



# THE EMPLOYMENT TRIBUNALS

**Claimant:** Mr A G Eastwood

**Respondent:** Kingly Solicitors Ltd. t/a Coles Solicitors (in voluntary liquidation)

**Heard at:** Newcastle CFCTC (By CVP)      **On:** 1 February 2021

**Before:** Employment Judge Newburn

**Members:**

***Representation:***

**Claimant:** In Person

**Respondent:** No attendance

## RESERVED JUDGMENT

1. The Claimant's claims for a redundancy payment and unlawful deductions from wages in respect of unpaid wages are dismissed upon withdrawal by the Claimant.
2. The Claimant's claim for breach of contract brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 succeeds in respect of the Claimant's notice pay and holiday pay and the Respondent is ordered to pay the following sums to the Claimant:
  - 2.1. unpaid notice: the Respondent is ordered to pay the net sum of **£2,960.60** in respect of the Claimant's notice pay and **£151.45**, in respect of employer's pension contributions for the period;
  - 2.2. holiday pay: the Respondent is ordered to pay the sum of **£1,148.03** gross in respect of 10.5 days' pay in lieu of untaken holiday. This is a gross award and the Claimant shall be liable to the Inland Revenue for any payments of tax and national insurance thereon.
3. The Claimant's claim for unfair dismissal is well founded. However, no compensation is due to the Claimant in respect of his unfair dismissal because:

- 3.1. The Claimant has received a statutory redundancy payment and therefore no basic award is payable.
- 3.2. No compensatory award is due as there was a 100% chance that the Claimant would have been dismissed had a fair redundancy procedure been followed. Accordingly, the compensatory award is reduced by 100% pursuant to the principles in Polkey v A E Dayton Service Limited 1988 ICR 142.
4. This makes a total award of **£4,260.08**
5. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply to these awards.

## REASONS

### The Issues

1. The issues to be determined in this case were as follows:
  - 1.1. What was the Claimant's notice period?
  - 1.2. Was the Claimant paid for that notice period?
  - 1.3. If not, was the Respondent entitled to dismiss without notice?
  - 1.4. Did the Respondent fail to pay the Claimant for annual leave the Claimant had accrued but not taken when his employment ended?
  - 1.5. Was the Claimant unfairly dismissed?
  - 1.6. If so, had a proper procedure been followed by the Respondent, what are the chances that the Claimant would have been dismissed in any event?
  - 1.7. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply to any of the Claimant's claims?
  - 1.8. Did the Respondent or the Claimant unreasonably fail to comply with it?
  - 1.9. Is it just and equitable to increase or decrease any award payable to the Claimant?
  - 1.10. If so, by what proportion, up to 25%?

### The Hearing

2. The Claimant's claim was one of multiple claims brought against the Respondent company. Evidence in respect of the Claimant's claim and the claims of 7 other employees were heard together.

3. At the start of the hearing I was provided with an up to date Excel spreadsheet which comprised a table confirming the claims that each Claimant was making against the Respondent.
4. I was also provided with one bundle of evidence amounting to 240 pages in respect of each Claimant's case against the Respondent. The bundle contained each Claimant's witness statement, schedule of loss, and documentary evidence.
5. To this bundle I admitted further evidence from the Claimants amounting to a further 27 pages which was inserted at the end of the bundle making the total bundle 267 pages. None of the further evidence that was admitted to the bundle related to the Claimant's claim. I considered all of the evidence submitted by the Claimant and heard his evidence on oath.
6. Despite the fact that the Respondent is in voluntary liquidation, the Claimant confirmed that he wished to obtain a judgment.
7. There was no evidence that any stay of this claim had been obtained under section 112 of the Insolvency Act 1986.

### Findings of Fact

8. The Respondent carried on business as a Solicitors practice operating from multiple offices across the North of England. The Claimant was employed with the Respondent firm of Solicitors from 27 April 2018, working 4 days per week as a Solicitor.
9. The Claimant was unable to locate a copy of his employment contract however the bundle contained contracts of employment from the other Claimants employed with the Respondent at pages 77 and 167. The Claimant gave oral evidence on the terms of his contract where no documentary evidence regarding a term of his contract was available.
10. The Claimant's payslips at pages 23 to 26 of the bundle showed the Claimant's earnings. The figures, taken from these wage slips show the Claimant earned:

#### 10.1. Pay:

10.1.1.	monthly:	£2,916.67 gross and £2,565.84 net;
10.1.2.	weekly:	£673.08 gross and £592.12 net;
10.1.3.	daily:	£168.27 gross and £148.03 net;

#### 10.2. Employer's average pension contribution:

10.2.1.	monthly:	£131.25
10.2.2.	weekly:	£30.29
10.2.3.	daily:	£7.57

11. The Respondent employer's pension contributions were unclear from the Claimant's payslips however the Claimant and all Claimants in the hearing gave evidence in their schedule of loss that employer's pension contributions were 4.5%. I accepted this figure and I calculated the Claimant's employer pension contributions accordingly.
12. On 12 August 2020, the Respondent company was subject to an intervention by the Solicitors Regulation Authority ("SRA") resulting in the immediate shutdown of all of the Respondent's offices. There was no warning, consultation, or notice of redundancy given to the Claimant, as the offices were immediately closed further to the intervention on 12 August 2020.
13. The Claimant was dismissed by reason of redundancy on 12 August 2020.
14. The Claimant made a claim to the Redundancy Payments Service and received a payment of £618.81 in respect of his holiday pay as well as a payment in respect of his statutory redundancy pay, and a payment relating to his unpaid wages. As he had received his statutory redundancy pay and his unpaid wages, the Claimant confirmed that he wished to withdraw his claim for a redundancy payment and unauthorised deduction from wages in these proceedings.
15. Contracts of employment for the employees working as Solicitors for the Respondent demonstrated that Solicitors employed with the Respondent were entitled to 3 months' notice on termination of their contracts.
16. I found that the Claimant was entitled to 3 months' notice on termination of his contract, and the Claimant did not receive any payment from the Respondent in respect of his contractual notice period.
17. The contracts of employment from the Respondent's other employees in the bundle demonstrated that the Respondent company's holiday year ran from 1 January 2020 to 31 December 2020. The Claimant's employment was terminated on 12 August 2020; this was 32 weeks into the leave year.
18. I accepted the Claimant's oral evidence that he was entitled to 25 days paid holiday per year and that this was not pro-rated. He had taken 5 days leave as at the date his employment terminated.
19. The Claimant had accrued 15.5 days at the date of termination of his employment and had taken 5 days leave which was paid at his normal rate of pay.
20. The Claimant searched for, and found, alternative employment with another firm of Solicitors which lasted between 26 August 2020 to 10 September 2020. The Claimant left that firm and found another role with a firm of Solicitors on 3 October 2020 and remains currently in employment with that firm.
21. The Claimant did not have any documentary evidence in respect of his expenses. His oral evidence was that the amount he had specified in his schedule of loss at page 19 of the bundle was an estimate to reflect having driven to and from an interview in Harrogate and having reviewed websites for further employment.

22. The Claimant's claim for a compensatory award included a claim for expenses and a claim for loss of statutory rights.

## The Law

### Redundancy

23. The definition of redundancy is set out in section 139 of the Employment Rights Act 1996 ("the Act"):

*"(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."*

### Unfair Dismissal

24. The test for an unfair dismissal is set out in sections 98(1), (2) and (4) of the Act as follows:

*"(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:*

*.....*

*(c) is that the employee was redundant,*

*.....*

- (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."*

### Compensation

25. Section 123(1) of the Act provides:

- "(1) *Subject to the provisions of this section and sections 124, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*
- (2) *The loss referred to in subsection (1) shall be taken to include—*
- (a) *any expenses reasonably incurred by the complainant in consequence of the dismissal, and*
- (b) *subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.*
- (3) *The loss referred to in subsection (1) shall be taken to include in respect of any loss of—*
- (a) *any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or*
- (b) *any expectation of such a payment, only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal.*
- (4) *In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland."*

26. The Polkey principles set out in Polkey v AE Dayton Services Ltd [1987] IRLR 503 HL confirm that where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated in any event, had

there been no unfairness. The Tribunal should make a percentage reduction in the compensatory award which reflects the likelihood that the Claimant would have been dismissed in any event.

### ACAS Uplift

27. Section 207A Trade Union and Labour Relations (Consolidation) Act 1992, provides:

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

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

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

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

(c) *that failure was unreasonable,*

*the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.”*

### Breach of Contract

28. Under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 a Tribunal can award a Claimant damages for breach of contract where the claim arises or is outstanding on termination of employment. The cap of the award that a Tribunal can make is currently £25,000.

29. The measure of damages in contract is a sum of money the payment of which will place the Claimant in the position that he would be in but for the breach.

### **Conclusions**

30. Based on the findings of fact above and considering the relevant law as it applies to the issues I conclude as follows:

### Notice pay

31. The Claimant was dismissed without notice in circumstances where the Respondent has failed to demonstrate that it was entitled to so dismiss him. The Claimant is accordingly entitled to damages for breach of contract, i.e. his notice pay.

32. The Claimant was contractually entitled to receive 3 months' notice.

33. However, the Claimant had obtained alternative employment on 3 October 2020, having been employed between 26 August 2020 to 10 September 2020. The Claimant therefore successfully mitigated his losses and was only out of employment for a period of 5 weeks.
34. The Claimant is therefore entitled to 5 weeks of his net weekly pay of £592.12 = **£2,960.60**.
35. The Claimant was entitled to the benefit of his employer's pension contributions for the same the period this being 5 weeks at £30.29= **£151.45**

#### Holiday pay

36. The Claimant was entitled to 25 days annual leave per year and his contract was terminated 32 weeks into the leave year.
37. The Claimant had accrued 15.5 days at the date of termination of his employment (this being  $25 \times 32/52$ ) and had taken 5 days leave which and was therefore entitled to 10.5 days leave.
38. In breach of contract the Respondent failed to pay the Claimant in respect of his accrued but untaken holiday pay on termination of his employment.
39. The Claimant is therefore entitled to £1,766.84, less the payment of £618.81 received from the Redundancy Payments Service in respect of holiday pay, this being a total sum of **£1,148.03** gross.

#### Unfair dismissal and Polkey

40. I find the Claimant's dismissal was procedurally unfair.
41. The Claimant's claim for unfair dismissal succeeds, however the Claimant's basic award is extinguished by the statutory redundancy payment received from the Redundancy Payments Service.
42. If the Respondent had followed a fair redundancy procedure, the Claimant would still have been dismissed by reason of redundancy on 12 August 2020, as this was the date that the Respondent's offices were all immediately closed further to an intervention by the SRA.
43. Accordingly, the Claimant's compensatory award for unfair dismissal is reduced by 100% pursuant to Polkey.

#### ACAS Uplift

44. As redundancy was the reason for dismissal, the ACAS Code of Practice on Discipline and Grievance does not apply to the Claimant's unfair dismissal claim and there is no uplift for unreasonable failure to comply with its provisions.

45. With respect to the Claimant's claims for breach of contract, in the circumstances of this case, the Respondent would not have reasonably been in a position to engage with the ACAS Code of Practice on Disciplinary and Grievance in order to resolve any grievances raised after 12 August 2020. As such, I find that there was no unreasonable breach of the code and do not award any uplift in respect of the Claimant's breach of contract claims.

### **Summary**

46. The Respondent shall pay to the Claimant:

46.1. Notice pay in the net sum of **£2,960.60**;

46.2. Employer's pension contributions in the sum of **£151.45**; and,

46.3. Holiday pay in the sum of **£1,148.03**.

47. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply to these awards.

**EMPLOYMENT JUDGE NEWBURN**

**JUDGMENT SIGNED BY EMPLOYMENT  
JUDGE ON 01 March 2021**

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### **Format of the Hearing**

The hearing was conducted by the parties attending by Cloud Video Platform. It was held in public in accordance with the Employment Tribunal Rules. It was conducted in that manner because a face to face hearing was not possible in light of the Government Guidance in connection with the coronavirus pandemic and it was in accordance with the overriding objective to do so.