



EMPLOYMENT TRIBUNALS

Claimant: Mr B Knight
Respondent: Off Broadway Limited
Heard at: East London Hearing Centre (in public, by video)
On: 6, 7 and 8 December 2021
Before: Employment Judge Moor

Representation

Claimant: Ms E Grace, counsel
Respondent: Mr M Withers, counsel

JUDGMENT

It is the judgment of the Tribunal that:

1. The claim of unfair dismissal is well-founded and succeeds.
2. The following decisions apply to the calculation of the award:
 - a. The Claimant had 2 years continuous employment.
 - b. Had a fair procedure been adopted there was a 80% chance that the Claimant was likely to have been dismissed 2 weeks after the 8 November 2020.
 - c. The basic award is reduced by 75% for contributory conduct.
 - d. The compensatory award is reduced by 50% for contributory conduct.
 - e. The compensatory award is increased by 20% by the Respondent's unreasonable failure to follow the ACAS Code.
 - f. The Claimant did not fail unreasonably to follow the Code.
 - g. I make no award under section 38 of the Employment Act 2002.
 - h. The Claimant failed to mitigate his loss partially from 1 August 2021 and fully from 1 October 2021.
 - i. Loss of statutory rights is awarded with adjustments.

3. The claim of wrongful dismissal (breach of contract for failure to give contractual notice) does not succeed.
4. The claim for accrued but untaken holiday pay for the holiday year from October 2020 succeeds.
5. The claim to carry over holiday from the previous holiday year fails.
6. The Respondent is ordered to pay the total sum of £2999.37. The calculation is set out in Annex 1:
 - a. Basic award £403.50
 - b. Compensatory award £2318.47
 - c. Holiday pay £277.40

Recoupment applies in this case and I refer to Annex 2 attached. For the purposes of the Recoupment Regulations:

The monetary award is **£2999.37**

The prescribed element is **£2189.35**

The period to which the prescribed element relates is 9 November 2020 until 1 October 2021.

The amount by which the monetary award exceeds the prescribed element is **£810.02**

Employment Judge Moor
Date: 9 December 2021

ANNEX ONE

CALCULATION OF AWARD

Start date: 31 October 2018
 End date (edt): 8 November 2020
 Complete years of service: 2
 Date of birth: 2.5.1969
 Age at edt: 51
 Gross pay pw: £576.92
 Net pay pw: £462.34
 Ex gratia payment: £1248.00
 Income £2700

Date by which loss reduces: 1 August 2021

Gross Weekly pay as bar staff = 40 x [10.50] = £21,840
 Net weekly pay as bar staff = £356.03

Date by which loss stops: 30 September 2021

Maximum 'week's pay' at date of termination: £538

BASIC AWARD (A)

	£
2 x 1.5 x 538 =	1614.00
Less conduct before dismissal at 75%	(1210.50)
Basic award	<u>403.50</u>

COMPENSATORY AWARD (B)

Prescribed element (loss to date of assessment)

Calculated net of tax and national insurance.

Loss of Earnings

2 weeks after dismissal full award 924.68

22 November - 1 August 2021 = 266 days = 36 weeks

36 x 462.34 16,644.24

1 August 2021 – 30 September 2021 = 61 days= 8.7 weeks

8.7 x 462.34 = 4,022.36
 21,591.28

Less Payments Received and Mitigation

Payment received after dismissal from Respondent (1,248.00)

Less donations received for living expenses of £2700 (2,700.00)

Notional Bar Tender Work from 1 August 2021

at £10.50ph x 40h pw
 8.7 weeks x 356.03 = (3097.46)

Total past loss of earnings 14,545.82

Adjustments

Less Polkey reduction 80% but only after 22 November
 i.e. 14545.82-924.68 = 13621.14 x 80% (10,896.91)

= 3648.91

Increase under s124(A) x 20% = 729.78
 = 4378.69

Less Contributory fault 50% = **2189.35**

Non prescribed element as loss stops prior to date of assessment.

Loss of statutory rights 2 x 538 1076
 Less Polkey 80% 215.20
 Increase under s124(A) 20% +43.04 258.24
 Less Contributory Fault 50%129.12 **129.12**

Total Compensatory Award 2189.35 + 129.12 **2318.47**

HOLIDAY PAY (C)

Time accrued from 1 October to 8 November = 38 days = 5.5 weeks
 Pro rata 5.6/52 x 5.5 = 0.59 weeks = 3 days
 Assuming 5 day a week 0.6 x 462.34 = **277.40**

Total award A + B + C = 403.50 + 2318.47 + 277.40 2999.37

Prescribed element is 2189.35

Non-prescribed is 810.02

ANNEX 2 RECOUPMENT

Recoupment of Jobseeker's Allowance, income-related Employment and Support Allowance, Universal Credit and Income Support

The Tribunal has awarded compensation to the Claimant but not all of it should be paid immediately. This is because the Department for Work and Pensions (DWP) has the right to recover (recoup) any Jobseeker's Allowance, income-related Employment and Support Allowance, Universal Credit or Income Support which it paid to the Claimant after dismissal. This will be done by way of a Recoupment Notice which will be sent to the Respondent usually within 21 days after the Tribunal's judgment is sent to the parties.

The Tribunal's judgment states the total monetary award made to the Claimant and an amount called the prescribed element. Only the prescribed element is affected by the Recoupment Notice and that part of the Tribunal's award should not be paid until the Recoupment Notice has been received.

The difference between the monetary award and the prescribed element is payable by the Respondent to the claimant immediately.

When the DWP sends the Recoupment Notice, the Respondent must pay the amount specified in the Notice by the Department. This amount can never be more than the prescribed element of any monetary award. If the amount is less than the prescribed element, the Respondent must pay the balance to the Claimant. If the Department informs the Respondent that it does not intend to issue a Recoupment Notice, the Respondent must immediately pay the whole of the prescribed element to the claimant.

The Claimant will receive a copy of the Recoupment Notice from the DWP. If the Claimant disputes the amount in the Recoupment Notice, the Claimant must inform the DWP in writing within 21 days. The Tribunal has no power to resolve such disputes, which must be resolved directly between the Claimant and the DWP.