



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr A. Williams

v

The Westbury Hotel Limited

Heard at: London Central

On: 12 June 2021

Before: Employment Judge P Klimov, (in chambers)

UPON APPLICATION by the Claimant made by a letter dated 30 April 2021 to reconsider the Tribunal judgment dated 19 April 2021 under rule 71 of the Employment Tribunals Rules of Procedure 2013, and without a hearing, the Judgment is varied as follows:

JUDGMENT

The Respondent is ordered to pay the Claimant compensation for unfair dismissal of **£63,017.63** comprising of:

1. Basic Award: £6,300
2. Compensatory Award:

Financial loss between the effective date of termination and 30 November 2020 (net)

Loss of salary, pension, 2019 Christmas bonus and healthcare benefits:	£61,302.31
Less Income Received in that period:	(£13,513.81)
(i) Total loss between the effective date of termination and 30 November 2020	<u>£47,788.50</u>

Financial Loss between 1 December 2020 and 30 June 2021 (net)

Loss of salary, pension and healthcare:	£17,273.26
Less Income Received in that period:	(£10,741.82)
Total loss between 01/12/2020 and 30/06/2021:	£6,531.44
Applying “ <i>Polkey</i> ” reduction @ 50%	(£3,265.72)
Contribution towards costs of setting up new business:	£1,500
(ii) Total:	<u>£4,765.72</u>
(iii) Loss of statutory rights:	<u>£300</u>
Total Financial Loss (i)+(ii)+(iii)	<u>£52,854.22</u>

After ACAS uplift of 25% [£13,213.55]	£66,067.77
Less 30% reduction under s123(6) ERA	(£19,820.33)
Total Net Compensatory Award	<u>£46,247.44</u>

Grossing up net total compensatory award:

balance of £30,000 allowance not used by Basic Award	£23,700
amount to be grossed up:	£22,547.44

Earnings				Tribunal Award		
Band	Gross	Tax	Net	Gross	Tax	Net
PA	12,500	0	12,500	0	0	0
BR	14,500	2,900	11,600	13,684.30	2,736.86	10,947.44
HR	0	0	0	19,333.33	7,733.33	11,600
Total	27,000	2,900	24,100	<u>33,017.63</u>	10,470.19	<u>£22,547.44</u>

Adding back tax-free amount:	£23,700.00
Total Compensatory Award:	<u>£56,717.63</u>

Total Compensation for Unfair Dismissal: £63,017.63

REASONS

1. On 30 April 2021, the Claimant applied for reconsideration of my remedies judgment dated 19 April 2021, under Rules 70-72 of the Employment Tribunals Rules of Procedure 2013.
2. The Claimant submits that the Tribunal has erred regarding (1) the order of adjustments to the compensatory award, and (2) the calculation of the Claimant's loss of earnings as a result of its finding that his employment would have ended in any event. The Claimant submits that it is necessary in the interests of justice for the Tribunal to reconsider the judgment.
3. On 15 May 2021, the Respondent wrote to the Tribunal objecting to the Claimant's application and putting its arguments against the two substantive grounds raised by the Claimant.
4. Having considered the parties submissions, I agree there is an error in my remedies judgment in so far as the total sum earned by the Claimant in mitigation (£24,225.36) was deducted after his total loss for both periods (from dismissal to 30/11/2020 and from 1/12/2020 to 30/06/2021) was calculated. I find that it is in the interest of justice to correct the error and recalculate the Claimant's compensation using the correct order of mitigation deductions and "*Polkey*" reduction.
5. The correct approach is to split the total mitigation sum into sums earned in the first and the second periods and deduct those from the respective losses attributable to those periods. With respect to the second period, the 50% "*Polkey*" reduction should be applied after such deduction is made.
6. The Respondent appears to accept that "*any reduction for Polkey is done after the full amount of any earnings have been deducted*" (see paragraph 13 of the Respondent's submissions). The Respondent, however, argues that there should be no reduction in the Claimant's earning sum before the "*Polkey*" reduction, as otherwise this would lead to a "*double reduction*".
7. I agree, there should be no additional 50% reduction of the mitigation earnings in the second period before the 50% *Polkey* reduction is applied to the resulting sum. The corrected calculations are set out in this judgment.
8. I accept that on the principles set out in *Digital Equipment Co Ltd v Clements (No. 2)* [1998] ICR 258, CA and *Ministry of Defence v Wheeler* [1998] ICR

242, CA that is the correct approach which I must follow. However, for the reasons set out in paragraphs 88 – 91 of my remedies judgment, I find it produces the result which, in my judgment, is not just and equitable, as it compensates the Claimant for losses in excess to those, which are attributable to the unfairness of his dismissal.

9. Also, I find it difficult to reconcile with the position when no “*Polkey*” reduction is applied to determine the employee’s net loss, and the employee then must give full credit for all sums earned in mitigation. The “*Polkey*” reduction is no more than a mechanism to establish the employee’s net loss attributable to the employer’s wrongdoing, and it is against that sum the employee must give credit for all sums earned in mitigation. The logic of discounting the sums earned in mitigation by the same per cent of “*Polkey*” reduction on the basis that the employee would not have had to earn those mitigation sums if he or she had not been unfairly dismissed by the employer, appears at odd with the position when no *Polkey* reduction is applied, as the same can be said for any mitigation earnings.
10. With respect to the Claimant’s second ground, namely that the calculation of the Claimant’s loss of earnings should include his hypothetical redundancy package comprising of what would have been his statutory redundancy pay and his contractual notice pay, I reject this.
11. My findings and conclusions on this issue are set out in my judgment at paragraphs 80 – 87.
12. The Claimant appears to argue that my conclusions are wrong in law. If that is his position, the appropriate course of action for him is to appeal my judgment on this issue to the EAT.
13. For the sake of completeness, I shall add that I do not agree with the Claimant’s analysis. The Claimant appears to seek to have his compensation covering both his ongoing losses after 30 November 2020 and loss of a chance to obtain his redundancy package in November 2020.
14. In my judgment, the Claimant cannot claim his losses for both, as one scenario necessarily precludes the other. More importantly, as stated in my remedies judgment, awarding a compensation equivalent to the Claimant’s statutory redundancy pay in respect of a hypothetical

redundancy in addition to the basic award would be compensating the Claimant twice for the same loss.

15. I also do not accept that it would be just and equitable to award the Claimant a compensation for what would have been his notice pay in a hypothetical redundancy dismissal, when the Claimant eschews making a notice pay claim in these proceedings to retain his right to do so through civil courts.
16. I do not accept the Claimant's submission that the example cited in paragraph 63 in *Credit Agricole Corporate and Investment Bank v Wardle [2011] ICR 1290* gives the Claimant the right to claim statutory redundancy pay in relation to a hypothetical redundancy in addition to his basic award or be compensated for loss of his notice pay while retaining the right to make a breach of contract claim with respect to his notice entitlement in separate civil court proceedings.

Employment Judge P Klimov
London Central Region

Dated 12 June 2021

Sent to the parties on:

14/06/2021

For the Tribunals Office

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