EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr P Murdock	and	British Airways plc

Held at Reading on 18 March 2021 (Hearing by video link CVP)
24 March 2021 (In chambers)

Representation
Claimant: Mr S Liberadski, counsel
Respondent: Ms M Tutin, counsel

Employment Judge Vowles
Members: Mrs A Brown, Mr D Gregory

RESERVED UNANIMOUS REMEDY JUDGMENT

Evidence

1. The hearing was held by CVP video link. The Tribunal heard evidence on oath and read documents provided by the parties. It also received written and oral submissions from both representatives. From the evidence heard and read, the Tribunal determined as follows.

Decision

2. The Claimant is awarded **£21,626.15** in compensation for unfair dismissal and wrongful dismissal. The Respondent is ordered to pay this sum to the Claimant, subject to the Recoupment provisions set out below.

Recoupment

3. The Claimant claimed benefits and the Employment Protection (Recoupment of Benefits) Regulations 1996 apply.
4. The prescribed period to which the prescribed element is attributable is 7 November 2015 to 7 November 2016.
5. The prescribed element is £12,429.50 (£17,756.44 less 30% for contributory conduct).
6. The monetary award is £21,626.15.
7. The amount by which the monetary award exceeds the prescribed element is £9,196.65.
8. The effect of the Regulations is that **payment of the prescribed element is stayed and should not be paid to the Claimant**, until the Secretary of State has served a recoupment notice on the employer in respect of

benefits paid to the Claimant or has notified the employer in writing that he does not intend to serve a recoupment notice.

Reasons – rule 62 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

9. This judgment was reserved and reasons are attached below.

Public Access to Employment Tribunal Judgments

10. The parties are informed that all judgments and reasons for judgments are published, in full, online at *www.gov.uk/employment-Tribunal-decisions* shortly after a copy has been sent to the Claimant and the Respondents

REASONS

Background

1. A full merits hearing was heard before this same Tribunal on 26-28 September 2016. In a reserved unanimous judgment with reasons given on 22 November 2016 the claims of unfair dismissal, wrongful dismissal and disability discrimination were dismissed.

2. The Claimant then presented an appeal to the Employment Appeal Tribunal (EAT) and the hearing was held on 12 October 2017. The EAT's judgment with their reasons was produced on 2 July 2018. The disability discrimination appeal was dismissed but the appeals in respect of unfair dismissal and wrongful dismissal were upheld and those claims were remitted to this same Tribunal for reconsideration in accordance with the EAT judgment.

3. On 25 and 26 November 2019 this Tribunal reconsidered its earlier decision in light of the EAT decision. The unanimous judgment was that the original decision on unfair dismissal was revoked and the Tribunal found that the Claimant was unfairly dismissed. That complaint succeeded.

4. The Tribunal also found that there were no grounds for any reduction in the award under the Polkey principle.

5. However, the Tribunal found, by a majority, that the dismissal was caused or contributed to by the conduct of the Claimant and any award should be reduced by 30 per cent under sections 122(2) and section 123(6) Employment Rights Act 1996.

6. The original decision on wrongful dismissal was also revoked. The Tribunal found that the Claimant was wrongfully dismissed. That claim also succeeded.

7. A one-day remedy hearing was listed on 18 June 2020 but because of the pandemic restrictions, it was not possible to hold the hearing. Fresh case

management orders were made, and the case was re-listed for a one-day remedy hearing on 18 March 2021 before the same Tribunal.

Evidence and submissions

8. The Tribunal heard evidence on oath from the Claimant, Mr Patrick Murdock.

9. The Tribunal also read written submissions and heard oral submissions from both parties' representatives.

10. The Tribunal also read documents provided by the parties.

11. Based upon the evidence, submissions and documents, the Tribunal found as follows.

Decision

Rate of pay

12. There was a dispute between the parties as to the Claimant's rate of pay on which any award of compensation for loss of earnings should be calculated.

13. Section 220 Employment Rights Act 1996 states that the amount of a weeks pay of an employee shall be calculated for the purposes of the Act in accordance with sections 221 – 229 of the Act.

14. The Claimant submitted that his remuneration should be calculated in accordance with section 222 of the Act as follows:

> Remuneration varying according to time of work
>
> *Section 222(1) This section applies if the employee is required under the contract of employment in force on the calculation date to work during normal working hours on days of the week, or at times of the day, which differ from week to week or over a longer period so that the remuneration payable for, or apportionable to, any week there is a according to the incidents of those days or times.*
>
> *(2) The amount of a weeks pay is the amount of remuneration the average number of weekly normal working hours at the average hourly rate of remuneration.*
>
> *(3) For the purposes of sub section (2) –*
>
> *(a) The average number of weekly hours is calculated by dividing by 12 the total number of the employees normal working hours during the relevant period of 12 weeks, and*
>
> *(b) The average hourly rate of remuneration is the average hourly rate of remuneration payable by the employer to the employee in respect of the relevant period of 12 weeks.*

(4) In sub section (3) "The relevant period of 12 weeks" means the period of 12 weeks ending –

(a) where the calculation date is the last day of a week, with that week, and

(b) otherwise with the last complete week before the calculation date.

15. Section 223 reads as follows:

Supplementary

Section 223 (1) for the purposes of sections 221 and 222, in arriving at the average hourly rate of remuneration only –

(a) The hours when the employee was working, and

(b) The remuneration payable for, or apportionable to, those hours,

shall be brought in.

(2) If for any of the 12 weeks mentioned in sections 221 and 222 no remuneration within sub section (1)(b) was payable by the employer to the employee, account shall be taken of remuneration in earlier weeks so as to bring up to 12 the number of weeks of which account is taken.

16. The Respondent submitted that the Claimant's rate of pay should be calculated in accordance with section 224 of the Act as follows:

224 Employments with no normal working hours

(1) This section applies where there are no normal working hours for the employee when employed under the contract of employment in force on the calculation date.

(2) The amount of a weeks pay is the amount of the employee's average weekly remuneration in the period of 12 weeks ending -

(a) Where the calculation date is the last day of a week, with that week, and
(b) Otherwise with the last complete week before the calculation date.

(3) In arriving at the average weekly remuneration no account shall be taken of a week in which no remuneration was payable by the employer to the employee and remuneration in earlier weeks shall be brought in so as to bring up to 12 the number of weeks of which account is taken.

17. The Claimant submitted that whether his remuneration was calculated in accordance with section 222 or section 224, it should be remuneration payable for when he was actually working. It was said that the purpose of the 12-week formula in section 223 and 224 was to ensure that the figure for a weeks pay fairly reflects average earnings for employees with variable hours. It was said that it is completely contrary to the purpose and natural meaning of the legislation to base the calculation entirely on a period when the Claimant was off sick. It was said that, whichever of the two statutory bases was used, the applicable period was the 12 weeks prior to 8 July 2015 when he went absent on sick leave and thereafter was paid only basic pay and company sick pay (which was cancelled out by statutory sick pay). He was not paid contractual flying pay because during this period he was not engaged on flying duties, although, in his final pay statements dated 30 November 2015, and 31 December 2015, he was paid a back payment of contractual flying pay which clearly related to his earlier flying duties before 8 July 2015.

18. In his witness statement the Claimant gave evidence about his contract and working pattern as follows:

> *"My original contract of employment is at page TBC of the bundle. The Tribunal will see at section 7 that my hours of work, holidays and sick pay were governed by collective agreement between the Respondent and the unions. Unfortunately, I do not have copies of these agreements which I recall were updated during the time that I worked for the Respondent.*
>
> *I was originally employed on a full-time basis. However, in 2007-8 my contract was changed to part time working because of my health issues. After that point I worked only 75 per cent of normal hours for air cabin crew. In practice this meant that I would have one week off every month and then work for three to four weeks.*
>
> *On average I would do three to four trips per month. After a return trip I would have a number of days off, depending on the distance of the trip. For example a night stop on a short haul route would normally warrant three days off in the UK whereas a round trip to Singapore or Sydney would give me a full week off afterwards.*
>
> *On the first Tuesday of each month I would receive a roster showing, for each day, the destination, names of operating crew, and the total number of hours for each trip. I recall that the number of flying hours any cabin crew could do was capped at 900 per year. I would tend to do around 700 to 750 hours per year."*

19. In his evidence under oath before the Tribunal, the Claimant said that he was employed as Cabin Crew on the Worldwide Fleet on a 75 per cent contract. He was engaged on long haul flights and the length of the flights were variable. He did three to four trips per month. He flew to a variety of locations (other than Africa). He said the overnight stays would depend upon the location to which the flight was made. He said he would always eventually return to London Heathrow after time off in the middle of the

flight. He confirmed that the number of hours he worked in any given month would depend on the location of the flight destination.

20. The Tribunal found that, given the Claimant's working pattern described by him, he fell within the definition in section 222(1). He was required under the contract of employment in force on the calculation date, to work at times of the day, which differ from week to week, or over a longer period so that the remuneration payable for, or apportionable to, any week varies according to the incidence of those days or times.

21. The Tribunal found that the purpose of sections 222 and 223 was to arrive at the average hourly rate of remuneration. During the period 8 July to the effective date of termination on 6 November 2015, the Claimant was not working and his remuneration, which consisted only of basic pay and sick pay, was not remuneration payable for or apportionable to his employment under the contract of employment. Accordingly, in accordance with section 223(2), the Tribunal found that account should be taken of remuneration in earlier weeks so as to bring up to 12 the number of weeks of which account is taken. That is, the 12 week period ending on 8 July 2015.

22. As submitted by the Claimant, the Tribunal found that, because the Claimant was paid on a monthly basis and the Tribunal only had his monthly pay statements, it would be appropriate to use, as a close approximation, his pay during the 13 week period from 1 April 2015 to 1 July 2015. That pay was as follows:

Month	Gross pay	Net pay	Page
April 2015	£2,360.58	£1,440.63	83(a)
May 2015	£2,494.92	£1,520.58	83(b)
June 2015	£2,474.74	£1,477.85	83(c)

TOTAL GROSS PAY - £7,330.24 ÷ 13 = £563.86 per week

Add £43.07 per week employer's contribution = £606.93

TOTAL NET PAY - £4,439.06 ÷ 13 = £341.47 per week

Basic Award

23. The Tribunal found that the appropriate basic award under section 119 of the Act was 19 x £475 (statutory maximum under section 227) = £9,025.00.

24. In the Tribunal's judgment sent to the parties on 29 November 2019, it was stated:

> *"The Tribunal finds, by a majority, that the dismissal was caused or contributed to by conduct of the Claimant and any award should be reduced by 30 per cent under sections 122(2) and 123(6) Employment Rights Act 1996".*

25. Section 122(2) reads:

122 Basic award: reductions

(2) Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where ethe 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.

26. Section 123(6) reads:

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.

27. Although section 122(2) was referred to in the judgment, it was not referred to in the reasons for the judgment sent to the parties on 10 March 2020.

28. The Claimant requested the Tribunal to reconsider the reduction of the basic award by 30% because reasons for it were not given and because it would not be just and equitable, bearing in mind the Claimant's unblemished record of 14 years employment.

29. The Tribunal took account of the decision in Royal Society for the Prevention of Cruelty to Animals v Cruden [1986] ICR205 and Chaplin v H J Rawlinson Limited [1991] ICR 553 where it was said:

"It is clear that if contribution is to be found, on principle, it should be found equally in proportion both to the basic award and to the compensatory award…"

"Plainly both sub sections involve the exercise a discretion the wording of each whilst sufficiently different to admit of differentiation in cases where the Tribunal finds on the facts that it is justified, is sufficiently similar to lead up to conclude that it is only exceptionally that such differentiation will be justified."

30. The Claimant quoted the case of Charles Robertson (Development) Limited v White [1994] ICR 349 where the decision in the above cases was doubted. It was said:

"Unhappily, and with great respect, it is not possible to discern a foundation for that proposition in Royal Society for the Prevention of Cruelty to Animals v Cruden." …

A judgment made pursuant to the former sub section (now section 122(2)) reflects factors that are materially different from those bearing upon a judgment made pursuant to the latter sub section (now section 123(6)), and vice versa. That said, the circumstances of any particular case may readily result in like reductions being made under both sub sections. …

> *The discrepancy in reduction – total with respect to the compensatory award and one half with respect to the basic award – is not wrong in principle but reflects that the discretion vested in the Industrial Tribunal by the statute as construed with the aid of the authorities."*

31. The Tribunal decided that in the circumstances described above it should reconsider the decision set out in the judgment as sent to the parties on 29 November 2019 regarding the reduction in the basic award of 30%.

32. The Tribunal found that it was in the interests of justice in the above circumstances to reconsider the 30% reduction in the basic award. It was in the interests of justice to amend the reduction applicable to the basic award under section 122(2) to 15%, that is one half of the reduction in the compensatory award under section 123(6). The reason for this amendment was that the Tribunal took into account the Claimant's submissions that he had 14 years unblemished employment record with the Respondent and that the basic award is intended to reflect the Claimant's length of service. Indeed, the basic award is calculated upon the length of service as set out in section 119.

33. The Tribunal considered that there should be some reduction in the basic award to reflect the Claimant's conduct described in paragraphs 28, 29 and 30 of the Tribunal's reasons, promulgated on 10 March 2020, but that the percentage should take account of the Claimant's unblemished length of service.

34. The basic award would therefore be £9,025 less 15%, that is £7,671.25.

Loss of earnings

35. The Tribunal considered that it would be just and equitable to award compensation for loss of earnings for one year from the date of dismissal.

36. The Claimant did not apply for any alternative paid work until December 2018 - 3 years after dismissal. The Tribunal found that a reasonable person would have made efforts to mitigate his loss by seeking alternative work and would have a reasonable expectation of achieving suitable alternative employment with a rate of pay comparable to that which he received with the Respondent. During the three-year period the Claimant was able to work on a voluntary basis for the CAB from November 2017, two days per week, 9am to 4pm.

37. In limiting loss of earnings to one year the Tribunal accepted that the Claimant had, as he said in his witness statement, suffered a mental breakdown after his dismissal and part of the reason for that mental breakdown was not only the dismissal but also the criminal conviction. He referred to the long history of depression and anxiety and his other impairments, including HIV infection, small fibre peripheral neuropathy, hypotension, chronic back pain, chronic obstructive pulmonary disorder, and non-diabetic hyperglycaemia. The Tribunal noted however that, apart from the mental breakdown, these were pre-existing medical impairments with which the Claimant managed to work as cabin crew for the Respondent. It

found that if he had not been dismissed he would not have been absent on sick leave but would have continued to work including flying duties.

38. The Tribunal did not therefore accept the Respondent's submission that any loss of earnings period should be based upon six months company sick pay followed by six months statutory sick pay. The Claimant was entitled to his net rate of pay as loss of earnings for the one year period.

39. The award for loss of earnings is 52 weeks x £341.47 = £17,756.44.

Compensatory award

40. The Tribunal award is as follows:

52 weeks x £341.47 (net average pay) = £17,756.44

Less notice pay £3,451.32 = £14,305.12

Bonus £300

Loss of statutory rights £400

TOTAL £15,005.12

Less 30% = £10,503.58

Wrongful Dismissal

41. The Tribunal award is as follows:

12 weeks x £287.61 (basic pay only) = £3,451.32

ACAS Code of Practice

42. The Claimant submitted that the Respondent had failed to comply with paragraph 9 of the ACAS Code of Practice on disciplinary procedures because the Respondent had put in the notification of allegations that the Claimant had breached the policy on disclosing convictions but in fact he had not breached the policy. The Claimant sought a 25% uplift under section 207(A) Trade Union and Labour Relations (Consolidation) Act 1992.

43. The Respondent submitted that this aspect of remedy had not been raised before this remedy hearing. It was not mentioned in the ET1 claim form or at the preliminary hearing or at either of the two full merits hearings. There was nothing in the two judgments of the Employment Tribunal about this matter.

44. The Tribunal reviewed its earlier judgments and find no evidence of any breach of the ACAS Code of Practice on disciplinary procedures in this respect. There were no grounds for any uplift under section 207(A) of the Act.

Total award

45. In accordance with the above, the total award is as follows:

Notice pay	£3,451.32
Basic award	£7,671.25
Compensatory award	£10,503.58
TOTAL AWARD =	**£21,626.15**

Recoupment Regulations

46. The Claimant claimed benefits and the Employment Protection (Recoupment of Benefits) Regulations 1996 apply.

47. The prescribed period to which the prescribed element is attributable is 7 November 2015 to 7 November 2016.

48. The prescribed element is £12,429.50 (£17,756.44 less 30% for contributory conduct).

49. The monetary award is £21,626.15.

50. The amount by which the monetary award exceeds the prescribed element is £9,196.65.

I confirm that this is the Reserved Unanimous Remedy Judgment in the case of Mr P Murdock v British Airways plc case no. 3322482/2016 and that I have dated the Judgment and signed by electronic signature.

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Employment Judge Vowles
Date: *11 May 2021*

Sent to the parties on:

…3/6/2021.....

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For the Tribunals Office