Case Number: 2305933/2023

THE EMPLOYMENT TRIBUNAL

Claimant:	Mr Walker
Respondent:	Canopy Wealth Management Limited
Heard at:	London South Employment Tribunal (video hearing)
On:	21 and 22 March 2024
Before:	Employment Judge Robinson

Representation

Claimant:	In person
Respondent:	Mr Canham, Director

CORRECTED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim of unfair dismissal is not well-founded and is dismissed.

2. The respondent was in breach of contract by dismissing the claimant without notice.

3. The respondent is ordered to pay the claimant the gross sum of £22,333, being damages for breach of contract. The respondent is entitled to deduct:

    a. tax and national insurance contributions due, and

    b. £17,500 from the net amount, to account for the tax free sums already paid to the claimant.

4. The respondent is ordered to pay the claimant a statutory redundancy payment of the net sum of **£4,823**.

5. The respondent is ordered to pay the claimant the net sum of £1,710 for unpaid pension contributions.

WRITTEN REASONS

1. I gave the above Judgment on day two of the 21-22 March 2024 hearing, together with oral reasons. The claimant has requested written reasons under Rule 62 of the Employment Tribunals Rules of Procedure 2013. My reasons were as follows.

Introduction

2. The claimant, Mr Walker, was employed by the respondent, Canopy Wealth Management Limited, from 4 June 2018 until 31 August 2023. At the time he left, the claimant's job title was "Mortgage and Protection Manager".

3. ACAS early conciliation started on 23 October 2023 and ended on 24 October 2023. The claim form was presented on 25 October 2023. The response form was received on 27 November 2023.

4. The parties accepted that the claimant was employed for the dates stated above and that his last day of employment was 31 August 2023.

Claims and issues

5. The claimant agreed at the outset that his claims, as set out in his claim form, were for two separate claims: one for unfair dismissal and one for notice pay.

6. Although at the conclusion of my oral judgment the claimant sought to refer to holiday pay entitlement and outstanding bonus pay entitlement, those claims had not been pleaded and could therefore not form part of his claim or this judgment.

7. On the two claims that *had* been made (unfair dismissal and notice pay), the parties agreed on the following matters:
    a. that there *was* a dismissal,
    b. the contractual entitlement to notice pay was six months, and
    c. there was no gross misconduct or any other reason why notice pay should not be payable.

8. I therefore agreed with the parties that the list of issues in dispute, for me to decide in this hearing were as follows:

Unfair Dismissal

1. What was the reason or principal reason for dismissal? The respondent says the reason was redundancy.

2. 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.

3. In particular, I need to decide whether:
    a. The respondent adequately warned and consulted the claimant;
    b. The respondent adopted a reasonable selection decision, including its approach to a selection pool;
    c. The respondent took reasonable steps to find the claimant suitable alternative employment;
    d. dismissal was within the range of reasonable responses.

Notice Pay

4. Was the claimant paid for his six months' notice period?

Procedure, documents and evidence heard

9. The parties submitted the following documents as evidence:
    a. A bundle of documents of 338 pages
    b. A witness statement from the claimant dated 29 January 2024
    c. Although the respondent had not submitted a witness statement, Mr Canham confirmed that he was content to adopt his statement of 27 November 2023 (at pages 231-234 of the bundle) as his witness statement.
    d. An audio recording of the settlement discussion

10. I heard oral evidence from Mr Canham for the respondent and from the claimant.

11. I have carefully considered the documentary evidence that I was referred to during the hearing, together with the parties' oral evidence and closing submissions.

The Law

Unfair Dismissal

12. Section 94 of the Employment Rights Act 1996 ("**ERA**") confers on employees the right not to be unfairly dismissed. That right can be enforced by complaining to the Tribunal under section 111. The employee must show that he was dismissed by the respondent under section 95. However, in this case, the respondent admits that they dismissed the claimant (within section 95(1)(a) of the ERA).

13. Section 98 of the ERA provides that in a complaint of unfair dismissal, it is for the employer to show what the reason for dismissal was and that it was one of the reasons set out in s.98(2).

14. The reason relating to the employee being redundant is one of those reasons (section 98(2)(c)). Section 98(4) provides that where the employer has shown what was the reason for the dismissal then:

> "...*the determination of the question whether the dismissal was 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*."

15. The burden of proof is neutral. The tribunal must not substitute its own views.

16. The Court of Appeal, in HSBC Bank Plc (formerly Midland Bank Plc) v Madden, Foley v Post Office 2000 ICR 1283, CA, held that although a tribunal *can* substitute its decision for that of the employer, that decision must not be reached by a process of substituting itself for the employer and forming an opinion of what the tribunal would have done had it been the employer.

17. In the leading case of Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 it was stated that:

"it is the function of the [employment tribunal] to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside the band it is unfair."

18. It is important to be aware that the 'band of reasonable responses' test applies not just to the decision to dismiss, but also to the procedure through which that decision is reached (J Sainsbury plc v Hitt 2003 ICR 111, CA).

19. One of the key factors in Mr Walker's case is whether the respondent's redundancy procedure was fair. In that context, I have considered the the House of Lords' rejection of the so-called 'no difference rule' in Polkey v AE Dayton Services Ltd 1988 ICR 142, HL. The effect of that judgment is that tribunals should not take account of the fact that a proper and fully redundancy consultation would have made no difference to the outcome to dismiss the employee. The ordinary wording of s.98(4) of the ERA does not permit a tribunal to consider that. That section simply directs tribunals to consider whether the employer acted reasonably when dismissing. However, their Lordships reasoned that the employer's actions in dispensing with a fair procedure were highly relevant to the question of whether a dismissal is fair.

Notice pay

20. Regulation 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 permits a claim for breach of contract to be made to the Employment Tribunals.

21. An employer will be in breach of contract if they terminate an employee's contract without the notice required under the contract being given. There is an exception to this where the employee has committed a fundamental breach of contract which would entitle the employer to dismiss without notice. However, the respondent accepts that that exception does not apply in this case.

22. The aim of damages for breach of contract is to put the claimant in the position they would have been in had the contract been performed in accordance with its terms. Damages relating to notice pay are subject to tax.

23. Severance payments are deductible from the losses in respect of which damages for wrongful dismissal are awarded, insofar as they are intended to discharge the employer's liability for wrongful dismissal.

The Facts that the Tribunal found

24. I have made the following findings of fact on the balance of probabilities having heard the evidence and considered the documents. These findings of fact are limited to those that are relevant to the issues listed above, and necessary to explain the decision reached.

25. Both parties accepted that the reason for the dismissal was for the potentially fair reason of the claimant's redundancy, as required by s.98(2)(c) of the ERA.

What was the reason for the dismissal – was there a redundancy situation?

26. I heard evidence from Mr Canham that there was a downturn in the mortgage market following the October 2022 interest rates rise, which began to affect the market into 2023. This was evidenced by the number of completed transactions shown in the documentary evidence provided in the bundle. The buy-to-let and residential work in particular was slowing down, meaning that the remaining remortgaging work was not as profitable.

27. I was also shown emails (page 266 of the bundle) where the claimant was admitting to the respondent in mid-2023 that he did not have much work to do. Furthermore, the claimant accepted in evidence that there was a slowdown in his work.

28. Mr Canham explained that the respondent, as a company, was just him and the claimant. There were no other employees, although Mr Canham's family did occasionally help-out on a short-term and ad-hoc basis. I accept Mr Canham's evidence that there was a slowdown in the mortgage market and that he made the business decision to move away from mortgages (which was the claimant's work) and towards a business based around 'Wealth and Money under management', which was not something that the claimant was qualified to do.

29. The claimant gave evidence that he offered to retrain as a paraplanner. However, Mr Canham's view was that he did not want or need a paraplanner as part of his business.

30. The respondent was, prior to the dismissal, made up of just two people – the claimant and the respondent.

31. The claimant raised the point that the respondent employed Mr Lombardy in September 2023; after the claimant had left. However, I accept Mr Canham's evidence that this was a short-term and part-time arrangement for 'pipeline work' i.e. transactions that already been started and which needed to be completed. I also accept Mr Canham's evidence that Mr Lombardy took on no new work. That conclusion is reinforced by the fact that Mr Lombardy only worked with the respondent for six weeks and left in October 2023.

<u>The redundancy process</u>

32. By Mr Canham's own admission, no formal redundancy process was followed. I find it clear from the evidence in the bundle and the oral evidence of both parties that the working relationship was very informal and always had been. Although the claimant was formally an employee, there had been a strong friendship between Mr Canham and the claimant,

given they had been working together for five years (and had been friends before that time).

33. Both parties gave evidence that there were previously informal loan arrangements between the claimant and the respondent. This was partly to alleviate some financial hardship the claimant was suffering, and partly to purchase IT equipment for the purposes of the claimant doing his job. The claimant confirmed he has kept that IT equipment as it is owned by him.

34. On the question of whether the selection pool was correct and whether there were alternative roles, it is clear from the evidence that, because the claimant was the only employee, there *was* no pool to select from. I accept Mr Canham's evidence that there simply *were* no alternative roles given the very small nature of the company.

35. The evidence on the communication and confirmation of the redundancy was not clear cut. Again, I accept Mr Canham's evidence that this was consistent with the informal nature of their relationship and that he wished to keep the redundancy process informal too. He reiterated the small nature of the business, with no HR or other administrative support meaning that a formal redundancy process could not be followed.

36. Ultimately both parties accepted in their evidence that there was a Whatsapp message on 4 August 2023, which was the first time that the issue of redundancy had been mentioned. That correspondence also alluded to the potential of a reduction in the claimant's work to three days per week. However, on 6 August 2023, a further Whatsapp message confirmed that the claimant was to be made redundant. I therefore find that the date of dismissal was 6 August 2023.

37. There was then a settlement discussion on 7 August 2023 and an exchange of emails on 8 August 2023 in which tax free amounts were discussed as full and final settlement of the contract.

38. The claimant gave evidence that he was coerced into these discussions

and felt pressured to accept what was being offered or face receiving nothing. I do not accept that there was coercion. I find that there was an informal negotiation, as there had been in many aspects of the employment relationship. I accept Mr Canham's evidence that he had never made anyone redundant before and was keen to end the relationship amicably with an informal settlement discussion. In addition, I find that Mr Canham was trying to facilitate the claimant being able to start a new role from 1 September and indeed there was evidence of Mr Canham sending emails to other companies, recommending and endorsing the claimant.

39. Both parties accepted in evidence that the claimant's full entitlement to redundancy and notice pay was never fully set out anywhere in writing as part of the settlement discussions. It is clear from the emails at pages 278-280 of the bundle that the negotiations were cordial and that there was no obvious pressure on the claimant to accept what was being offered. Indeed, the claimant responded with a counter offer to increase the settlement amount from £20,000 to £21,000, which the respondent accepted. From the email correspondence, the claimant seemed to me to be as keen as the respondent to end the employment relationship amicably and quickly to allow the claimant to move on to new employment elsewhere. I do not find that there was any reason why the claimant could not have paused the settlement discussions in order to consider his position and take advice if he wished.

Payments in lieu of notice

40. Both parties accepted that the claimant was given:
    a. his full entitlement to pay for the month of August on 31 August 2023 (the date on which he finished working for the respondent), and
    b. an amount of £17,500 in instalments (£3,500 short of the settlement figure of £21,000 that the parties had agreed).

SRP

41. Both parties accepted in evidence that the statutory redundancy payment that was due was £4,823.

Salary overpayment

42. The respondent made a counter-claim that the claimant's payslips had mistakenly paid him £3,075 instead of £3,000 per month since April 2020. Both parties accepted that that extra £75 *had* been made and that it was not provided for in the written contract.

43. However, the claimant gave evidence, which I accept, that he informed Mr Canham of this discrepancy but that Mr Canham had done nothing about it and had essentially acquiesced to this relatively minor overpayment. It was only when the employment tribunal proceedings commenced that Mr Canham sought to try and recover it.

Pension contributions

44. The parties agreed in their evidence that there was a pension discrepancy from the external pension provider. This meant that the claimant had not had the pre-tax amount of £90 paid to his pension provider. Both parties accepted that this payment was due from July 2022 to the end of the notice period – a period of 19 months.

The Tribunal's conclusions

45. Having found the facts as set out above, and heard the closing submissions of the parties, the Tribunal has come to the following conclusions.

Unfair dismissal

46. I find it clear that the reason for the dismissal was that there was a redundancy situation. The claimant did not dispute in his evidence that there was a downturn in the market and it is clear from his emails at the time that business was slow.

47. It is highly relevant that the respondent is a very small organisation, which comprised only the claimant and Mr Canham. I must factor that in when considering whether there is a redundancy situation. It is within Mr Canham's discretion to decide the direction of his business and if he wished to move

away from the type of work done by the claimant because it was clearly not as profitable as it was previously, then that is a legitimate business decision that gives rise to a redundancy situation.

48. I therefore find that the respondent acted reasonably in treating redundancy as a sufficient reason to dismiss the claimant.

The redundancy process

49. I also need to consider issues around warning and consultation, whether a reasonable selection criteria was applied, and if other roles were considered.

50. On warning and consultation, I accept the claimant's view that it all happened rather quickly. But given only two people were involved in the business, there was clearly an absence of other people to select for redundancy (there was no possible selection pool), and an absence of any alternative employment. I accept Mr Canham's evidence that he wished to make the process informal and quickly resolved so that the claimant could start other work on 1 Sept. Notifying the claimant of the redundancy situation and the likely redundancy by Whatsapp was consistent with the method of communication used between the parties in their day-to-day work. It is again indicative of the informal and small nature of the business.

51. The question for me to decide is whether that decision to dismiss for redundancy was a fair one by reference to whether it was within the band of reasonable responses available to an employer (Iceland Frozen Foods Ltd v Jones).

The reasonableness of the decision to dismiss

52. Finally, turning now to the decision to dismiss, I am aware that I must not substitute my own view for that of the respondent in this case. That is not the role of the Tribunal in unfair dismissal cases. The question is not what *I* believe a reasonable response to the respondent's business situation would have been. Instead, the question is whether the decision to dismiss was within the band of reasonable responses available to an employer in this situation. I find that it was.

53. Where the respondent's business is as small as it is in this case in terms of the number of members of staff (i.e. only the respondent and the claimant), it is a legitimate business decision for the respondent to opt to move away from the mortgage business. Indeed, it would be entirely unreasonable for the respondent to be obligated to continue his unprofitable mortgage business to sustain the claimant in employment given that was the role the claimant was qualified to do. The respondent is entitled to decide how he runs his business and the time of work he wishes to do that is most profitable.

54. The claimant's claim for unfair dismissal is therefore dismissed.

Notice pay

55. It is not in dispute that the claimant is entitled to damages for breach of contract. The intention is to put the claimant in the position he would have been in had the contract been performed correctly i.e. the position he would have been in had the respondent given him the six months' notice to which he was entitled.

56. Damages should take account of pay and contractual benefits such as Commission that the claimant would have received during the notice period. Since the claimant will be liable for tax on the element of the notice pay relating to pay, I use the gross figures for the calculation.

57. I have calculated the notice pay by reference to the claimant's gross pay. This is to include his contractual entitlement to commission. In his final three months' pay slips, the claimant received the following gross amounts:
    a. August 2023 - £4,505
    b. July 2023 - £4,563
    c. June 2023 - £3,823

58. Adding those three amounts together and dividing by three, provides an average monthly gross pay of £4,297.

59. The claimant's notice period was six months, for which he was entitled to be paid. The parties do not dispute that.

60. Given a date of dismissal of 6 August 2023, his notice period would have run until 6 February 2024. However, the claimant *was* paid for August 2023.

61. He is therefore owed five months until the end of January 2024, plus 6 days of notice pay in February 2024. I have multiplied the five months by £4,297 = £21,485. I have calculated the pay for those additional 6 days of February by multiplying the average monthly pay by 12 months (to get an annual figure), then dividing it by 365 days (to get a daily figure) and then multiplying it by 6 days = £848. The total gross notice pay due for 5 months and 6 days is therefore £22,333.

62. The respondent is ordered to pay the claimant that amount of £22,333 but the respondent is entitled to deduct tax and national insurance from that amount, and to deduct £17,500 from the net amount to account for tax free sums already paid.

Statutory Redundancy Pay

63. The parties accept that statutory redundancy pay was also due in addition to the notice pay. The correct amount for that was £4,823. The respondent is ordered to pay that amount which is not taxed.

Pension contributions

64. The respondent accepts that the claimant is owed £90 per month since July 2022 until the end of his notice period, in order to account for missed pension contributions. This is £90 times 19 (the number of months between July 2022 and the beginning of February 2024). That totals £1,710.

Personal loan

65. I conclude that the personal loan between the parties is not a relevant part of this claim. It is a matter to be sorted out between Mr Canham and the claimant separately and not a matter for this Tribunal to factor in, in relation to the claimant's claims for unfair dismissal and notice pay.

Employment Judge Robinson
Date 10 April 2024