# EMPLOYMENT TRIBUNALS

**Claimant:** MISS INESE METERE

**Respondent:** WINKLEIGH TIMBER LIMITED

**Heard at:** Exeter (by CVP & In Person) **On:** 7 & 8 September 2022

**Before:** Employment Judge Oldroyd (sitting alone)

**Appearances**

For the Claimant: Miss Metere (in person)

For the Respondent: Miss Barlay (by CVP)

# JUDGMENT

1. The Claimant was unfairly dismissed by the Claimant. The Respondent is not ordered to pay either basic or compensatory damages.

2. The claim for wrongful dismissal is not well founded and is dismissed.

3. The claim for additional redundancy pay pursuant to Section 135 Employment Rights Act 1996 is not well founded and is dismissed.

4. The Respondent failed to provide the Claimant with a written employment particulars as required by s.1 Employment Rights Act 1996. A sum of 2 weeks' pay amounting to **£612.93** is awarded by way of compensation pursuant to Section 38 Employment Rights Act 1996.

# REASONS

## INTRODUCTION & SUMMARY OF CLAIM AND DEFENCE

1. The Claimant is the former employee of Winkleigh Timber, the Respondent to this claim.

2. The Claimant was made redundant on 25 July 2021. Upon her redundancy, the Claimant was paid a statutory redundancy payment of £891 that had been calculated upon a belief that the Claimant had approximately 2 years of continuous employment. The Claimant was paid notice pay of £1,069.20, comprising about 3 weeks' salary, the notice period also having been calculated by reference to two years of continuous service.

3. In this claim, the Claimant alleges three things:

    a. That she was unfairly dismissed because of redundancy. The Claimant says that there was not a genuine redundancy, that she was given inadequate notice, not offered an alternative position and her selection was not fair. The Claimant seeks basic and compensatory awards.

    b. That she was underpaid statutory redundancy as it ought to have been based upon continuous employment of approximately 10 years, being £3,742.20.

    c. That she was wrongfully dismissed because the Respondent acted in breach of contract by failing to pay her notice pay based upon her approximately 10 years of continuous service in the sum of £3,564.

4. Taking into account that the sums that were paid to her by way of statutory redundancy and notice pay, the Claimant seeks to recover £5,346 plus basic and compensatory awards for unfair dismissal.

5. The Respondent denies the claims.

6. The Respondent says that the redundancy was the genuine result of a downturn in its business, that every effort was made to contact the Claimant to discuss the redundancy and alternatives and that ultimately, her selection was reasonable. The Respondent also says that the redundancy payment and notice were properly based upon a 2 year period of service as the Claimant had resigned in 2019 and recommenced her employment just over a week after that resignation.

## THE EVIDENCE

7. The Claimant produced a witness statement and gave oral evidence.

8. The Respondent's directors (John and Jo Winckworth) produced witness statements as did the Respondent's employees, Mr Good, Mrs Adomaitiene and Mr Adomatis.

9. I was also referred to various documents in a bundle that had been agreed between the parties. I also had regard to an additional bundle lodged by the Claimant with her witness statement for the purposes of a previously adjourned hearing.

**REPRESENTATION & ATTENDANCE**

10. The Claimant represented herself and appeared by way of CVP. The Respondent was represented by an advocate, Miss Barlay who also appeared by CVP. The Respondent's witnesses were present, in person, whilst evidence was given.

**REASONABLE ADJUSTMENTS**

11. The Claimant is a Latvian national. Whilst the Claimant has some command of the English language, she requested the assistance of an interpreter. A Latvian interpreter was not available for the hearing but the Claimant also speaks fluent Russian and so she had the assistance of a Russian interpreter throughout the hearing.

12. All aspects of the hearing were interpreted and I am satisfied that the Claimant was able to participate effectively at all times.

**THE LAW**

**Unfair dismissal**

13. Section 94 of the Employment Rights Act 1996 (the **Act**) contains the right not to be unfairly dismissed.

14. Section 98 at subsections (1) and (2) set out five potentially fair reasons for dismissal, one of which at subsection (2)(c ) is redundancy. Redundancy arises, as set out at Section 139, where a business no longer requires an employee to carry out a particular kind of work because the need for it has ceased or diminished.

15. Section 98(4) sets out the test of fairness to be applied if the employer is able to show that the reason for dismissal was one of those potentially fair reasons. The test of fairness reads:

16. "*Where the employer has fulfilled the requirement of subsection (1) 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."*

17. Where the employee has been employed for two years and no automatically unfair reason is asserted, the burden lies on the employer to show what the reason or principal reason was, and that it was a potentially fair reason under section 98(2).

18. In respect of redundancy, the leading case is the decision of the EAT in **Williams v Compair Maxam Limited [1982] IRLR 83**. In general terms, employers acting reasonably will give as much warning as possible of impending redundancies to employees, consult them about the decision, the process and alternatives to redundancy, and take reasonable steps to find alternatives such as redeployment to a different job. The acid test remains whether redundancy and its surrounding process was within the range of reasonable responses of a particular employer.

19. If a dismissal is unfair it gives right to a basic statutory award calculated by reference to the age and length of service of a claimant. Any redundancy payment is deducted from such an award pursuant to Section 122(4) of the Act. A compensatory award for actual losses also falls to be made but this may reduced if dismissal would have occurred regardless of any unfairness. This form of deduction was recognised by the House of Lords in **Polkey v AE Dayton Services Ltd [1987] IRLR 50**

**Wrongful Dismissal**

20. An employee who is dismissed from their employment is entitled to notice, being not less than that laid down by Section 86 of the Act. In respect of an employee who is employed continuously between 2 and 12 years, the requisite notice period is equivalent to one week's notice for each year of employment. An employer who fails to provide the requisite notice (or offer payment in lieu) will be in breach of contract and liable to pay damages in respect of that breach.

21. It was not disputed in this case that the Claimant's actual contractual period was equivalent to that laid down by Section 86 of the Act.

**Statutory Redundancy Payments**

22. Section 135 of the Act obliges an employer to make a statutory redundancy payment to an eligible employee who is dismissed by reason of redundancy.

23. The amount of any payment is governed by Section 162 and it is dependent upon an employee's age, continuous length of employment and pay. In respect of this claim, it is relevant to note that an employee is entitled to one week's pay for each complete year of service between the ages of 22 and 40 and then one and half week's pay for each complete year after reaching the age of 41.

24. An employee who believes that they have not been paid the correct amount of redundancy is entitled to make a referral to the Tribunal pursuant to Section 163 of the Act and the Tribunal is able to make an order for payment.

**Employment Particulars & Section 38 of the Act**

25. Under Section 1 of the Act, an employee is entitled to receive, from their employer, written particulars of their employment. Where the Claimant is successful in bringing a claim for either unfair dismissal, wrongful dismissal or a failure to pay redundancy, then Section 38 of the Act requires the Tribunal to make an award of compensation of two weeks' pay. If it is just and equitable, the Tribunal may award compensation of up to four weeks' pay. Any award does not require an employee themselves to have made a reference to the Tribunal.

**LIST OF ISSUES**

26. The issues in this case, by reference to the parties' positions, can be summarised as follows:

**Unfair dismissal**

24.1 What was the reason for the Claimant's dismissal? The Respondent asserts that it was a reason related to redundancy under s. 98 (2) of the Employment Rights Act 1996. The Claimant asserts that her role was not redundant and another person assumed her duties.

24.2 Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant and in terms of the process that was followed. In particular and having regard to the resources that were available to the Respondent:

a. Did the Respondent adequately warn and consult the Claimant?

b. Did the Respondent adopt a reasonable selection decision, including its approach to a selection pool?

c. Did the Respondent take reasonable steps to find the Claimant a suitable alternative role?

24.3 In terms of remedy and upon the Claimant confirming that she does not wish to be reinstated and/or re-engaged:

a. What basic award is payable to the Claimant, if any and would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

b. If there is a compensatory award, how much should it be? In particular:

i. What financial losses has the dismissal caused the Claimant?

ii. Did the Claimant taken reasonable steps to replace their lost earnings by looking for another job? If not, for what period of loss should the Claimant be compensated?

**iii.** Is there a chance that the Claimant would have been fairly dismissed anyway if a fair process had been followed, or for some other reason. If so, should the Claimant's compensation be reduced and by how much? This form of deduction was recognised by the House of Lords in **Polkey v AE Dayton Services Ltd [1987] IRLR 50**.

**Wrongful dismissal notice pay**

24.4 What was the length of the Claimant's continuous employment?

24.5 What was the Claimant's notice period?

24.6 Was the Claimant paid for that notice period and what was she entitled to?

**Redundancy Payment and Section 136 ERA 1996**

24.7 What was the length of the Claimant's continuous employment?

24.8 What was redundancy payment was the Claimant entitled to and was she paid that?

**Section 38 Employment Rights Act 1996**

24.9. If the Claimant succeeds in a substant aspect of her claim, is she entitled to a compensation payment pursuant to Section 38 ERA 1996 on the basis that she was not provided Employment Particulars.

**FINDINGS OF FACT**

25 The Claimant is a Latvian national who was born on 1 April 1979 and who arrived in the UK in 2010.

26 The Claimant was first employed by the Respondent on 18 April 2011 as a 'polisher'.

27 To this end, the Respondent is a small family run company, comprising about 17 employees, specialising in the production of wooden furniture. The Respondent, I note, has no dedicated HR or accounts department with such matters largely being attended to by its directors.

28 The Claimant's initial duties involved polishing furniture that was produced and, on an ad hoc basis, assisting in cleaning the Respondent's showroom.

29 The Claimant's supervisor was Mrs Adomaitien who had herself begun working for the Respondent in 2005.

30 The Claimant describes herself as having been, initially at least, on reasonable terms with Mrs Adomaitien. That relationship began to sour in late 2016 after the Claimant says that she received unwanted romantic attention from Mr Adomaten, Mrs Adomaitien's husband and also an employee of the Respondent. The Claimant became, in simple terms, unhappy with her working environment.

31 Consequently, by the beginning of 2019, the Claimant was interested in pursuing an alternative line of employment. The Claimant's then boyfriend suggested that she take up employment with a local business called Forthglade which the Claimant agreed to do. The Claimant was employed by Forthglade for a very short period of time and between 21 and 31 January 2019. The Claimant found the work too physical for her liking and she returned to work for the Respondent by 4 February 2019.

32 There is a significant factual dispute between the parties as to whether, before starting work at Forthglade on 21 January 2019, the Claimant resigned from her employment with the Respondent such that there was a break in her continuous employment.

33 The Claimant is adamant that she did not resign before working for Forthgade. Instead, the Claimant says that she spoke alone with Mr Winckworth, a director of the Respondent and asked if she could take a period of unpaid leave to "trial" her new role at Forthglade and that Mr Winckworth readily agreed. In support of her position, the Claimant points to the fact that:

33.1 It was not uncommon for unpaid leave to be agreed verbally.

33.2 She was not provided with a P45, suggestive of the fact that her employment had not been ended.

33.3 She was not provided with a new contract or particulars of employment upon her return to work. Section 1 of the Act requires such documents to be provided where new employment commences.

34 The Respondent says that the Claimant did resign, however. I accept that this was the case for the following reasons.

34.1 Mr Winckworth says that the Claimant resigned unequivocally in the presence of himself, his wife and co-director and his employee of 30 years, Mr Good. Each of these individuals gave consistent evidence of the resignation which I accept. I found their recollections of the resignation to be detailed, consistent and plausible.

34.2 I accept the submission by Miss Barlay that it would be commercially implausible for the Respondent to have allowed the Claimant to remain on unpaid leave whilst alternative employed was trialled.

34.3 I note that Mrs Adomaitien and her husband also gave evidence to the effect that the Claimant told them that she had resigned on the evening of her resignation. Whilst I accept that I should treat this evidence with some caution (only in the sense that it is accepted that Mrs Adomaitien and her husband are not on good terms with the Claimant), I have no reason to conclude that their evidence is fabricated.

34.4 The Respondent wrote to the Claimant on 1 February 2019 referring to her "*re-instatement*". This contemporaneous document is consistent with the Respondent's position that there was a resignation.

34.5 Although a P45 was not issued, I accept Mrs Winckworth's oral evidence that this was because the Claimant resigned and returned with a single payroll period and that this was an administrative oversight. The absence of a P45 does not mean that the Claimant cannot have resigned.

34.6 Similarly, although the Claimant was not provided with a new contract or new particulars of employment, I again accept the evidence given by Mrs Winckworth that this was again, an administrative oversight or else based on a belief that the employment was resuming on the basis of previous documents issued to her when she was first employed.

35 As I have said, the Claimant returned to work with the Respondent on 4 February 2019, working again as a polisher but her role changed slightly in that she was now required to carry out additional cleaning duties. The Respondent's directors readily accept that they was all too pleased to see the Claimant return as her work up until this point had been of a good standard.

36 On 27 March 2020, as the Covid pandemic began to take hold of the country, the Claimant was placed on furlough along with a good number of other employees, including Mrs Adomaitien.

37 Upon being placed on furlough, it is clear that the Claimant was in regular touch with Mrs Winckworth, making enquiries as to when she might be able to return to work. The contact was, at the Claimant's instigation, by text. These text messages appear in the bundle.

38 As the Covid period progressed, though, Mr & Mrs Winckworth described in evidence in clear terms how the Respondent's trade began to weaken, not only as a result of the Covid lockdown but also through the loss of skilled joiners. This in turn meant that production was decreased and the Respondent had a diminished need for polishers. I accept Mr & Mrs Winckworth's evidence on this issue.

39 It was against this backdrop that, in mid-2021, the Respondent resolved that redundancies were necessary. The Respondent was to make 6 redundancies across its small business and the Claimant was one of them.

40 At the time of the Claimant's redundancy, the Respondent employed two polishers, the Claimant and her supervisor Mrs Adomaitien (who had returned to

work from furlough by this stage). It was resolved that one position was redundant owing to the down turn in business. Both the Claimant and Mrs Adomaitien were selected for possible redundancy.

41 The Claimant denies that her role was redundant and she points to the fact that her role was promptly filled by Mr Winckworth's daughter. I reject that assertion for two reasons. First, I have accepted that the business had reduced in turnover and production (in keeping with the fact that other redundancies were made). Second, although Mr Winckworth's daughter may have assumed some of the Claimant's duties, this, on the Claimant's own evidence, does not appear to have been until January 2022, some months later.

42 The Respondent wrote to the Claimant by letter addressed to her home on 2 June 2021 indicating possible redundancy and inviting her to discuss matters. I have no doubt that the letter was sent, but the Claimant denies receiving it (which the Respondent does not accept).

43 Whilst I find it surprising that the Claimant did not receive this letter (and also that the Claimant was relatively slow to later assert that she did not receive the letter), I have no reason to doubt her evidence on this issue. Indeed, the fact that the Claimant did not receive the letter does explain why, as a matter of fact, the Claimant did not respond to the letter or engage in the redundancy process. I find this lack of engagement equally surprising in circumstances where, hitherto, the Claimant had been in regular contact with the Respondent with a view to exploring when she might return to work.

44 The Respondent, not having received engagement from the Claimant, did make attempts to make contact with the Claimant before making a redundancy decision. Mr Winckworth describes, in this regard, how he drove to the Claimant's house on two occasions only to find the Claimant was not at home. On one occasion, Mr Winckworth posted a business card through the Claimant's letter box and asked that she make contact. The Claimant has no recollection of receiving a business card, but in any event she did not make contact with the Respondent.

45 What is clear, however, is that even though the Claimant had been in text contact with the Respondent in the preceding months, no attempt was made to contact her by text which one might have expected. Text, was plainly the Claimant's preferred method of communication and the Respondent had previously engaged in that form of communication. The Respondent sought to justify this by stating that redundancy was a very serious matter and it was not appropriate to communicate by text. Whilst I agree with that sentiment, I do consider that in this case the Respondent ought reasonably to have at least asked the Claimant to make contact with them by text so that the prospect of redundancy could then be discussed personally with her. I reach this conclusion in the knowledge that, on previous occasions, the parties had exchanged a number of text messages. Alternatively, simple telephone contact would have been appropriate.

46 In the event, the Respondent carried out the redundancy exercise without the Claimant being aware of it.

47 To this end, Mr & Mrs Winckworth used a scoring matrix to assess the relative strengths of the Claimant and Mrs Adomaitien as against about 30 criteria. The matrix appears in the bundle and Mrs Adomaitien scored 401, to the Claimant's 285. Reviewing that matrix, it would seem that both employees were regarded favourably and Mrs Adomaitien's higher score flowed from her greater English skills and her office management skill set that flowed from that and her broader knowledge of the Respondent's business. I am satisfied that the scoring exercise was carried out fairly and I note in this context that the Claimant accepted her English skills were inferior to those of Mrs Adomaitien.

48 The scoring exercise having being completed, it is a fact that no alternative position was offered to the Claimant. The Respondent did not address why this was in its evidence but it was the inevitable consequence, in my judgment, of the fact that the Claimant and Respondent were not in direct contact. I do consider that it would have reasonable for other roles to have been considered with the Claimant and I accept the Claimant's evidence that she was open to alternative roles and even to retraining.

49 However, I am satisfied that there were no other suitable positions available. This is because:

49.1 The Claimant, in evidence, pointed to job adverts placed by the Claimant at or about the time of the redundancy (and which appear in the bundle) to suggest that other roles were available. However, these adverts relate to skilled joiner work. The Claimant was not skilled in this area.

49.2 The Claimant, in giving evidence, could not point to an unskilled role or a role similar to the one she was carrying out that she would have been able to fulfil.

49.3 I note generally that, at this time, nearly of third of the workforce was being made redundant. The Respondent was a very small organisation, of course. It is understandable that other roles were not available.

50 The upshot was, that by letter dated 2 July 2022 the Claimant was advised by letter that she was being made redundant on three weeks' notice as from 25 July 2021 (at which time her furlough pay would cease). This was first the Claimant knew of possible redundancy. It plainly came as a shock to her.

51 The three weeks' notice period was based upon an employment period of just over two years (4 February 2019 to 2 July 2021) and on the Respondent's case this was generous as the Claimant was in fact entitled to just 2 weeks' notice. The Claimant was made a payments of £891 by way of redundancy and £1069.21 in lieu of notice. At this time the Claimant was earning £1,527 pcm gross and £1,329 net.

52 On 5 July 2021 the Claimant acknowledged her redundancy but asserted that she was entitled to redundancy and notice pay on the basis of 10 years of continuous service dating back to 2011. This was rejected by the Respondent in correspondence who reminded the Claimant that, in its view at least, her

continuous employment had been broken by her resignation in 2019 (which the Claimant disputed).

53 The Claimant was ultimately able to find new full time employment just short of 4 months later on 17 November 2021 and she explained to the Tribunal that she now earns a comparable if not better wage (being £9.50 per hour, 40 hours a week or about £1,645.40 gross). I accept that the Claimant acted diligently in finding alternative employment as quickly as possible.

54 The Claimant presented this claim to the Tribunal on 5 August 2021, within 3 months of her dismissal.

**THE CLAIMS**

55 I now consider the three claims advanced being claims for unfair dismissal, wrongful dismissal and a claim for additional redundancy pay. If the Claimant succeeds in her claim, I am obliged to further consider whether, if the Claimant was not provided with particulars of her employment, I must make a compensatory award in accordance with Section 38 ERA 1996.

**UNFAIR DISMISSAL**

56 I have found that the Claimant was dismissed for at least a potentially fair reason, namely redundancy. I have rejected the suggested that the Claimant's assertion that she was simply replaced by another employee.

57 In terms of whether the Respondent acted reasonably in making the Claimant redundant, I have found that the Respondent acted reasonably in selecting the Claimant for potential redundancy and then finally selecting her for actual redundancy.

58 However, I have also found that, notwithstanding the limited resources available to the Respondent, it acted unreasonably by not making direct or personal contact with her, if needs be by text or telephone, such that the Claimant first knew of her potential redundancy when she was actually advised of it by letter dated 2 July 2021. This had the knock on effect of meaning that additional roles were not discussed with her. For these reasons, I find that the dismissal was unfair.

59 In terms of remedy, I have found the Claimant had two full years of service prior to her dismissal owing to the fact of her resignation. Having then regard to her age, she is entitled to a basic award of £887.79. However, I deduct the redundancy award made to her which was £891. This gives rise to a nil basic award.

60 The Claimant was without employment during the period 25 July to approximately 17 November a period of approximately 4 months during which the Claimant might have earnt £5,308 net. That would be, ordinarily, the basic level of compensatory award and I see no basis on which to reduce it on the basis that the Claimant was in any way at fault for her redundancy or lack of communication about it.

61 However, pursuant to the **Polkey** principle, I am entitled to reduce that award having regard to the chance that, even if the redundancy procedure had been fair, the Claimant would have been dismissed in any event. On the evidence before me, and given that I am especially satisfied that the selection of the Claimant was fair and no other roles were available, I will make a reduction of 100% such that there is no compensatory award.

**WRONGFUL DISMISSAL**

62 Having found that the Clamant had two years continuous service giving rise to a minimum notice period of 2 weeks and that she was paid 3 weeks' notice, I find that the claim for wrongful dismissal is not well founded and is dismissed.

**STATUTORY REDUNDNACY**

63 Having found that the Clamant had two years continuous service and that she was paid redundancy on that basis, I find that the claim for additional redundancy pay pursuant to Section 135 ERA 1996 is not well founded and is dismissed.

**SECTION 136 ERA 1996**

64 Under Section 1 of the Act and employee is entitled to receive, from their employer, written particulars of their employment. The Clamant having resigned and then been reinstated was not provided with such particulars. Whilst I accept that the Respondent simply assumed that the Claimant's employment would resume on the basis of documents issued to her in 2010, the Claimant's role did change slightly upon her reinstatement. Regardless of this though, it is clear that, as there had been a break in continuous employment, new documentation ought to have been issued and was not.

65 Where the Claimant is successful in bringing a claim for unfair dismissal and even though it has not resulted in a financial award being made, Section 38 of the Act requires the Tribunal to make an award of compensation of at least two weeks' pay. If it is just and equitable, the Tribunal may award compensation of up to four weeks' pay. In this case, I consider that an award of 2 weeks' pay is just and equitable having regard to the fact that the Respondent is a small business with limited resources and that there was a clear understanding between the parties that the Claimant was being re-employed on the same basis as previously. I thus make an award in favour of the Claimant of two weeks net pay which I have calculated to be £612.93.

66 Had I found that the Claimant had not resigned, then no award would have fallen to be made pursuant to Section 38, but the claims for wrongful dismissal and for statutory redundancy would then have succeeded, of course.

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Employment Judge Oldroyd

Dated: 14 September 2022

Sent to the parties on

15 September 2022 By Mr J McCormick

For the Tribunal:

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