

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: S/4100803/2017**

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**Heard in Glasgow on 11 April 2018**

**Employment Judge: Mr J Hendry**

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**Mr Andrew Taylor**

**Claimant  
Represented by:-  
In Person**

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**Timbmet Ltd**

**Respondent  
Represented by:-  
Mr S Hughes  
Advocate**

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**JUDGMENT OF EMPLOYMENT TRIBUNAL**

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The Judgment of the Employment Tribunal is that the respondent shall pay to the claimant a monetary award of One Thousand Two Hundred and Seventy Nine Pounds and Ninety Eight Pence (£1279.98); the prescribed period runs from the 6 March 2017 until the date of issue of this Judgment and the prescribed element of the award amounts to £767.99 having been reduced by 40% to take account of contributory fault and that the monetary award exceeds the prescribed element by £511.99.

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**Reasons**

1. The Employment Tribunal in its judgment dated 19 December 2017 and copied to parties on the 21 December 2017 found that the claimant's

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**E.T. Z4 (WR)**

application for a finding unfair dismissal succeeded. A hearing on remedy was fixed for the 11 April.

2. At the hearing the claimant gave evidence and showed the Tribunal his up to date Wage Slips that had been sent to him by his new employer, Aldi. The evidence itself was relatively brief and factually uncontested.
3. The issue for the Tribunal was whether or not in the light of the findings made in the earlier judgment whether any compensation should be reduced on account of the claimant's own actions.
4. The Judgment had found that the claimant had been contracted to work 30 hours per week, so his monthly pay was £1,324.50 Gross and £1,143.21 Net.

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**The Tribunal made additional findings in Fact:**

5. The claimant looked for work after his dismissal on 6 March 2017. He was initially unsuccessful. He was in receipt of benefits namely Universal Credit.
6. He did get the opportunity of a work trial through an agency but the trial was unsuccessful as he did not have the correct skills. He was not paid.
7. The claimant began work with Aldi on 4 September 2017. His wage was regular. He would earn £1,031.65 Net per month. The difference between the claimant's rate of pay with the respondents and with his new employers, amounted to £212.00 per month.
8. The claimant is settled in his current employment and not looking for better paid work.

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## Submissions

- 5 9. Mr S Hughes helpfully provided the Tribunal with written submissions to which he added in the course of the submissions. He provided the Tribunal with two authorities to consider, namely the case of **Montracon Ltd and Hardcastle UK EAT/307/ 12 and Optikinetics Ltd v Whooley 1999 ICR984.**
- 10 10. The submission, in essence was that when the Tribunal came to consider the compensatory and basic award, they should both be reduced to nil. Reference was made to section 122 (3) and 123 (6) of the Employment Rights Act and to the various tests which should be applied. In his view where a Tribunal finds that a claimant has  
15 contributed to dismissal it is required to make a reduction under section 123 (6) of the Act, whereas such a reduction is discretionary in terms of section 122 (3). Where a reduction is made in terms of each section the proportion of each reduction does not equate with each other. His clients position was the claimant was guilty of Gross Misconduct and  
20 further that the conduct of the claimant making prank telephone calls contributed to the situation leading to the dismissal. It was clarified with the claimant by Mr Hughes that claimant was unaware when he made a prank call in the afternoon of 16 February that Mr William Masson's wife was unwell.
- 25 11. In response the claimant asked the Tribunal to look at the situation outlined in the Judgment. He submitted that he was entitled to compensation and that the principal culprit in the incident leading to his dismissal was Mr Masson.
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## Discussion and Decision

12. The starting point is to consider sections 122 and 123 which deal with the basis and compensatory awards.

**122 Basic award: reductions.**

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(1). *Where the tribunal finds that the complainant has unreasonably refused an offer by the employer which (if accepted) would have the effect of reinstating the complainant in his employment in all respects as if he had not been dismissed, the tribunal shall reduce or further reduce the amount of the basic award to such extent as it considers just and equitable having regard to that finding.*

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(2). *Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.*

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**123 Compensatory award.**

(6) *Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*

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13. Mr Hughes correctly identified the process that the Tribunal must follow when considering these two different statutory awards. Let me say from the outset that the claimant was to an extent the author of his own misfortune in taking part with others in making prank calls. However, I did not accept that he was fully to blame for the altercation that erupted

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and I found his version of events , which was not directly contested by evidence from the respondents , as being persuasive. It seems that Mr Masson was furious and sought out the claimant to confront him. I also accept that he claimant was struck first when sitting or about to stand up and that he responded physically to that assault. There was no evidence of other intimidating or insulting behaviour on his part. With these matters in mind I now turn to the two sections of the Act.

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14. First of all the calculation fo the basic award was agreed to be £611.30 based on the claimants gross wage and service. The Tribunal has a wide discretion. However, reduction to nil is an exceptional and unusual but not unheard of finding ( **Lemonious v Church Commissioners** EAT/0253/12 ). The question for the Tribunal would be whether it is just and equitable to do so. I did find that the claimant's conduct was blameworthy and to a not inconsiderable extent. I do not accept however that this was a clear case of gross misconduct as Mr Hughes suggested. Dismissal on these grounds might have been fair if circumstances had been different and the employer, after a proper investigation, rejected his version of events or, after investigation, concluded that there was insufficient mitigation to outweigh his actions. There was substantial mitigation in this case namely the aggressive behaviour and assault by Mr Masson. Looking at all the circumstances in the present case I concluded that the appropriate reduction to reflect my findings would be a reduction of 40%.

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15. I must also consider the compensatory award. The Tribunal must consider a reduction under this section and whether it is just and equitable to award compensation. In the circumstances the reduction will be the same as that of the basic award namely 40%. The award is subject to the Recoupment Regulations.

16. The claimant is therefore entitled to the following sums. It was agreed that the basic award was £611.30 based on his service and age. No

issue was taken in relation to the claim for loss of statutory rights valued at £250. The claimant began work on the 4 September some six months after his dismissal. The loss of wages claim amounts to £1272 (£212 x 6). The total compensatory award amounts to £1522. The total monetary award is £2133.3 (£611.30 plus £1522) subject to the above reduction of 40% this makes it £1279.98. The prescribed element is the part of the award that covers the claimant's losses from the date of dismissal up until the issue of the Judgment. The prescribed element must in turn be reduced by 40% to take account of the above reduction It amounts to £767.99 (£1279.98 less £511.99) .In this case the prescribed element is £767.99.

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**Employment Judge: J Hendry**  
**Date of Judgment: 09 May 2018**  
**Entered in register: 15 May 2018**  
20 **and copied to parties**