.42$. This therefore results in Period C gross losses amounting to **£2,144.52** ($\text{£}357.42 \times 6$).

61. Period C net losses are calculated using her net monthly salary of £1,830.92 at the respondent, compared to her new net monthly salary of £1,580.95 at the claimant's new employer. As outlined above, there are no pension losses during this period. Her net Period C losses are therefore $6 \times (\text{£}1,830.92 - \text{£}1,580.95) = \text{£}1,449.82$.
62. I make no reduction for contributory fault or to reflect the possibility that the claimant could have been made redundant fairly had a fair process been followed (known as a "Polkey" reduction). I conclude that the claimant was not at fault for her dismissal and also that the claimant would not have been dismissed if a fair process had been followed as the claimant would have shown that it was not in fact her duties that were no longer required and/or could have taken the role as chef. The claimant's selection for redundancy was motivated by the fact that the respondent was in dispute with the claimant about other matters. The respondent has not submitted any response to indicate why the decision to make the claimant redundant was fair. I also make no adjustment to the award for any alleged failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures: it does not apply in redundancy situations.
63. I award **£500** in respect of loss of statutory rights. The claimant will have to work for her new employer for a two year period before accruing the right to claim unfair dismissal or a redundancy payment.
64. I have not issued any "basic award" to the claimant because this is calculated according to a statutory formula and does not apply where the claimant receives a statutory redundancy payment: I have ordered that a statutory redundancy payment be made to her separately below.
65. Therefore, the total compensation to which the claimant is entitled for unfair dismissal, which should be based on her net losses as the compensatory award is under £30,000 and as such can be paid free from deductions for tax and national insurance contributions, is $\text{£}9,947.17 + \text{£}1,365.94 + \text{£}1,499.82 + \text{£}500 = \text{£}13,312.93$. However the recoupment provisions apply as set out below and therefore only part of the award should be paid to the claimant at this time. Once the Secretary of State has completed the recoupment process, this will enable the respondent to identify how much of the remaining sum owed should be paid to the Secretary of State and how much should be paid to the claimant.
66. Recoupment

As the claimant was in receipt of universal credit, the recoupment provisions apply. Recoupment is a process whereby, when a successful claimant has been in receipt of benefits because of their unemployment, their compensation is adjusted so that there is no double recovery (because if they received their full loss of earnings plus benefits on top, this would be a greater sum than they would have received in their employment had they not been dismissed unfairly). A separate explanatory note was sent to the parties alongside the Judgment in this case to explain recoupment in more detail, however the key point to note is that these is a specific process and formula followed to calculate this, and the respondent is required only to pay initially the difference between the "monetary award" and the

“prescribed element”. Once the Secretary of State has sent the respondent a Recoupment Notice, the respondent must pay that amount to the Secretary of State and then, if that amount is less than the “prescribed element”, the respondent must pay the balance to the claimant.

The relevant figures are as follows:

Figures provided in original Judgment - Incorrect

- Total Monetary Award = £11,705.05 + £1,860.29 + £2,144.52 + £500 = **£16,209.86**
- Prescribed element (losses from end of notice period to hearing date, but not including pension losses or loss of statutory rights) = £11,335 + £1,648 = **£12,983.00**. This element is not yet payable to the claimant, but the difference between any recoupment ordered by the Secretary of State and this sum will be payable once the recoupment process has been carried out.
- The period of the prescribed element is from 15 February 2023 (after the notice period expired) to 11 December 2023.
- The difference between the total monetary award and the prescribed element (which represents broadly future losses, loss of statutory rights and pension loss) is £16,209.86 - £12,983 = **£3,226.86**. This element is payable by the respondent without waiting for the recoupment process to occur first.

Figures provided in corrected Judgment – Correct

- Total Monetary Award = £9,947.17 + £1,365.94 + £1,499.82 + £500 = **£13,312.93**
- Prescribed element (losses from end of notice period to hearing date, but not including pension losses or loss of statutory rights) =
 - Period A: £9,577.12 +
 - Period B: (20 x £422.52) - (20 x £364.84) = £1,153.60

which totals **£10,730.72** (Period C losses not being subject to the recoupment provisions). This element is not yet payable to the claimant, but the difference between any recoupment ordered by the Secretary of State and this sum will be payable once the recoupment process has been carried out.

- The period of the prescribed element is from 15 February 2023 (after the notice period expired) to 11 December 2023.
- The difference between the total monetary award and the prescribed element (which represents broadly future losses, loss of statutory rights and pension loss) is £13,312.93 - £10,730.72 = **£2,582.21**. This element is payable by the respondent without waiting for the recoupment process to occur first.

Redundancy Payment

67. As explained above, I have found that the claimant's dismissal was by reason of redundancy. The respondent did not make a redundancy payment to her. As the claimant had more than two complete years' service with the respondent, and given that her employment ended by reason of redundancy, she was entitled to a statutory redundancy payment.
68. At the time of her dismissal she had two complete years' service and was aged 31. Her weekly pay was £500 as set out above. Therefore the redundancy payment owed to her, applying the statutory formula, would be $£500 \times 2 = £1,000$. The claimant is therefore entitled to a redundancy payment of **£1,000**.

Holiday Pay

69. The claimant's leave year ran from January to December, and therefore one month of the leave year had passed when the claimant's employment ended. She had accrued 2.33 days' leave by that time, which under the respondent's policy would be rounded up to 2.5 days' annual leave. She had not taken any leave during January and did not carry forward any days from the previous year.
70. I conclude that in those circumstances the claimant had 2.5 days' accrued but untaken leave as at the termination date, which was not paid to her by the respondent. Her daily rate of pay was £100 (£500 divided by 5 because of her 5 day working week), and therefore I conclude that the respondent failed to pay the claimant **£250** in respect of holiday pay.

Notice Pay (Wrongful Dismissal)

71. The claimant's contract of employment referred to statutory notice, which at the time of her dismissal amounted to two weeks' notice. The claimant had not committed gross misconduct and therefore was entitled to two weeks' notice of termination of employment. She was not paid any notice pay.
72. The respondent therefore failed to pay the claimant $2 \times £500$ i.e. **£1,000** in respect of notice pay.

Employment Judge Edmonds

2 February 2024