



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Goodger
Respondent: Ms S Dalton
Heard at: Southampton Employment Tribunal
On: 6 January 2025
Before: Employment Judge Hay

Representation

Claimant: in person
Respondent: Did not attend

JUDGMENT ON REMEDY

1. The claimant, Mrs Goodger, is entitled to the following sums by way of remedy;
 - 1.1 £104.20 for breach of contract in relation to payment in lieu of notice.
 - 1.2 £228.00 in respect of unauthorized deductions from wages.
 - 1.3 £222.73 payment for annual leave accrued but not paid on termination.
 - 1.4 £312.60 compensatory award for unfair dismissal.
 - 1.5 £1200.00 award for injury to feelings arising from age discrimination.
2. That amounts to a total sum of £2067.53. Reasons for the awards and calculation of the amounts are given below.
3. All awards are gross. It is for Mrs Goodger to account to HMRC for any applicable payments of tax and National Insurance in respect of those sums.

Background

4. The Respondent, Ms Dalton, failed to engage properly with the tribunal and Judge Rayner issued an unless order requiring Ms Dalton to engage with the process and provide contact details to enable that to happen. Ms Dalton failed to comply with that order and so her response was struck out. The order making that strikeout informed Ms Dalton that she could apply to set aside the consequences of that decision. She did not do so.
5. Following the strike out order Ms Dalton was informed that she would be notified of the hearing and permitted to attend although participation in the hearing would be at the discretion of the judge hearing the claim. Ms Dalton wrote to the tribunal to inform them that she was unwell and would not be attending. She did not provide any evidence to support that assertion.
6. The Judge dealing with the hearing did not start the hearing until after its listed start time to ensure that Ms Dalton had an opportunity to attend if she wished to. The Judge was satisfied it was appropriate to continue with the hearing because Ms Dalton had had a fair opportunity, as provided for by the employment tribunal rules, to participate in this claim, to respond to it, and had an opportunity to present evidence in reply to it. The rules say how Ms Dalton should have done so. In this case that would have involved applying to set aside the effect of the unless order and then engaging with the Tribunal in a proper manner. Miss Dalton did not do that. She did send some emails to the Tribunal after her response was struck out. The Judge read those emails and read what purported to be a statement from another employee of Ms Dalton. The Judge gave no weight to those documents because the emails contained assertions but no evidence, and because the person from whom the witness statement apparently came had not signed it, and because neither Ms Dalton nor her potential witness attended the final hearing.
7. At the end of the hearing the Judge attempted to deal with remedy. There was scant evidence available to her to be able to make the relevant determinations, and the schedule of loss provided by the claimant offered little assistance. Although some determinations were considered in the hearing, it was necessary to reserve judgment on remedy to be provided in writing. Some of the decisions included in this judgment differ from those given at the hearing. This is because the Judge has now had time to consider the relevant statutory tests and apply them to the evidence presented. Where the decisions are different the reasoning behind the decision is explained and the calculations recorded.

Findings of fact

8. Following a final hearing the Tribunal made the following relevant findings of fact: The claimant Mrs Goodger was contracted by respondent, Ms Dalton, to work a minimum of 10 hours per week in a café owned and run by the latter. Those hours were to be flexible. The claimant was interviewed and offered the job on those terms by the then manager of the café, who in that capacity was acting as Ms Dalton's agent.
9. At the time of her employment Mrs Goodger was aged over 24 years and was entitled to a minimum wage of £9.50 per hour. She was employed from 1st of November 2022 to the 22nd of April 2023. She had no fixed shifts, and her hours of work were communicated to her via WhatsApp, on which rotas would be posted and supplemented by WhatsApp messages. During the latter period of her employment, once the manager had left in January 2023, Mrs Goodger's hours were regularly altered and reduced and sometimes cancelled outright. Because of her age Mrs Goodger was paid a higher minimum wage than younger co-workers who, like her, worked front of house. The Tribunal found this was the reason she had been selected to have her hours reduced.
10. The Tribunal also found that Mrs Goodger had been discriminated against, that is treated less favourably, because the respondent allowed it to become well known, and a source of speculation and amusement among employees and customers, that Mrs Goodger would be treated like this.
11. On 18 April 2023 Mrs Goodger had her shift cancelled and this prompted her to ask her employer Ms Dalton, for a copy of her contract. The response was that she did not have a contract and would not be given one. In a WhatsApp exchange between Mrs Goodger and Ms Dalton on 19 April claimant asserted her right to a contract, and to be treated equally as a part time employee. The content of the messages show she was simply asking for clarity about when and how she might have her work cancelled, and her right to both notice of any cancellation and payment if she was available to work her allocated shifts. The response from Ms Dalton was that IF she was to give claimant a contract it would be a flexible zero hours contract. There followed a brief exchange of messages following which, by blocking Mrs Goodger on WhatsApp, removing her from the café's group chat, and sending her a P45, Ms Dalton dismissed her.
12. The Tribunal concluded that dismissal was automatically unfair pursuant to s104 of the Employment Rights Act: dismissal for asserting a statutory right.
13. At the time of her dismissal Mrs Goodger had not been paid holiday pay nor been given notice, nor had she been paid in lieu of the same.

14. Mrs Goodger presented her claim on 19 May 2023, having previously commenced the Early Conciliation process with ACAS on 20 April 2023. Thus the relevant date for time limits and for calculating damages is 21 January 2023. This accords not only with the rules about time limits in the relevant statutes which the Tribunal applied, but also the evidence from Mrs Goodger that the job was “ok” until the end of January 2023 when the manager left.
15. As a consequence of the Tribunal findings Mrs Goodger is entitled to a financial remedy for the following:
 - 15.1 Notice pay
 - 15.2 Reimbursement of unauthorised deductions.
 - 15.3 Holiday pay
 - 15.4 Compensation for unfair dismissal
 - 15.5 An award for injury to feelings arising from age discrimination.

Notice pay

16. Section 86 of the Employment Rights Act 1996 says that every person who has been continuously employed for one month or more is entitled be given notice by their employer: s86 (1). Relevant notice periods are:
 - 16.1 At least one week for someone continuously employed for less than two years: s86 (1) (a)
 - 16.2 For someone continuously employed for between two and twelve years, at least one week’s notice for each year of employment: s86 (1) (b)
 - 16.3 Not less than 12 weeks’ notice if employed for 12 years or more: s86 (1) (c)
17. Section 88 of the Employment Rights Act 1996 provides that an employer is liable to pay an employee for their normal working hours during that period of notice provided the employee is
 - 17.1 able and willing to work during the notice period, or
 - 17.2 incapable of work due to sickness or injury, or
 - 17.3 absent from work for a pregnancy or parental leave, or
 - 17.4 on holiday.
18. There is no statutory entitlement to be paid notice pay but where an employer fails to give notice as required by section 86, the right to be paid for notice, had it been properly given, will be taken into account in assessing the employer’s liability for breach of contract: s 91 (5) Employment Rights Act 1996.
19. On her ET/1 claim form Mrs Goodger ticked the box claiming “I am owed notice pay”. That was treated as a claim for breach of contract because

Mrs Goodger has a statutory entitlement to notice, and there was no evidence of any other contractual arrangement which would displace or replace that statutory right. Had Ms Dalton specifically addressed notice periods and payments in a written contract of employment such a term might have applied, but she did not.

20. The Tribunal therefore concludes that the damages owed to Mrs Goodger for breach of contract specifically for failing to give a weeks' notice, during which time Mrs Goodger could have worked and earned her wages, is the equivalent to the 10 hours per week for which she was contracted.
21. The national minimum wage increased on 1 April 2023 to £10.42 for people aged over 24. Had Mrs Goodger been given notice in accordance with s86 it would have been dated after 1 April 2023, and so her damages are equivalent to $10 \times £10.42 = £104.20$. That is the amount of the award for breach of contract regarding notice.

Unauthorised deductions

22. Section 13 Employment Rights Act 1996 protects workers from unauthorised deductions from their wages, whilst allowing for some specific exceptions. S13 (3) states that "where the total amount of wages paid on any occasion by an employer to a worker...is less than the total amount of wages properly payable by him to the worker on that occasion...the amount of the deficiency shall be treated...as a deduction".
23. The Tribunal is required to determine the amount of wages "properly payable" in order to work out whether there has been an unlawful deduction. Following *Grey May (Carpet Fitters & Contractors) Ltd v Dring* 1990 ICR 188 EAT, the Employment Tribunal should apply principles derived from common law and contract law to such claims. That requires the Tribunal to consider all relevant terms of the contract, as it was determined by the Tribunal, including any implied terms: see *Camden Primary Care Trust v Atchoe* 2007 EWCA Civ 714 CA.
24. The Tribunal concluded that Mrs Goodger was contracted to work a minimum of 10 hours per week. Where she worked more than that, she is entitled to be paid for all the hours that she worked. Where she worked less than 10 hours per week, provided she was willing and able to work that minimum number of hours, she would be entitled to be paid for 10 hours per week.
25. Mrs Goodger claims an entitlement to be paid the difference between the hours she was scheduled to work at the café, and the hours she actually did work and was paid for. Both she, and the Tribunal, faced difficulties in calculating that amount because Mrs Goodger did not have any payslips

to present on which she had based her calculations. She worked out how much she was owed by calculating the number of hours she was rota'd to work and how much she would have been paid for working those hours, and then deducting the payments she actually received for the hours she did work which were less. That gave an overall figure of £228.00 as the difference between what she would have been paid for the hours she was rota'd to work, and the pay she actually received.

26. Where those changes and cancellations meant she worked less than 10 hours per week, that amounted to an unauthorised deduction from wages. Based on the evidence of the limited number of rotas Mrs Goodger provided, the Tribunal accepted that it was more likely than not that those short notice changes did have the effect of reducing her hours to less than 10 hours per week over the relevant period. That reduction in hours created a consequential reduction in her pay, which meant she was paid less than the amount payable to her under the terms of the contract.
27. That deduction was not an authorised deduction within the permitted exceptions listed in s13 Employment Rights Act, and so Mrs Goodger is entitled to those payments, and will be awarded £228.00 in respect of her claim for unauthorised deductions.

Holiday Pay

28. An employee's right to holiday pay derives from the Working Time Regulations 1998. Regulations 13 and 13B between them entitle workers to four weeks annual leave plus an additional 1.6 weeks: see Regulation 13 (1) and Regulation 13A (1) and (2) (e). Regulation 13 (3) specifies that a worker's leave year begins on the date as provided for in any relevant agreement or on the date on which the employment begins and each subsequent anniversary of that date. Mrs Goodger was not provided with a written contract, so applying Regulation 13, her leave year runs from 1st November until 31 October.
29. Regulation 14 contains the formula for calculating the payment due to a worker whose employment is terminated part way through their leave year, where that worker has not taken all the of the holiday pay which they have accumulated by the time of their termination. Mrs Goodger accrued (or built up) paid holiday entitlement during her employment but had not taken any paid leave by the time of her dismissal. Regulation 14 (2) states that 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 a payment in lieu of leave. Ms Dalton did not make any such payments because she did not pay any holiday pay to the claimant.

30. Applying the formula in regulation 14 (3) Mrs Goodger had accrued 2.296 weeks of paid leave entitlement that being
- 30.1 5.6 weeks under Reg 13 and 13A
 - 30.2 $\times 0.41$ representing the five months of her employment divided by the 12 months of the leave year
 - 30.3 $\times 0$ that being the amount of paid leave she had taken during the period of her employment.
31. Regulation 16 states a worker is entitled to be paid a week's pay in respect of each week of leave. The difficulty facing Mrs Goodger and the Tribunal is that she had no payslips to present to the Tribunal on which her "week's pay" could be calculated and she did not provide any other evidence on which the calculation could be made. In a document intended to be a "Schedule of Loss" she said she had estimated her loss of wages along with unlawful deductions of holiday pay but she did not place a figure on it. The closest she came to providing evidence about it was in the hearing when she quoted from the .Gov website holiday pay calculator which variously produced figures ranging from £258.40 to £266.00. Both of those figures are more than the figures generated by applying 2.296 to her 10 hours a week.
32. Calculating her paid leave entitlement on contractual hours of paid work 10 per week, gives a week's pay as £95.00 between November 2022 to 30 March 2023, and £104.20 from 1 April 2023 to her termination. Dividing her 2.296 weeks entitlement across the 5 months over which it accrued means that between November 2022 to March 2023 she accrued 1.84 weeks pay at £95.00 per week, and in April 2023 she accrued 0.46 weeks pay at £104.20. That gives figures of £174.80 and £47.93 respectively. Adding those together to get her accrued entitlement of 2.296 of her annual 5.6 weeks entitlement, gives a figure of £222.73.
33. This is slightly less than the amount discussed in the hearing or as calculated by the .Gov website, but it has been reached applying the formula set out in the relevant legislation and based on the evidence the claimant was able to present to the Tribunal. It may represent less than her actual entitlement but if so that is because she was not able to show with evidence what that figure was. She has been able to show that it is more likely than not that she was entitled to holiday pay at a rate equivalent to the 10 hours a week that the Tribunal found she was contracted, and that is the basis for her award.

Compensation for unfair dismissal

34. The Tribunal found that the reason for Mrs Goodger's dismissal was because she had asserted her statutory right to a written contract. Section 104 Employment Rights Act 1996 states that an employee is dismissed

unfairly if the reason or principal reason for the dismissal is that they brought proceedings to enforce a relevant statutory right or alleged that their employer had infringed such a right. Section 104 (4) lists the relevant statutory rights and specifically includes any for which the remedy is by way of complaint or reference to an Employment Tribunal.

35. Section 1 Employment Rights Act 1996 entitles an employee to a written statement of the particulars of their employment. Section 11 allows an employee to make a reference to the Employment Tribunal to determine what particulars ought to have been included to comply with section 1.
36. By asking for a written contract Mrs Goodger alleged that Ms Dalton had infringed her right to a written statement of employment particulars. That was something Mrs Goodger was entitled to “refer” to the Tribunal, so by dismissing her because she asked, Ms Dalton has dismissed Mrs Goodger unfairly.
37. Mrs Goodger is therefore entitled to an order of compensation for unfair dismissal: see S111 and s112 Employment Rights Act 1996. Compensation is calculated by reference to sections 118 – 124 and ordinarily include a “basic” award and a “compensatory” award.
38. S119 deals with the basic award the amount of which is calculated by working out how long the employee had been continuously employed, working backwards from the effective date of termination, and then reckoning the number of years employment that includes, before allowing an appropriate amount for each of those years of employment: s119 (1) (a) to (c). The appropriate amount is set by s119 (2) and is calculated according to the age of an employee during any relevant years of employment.
39. At the hearing the Judge indicated that because Mrs Goodger had not been continuously employed for a year, she would be entitled to a basic award adjusted downwards.
40. Upon further consideration of the relevant legislation (law) Mrs Goodger does not appear to qualify for this basic award. This is because s119 ERA states that the amount of the award “shall” be calculated by reference to “the number of years of employment”. This requires the ET to determine the period ending with the effective date of termination (date of her dismissal) and “reckoning backwards from that period number of years of employment falling within that period”.
41. Counting backwards from the date of her dismissal, Mrs Goodger does not have any “years of employment” completed with the respondent, and so does not qualify for this basic award.

42. This basic award under s119 is intended to mirror the effect of a redundancy payment which is compensation for the loss of job security. Employees only qualify for redundancy where they have two years continuous service, so that would not be a protection that Mrs Goodger qualifies for. This supports the interpretation of s119 as a provision which does not extend to all employees, but is dependent upon a minimum length of employment of at least one year, which Mrs Goodger does not satisfy.
43. The amount of a compensatory award is such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant because of the dismissal, so far as that loss was caused by action taken by their employer: s123 Employment Rights Act 1996. Such loss includes any expenses reasonably incurred by the claimant because of the dismissal and the loss of any benefit they might reasonably have expected to have but for the dismissal.
44. The difficulty in forming a view of what is just and equitable is that there was no substantive evidence of loss presented by Mrs Goodger. Her schedule of loss document did not show any calculations but under the heading "Claim for Automatic Unfair Dismissal" simply recorded "I claim the equal to 12 months pay compensation". She does not explain how she worked this out or place any monetary figure on it. In oral evidence Mrs Goodger said she had applied for two other jobs but didn't get them which she thought was because the café from which she was dismissed was in a small village, and by inference, people knew what had happened there. Mrs Goodger mentioned that she has now started a new job but again, presented no evidence in support of when it started or how it might have affected her claim to be entitled to "12 months pay compensation".
45. The evidence from Mrs Goodger of Ms Dalton's reaction to her request for a contract, and clarity about how notice of cancellations and payments for short or cancelled shifts should work, was to say Mrs Goodger would only get a zero hours contract. That was clearly how Ms Dalton had intended the contract to operate, although the Tribunal found her manager had agreed something different with Mrs Goodger. Ms Dalton would have been entitled to dismiss Mrs Goodger on the basis that the business in the café could not support an employee with Mrs Goodger's availability on a minimum of 10 hours a week. This could amount either to a redundancy or some other substantial reason justifying dismissal, under section 98 Employment Rights Act.
46. Had Ms Dalton not dismissed Mrs Goodger when she did, a proper inference is that she would have offered her a zero hours contract, and if that was not accepted, terminated the contract with an appropriate period

of notice. Given the short period of employment that would have been a period of not less than one week: s86 Employment Rights Act.

47. Had Ms Dalton dismissed the claimant because the business could not support her minimum 10 hours a week within the flexibility Mrs Goodger required, that might have been a redundancy situation, for which Mrs Goodger would not have been entitled to a statutory redundancy payment due to her short period of employment.
48. If not a redundancy, the respondent could have argued that the need to maintain a flexible workforce and to reduce and manage costs in quieter periods amounted to some other substantial reason for Ms Goodger's dismissal. It is impossible to find as a fact that such an argument would definitely have succeeded but given the nature of the business, a small village café, with limited opening hours and a small staff, it would not be an unreasonable argument.
49. That therefore means it is likely that the claimant would have been dismissed in any event, even if Ms Dalton had acted fairly. Following the case of *Polkey v AE Dayton Services Ltd* [1987] IRLR 50 (HL) the Tribunal is required to reduce any award for future loss to reflect the chance of that happening. That reduction can be in the form of a % reduction to any award, or a finding that on "X date" the claimant would have been fairly dismissed. On the basis of the claimant's evidence on this subject, the Tribunal finds that she would have been dismissed following a fair process if and when she declined to accept a zero hours contract. At that stage, the Tribunal concludes that Ms Dalton would have dismissed her with notice, and that such a dismissal would have been a fair one.
50. In all the circumstances of this case, the Tribunal concludes it would be just and equitable to make a compensatory amount equivalent to two weeks pay, reflecting a short period of one week in which Mrs Goodger remained employed whilst she would have considered whether or not to accept a zero hours contract with the respondent, and then the statutory entitlement to one weeks' notice, or payment in lieu of notice, if and when she declined.
51. Because the Tribunal has already awarded the sum equivalent to one weeks' pay for breach of contract in relation to payment in lieu of notice, that sum will be deducted from the compensatory award, as to do otherwise would amount to double recovery.
52. In addition, the respondent was and remained in breach of her obligation to provide the claimant with a written statement of particulars. Applying section 38 (3) of the Employment Act 2002 the Tribunal is obliged to increase the award by a minimum of two weeks' pay, unless there are

exceptional circumstances which make it unjust or inequitable to do so. There are no such exceptional circumstances and the award shall be so increased.

53. That means Mrs Goodger shall be awarded the equivalent to 3 weeks pay as a compensatory award calculated as £416.80 being:

53.1 A weeks' pay being 10 contractual hours x minimum wage of £10.42: £104.20 (the hypothetical week in which she decided whether to accept a zero hours contract)

53.2 £0.00 for the weeks' notice she was entitled to (because she has been awarded compensation for this as a breach of contract)

53.3 Plus 2 weeks uplift for failure to provide a written statement of particulars being an additional £208.40

Award for injury to feelings

54. The Judge heard submissions from Mrs Goodger in the hearing and accepted that Mrs Goodger had felt embarrassed and humiliated by the manner of her treatment, in particular the fact that customers would speculate whether she would get to finish her shifts. The Judge also noted that the existence of an award specifically for injury to feelings reflected the reality that any form of discrimination would have an adverse impact upon the person discriminated against. The Judge concluded that this fell within the lowest of the three bands identified in the case of *Vento v Chief Constable of West Yorkshire Police (No 2)* [2003] IRLR 102, to which the claimant had been directed. Mrs Goodger agreed with this.

55. The figures relevant to that lowest band, updated annually, are currently £1200 to £11,700. The Tribunal concluded that the discrimination experienced by Mrs Goodger fell at the lower end of that bracket because it amounted to her feeling undervalued and also humiliated by people talking and joking about it. It had not prevented her from seeking other employment, and she had been able to return to a professional job. One of the things Mrs Goodger complained about was the fact that this occurred in a small village and she still had to see the respondent Ms Dalton, whilst out walking her dogs. The Tribunal explained, and Mrs Goodger accepted, that the Tribunal could not prevent that sort of discomfort, and that was not itself a reason to increase an award.

56. Noting that the lowest figure quoted of £1200.00 is the figure applicable to claims presented after 6 April 2024, and Mrs Goodger's claim was presented in 2023, and therefore the lowest applicable figure at the time of her claim will have been slightly less than £1200.00, the Tribunal will make an award for injury to feelings in the sum of £1200.00.

57. These findings are provided in a reserved judgment, and no further written explanation will be provided. This judgment will be entered in the public register.

Employment Judge Teresa Hay

Date 23 January 2025

JUDGMENT SENT TO THE PARTIES ON
11 February 2025 By Mr J McCormick

FOR THE TRIBUNAL OFFICE