



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Marc Ramsden  
**Respondent:** Maldon District Council  
**Heard at:** East London Hearing Centre  
**On:** 15 October 2021  
**Before:** Employment Judge Barrett

## Representation

**Claimant:** Represented himself  
**Respondent:** Mrs Emma Holmes, Senior Legal Specialist at the Respondent

# REMEDY JUDGMENT

The judgment of the Tribunal is that: -

1. The Respondent shall pay the Claimant the sum of £21,261.74, comprising:
  - a. A basic award of £1,159.74;
  - b. A compensatory award of £20,102.00.
2. For recoupment purposes:
  - a. Monetary award: £21,261.74;
  - b. Prescribed element: £15,721.12;
  - c. Period of prescribed element: 5 June 2019 to 15 October 2021;
  - d. Balance of the monetary award in excess of the prescribed element: £5,540.62

# REASONS

## Introduction

1. By a reserved judgment sent to the parties on 30 June 2021, the Claimant succeeded in his claim for unfair dismissal. It was found that a 50% *Polkey* reduction should be made to reflect the chance the Claimant might have been fairly dismissed. This hearing was listed to decide remedy.

## The hearing

2. Both parties had applied for reconsideration of aspects of the liability judgment. Those applications were considered, and oral judgment was given, at the beginning of the remedy hearing.
3. The Claimant gave evidence on his earnings and steps taken to find alternative employment since he was dismissed by the Respondent. In addition to his witness statement and schedule of loss, he provided copy documents of his medical records. In order to protect the Claimant's privacy, Mrs Holmes handed her copy of these documents back to him at the end of the hearing. The copy provided for the Tribunal's use has been confidentially shredded. There is no need to refer to the details of those documents within this judgment.
4. The Respondent provided written submissions setting out its case on remedy in advance of the hearing. The Respondent additionally submitted job search documents showing jobs which, it contended, the Claimant would have been qualified to apply for.
5. After the Claimant's evidence, we took a short adjournment before the Claimant and Mrs Holmes both made helpful closing submissions.

## Findings of fact

6. The Claimant was dismissed on 5 June 2019. He was paid in lieu of his one month's notice period and a redundancy payment of £1,157.00. The parties agree that while working for the Respondent, his net weekly pay was £386.58. He was not a member of the Respondent's pension scheme.
7. After he was dismissed, the Claimant signed up to an employment agency, HR Go. That agency found him a position working in a local factory. Although he was offered this role within a fortnight of leaving the Respondent, it took some time for his start date to be confirmed. He worked there from 9 September 2019 to 25 March 2020.
8. In March 2020, the company which operated the factory relocated to Coventry. The Claimant was told in advance that his job would be coming to an end. He notified his employment agency that he was looking for new work and made 2 job applications, which were unsuccessful. The end of his factory job coincided with the national Covid-19 lockdown.

9. In November 2020 the Claimant went into hospital for an operation, which meant he was too unwell to work for approximately two weeks. There is no dispute that had he remained in the Respondent's employment he would have received full sick pay over this period.
10. The Claimant's health impacted on his ability to search for alternative work because he was required to shield during the lockdown period. He has explained, and I accept, that he does not have the computer skills to apply for the types of office jobs that can easily be done from home.
11. The Claimant gave evidence, which I accept, that he has made 8 job applications and had 4 job interviews but so far not been successful in obtaining alternative employment.
12. From March 2020 to date, the Claimant has received £6,370.00 in Universal Credit payments.
13. The Claimant will need to have further medical appointments in future as his health condition remains under review, but he is now well and able to work. The Claimant would not be suited to a computer-based job. He may need additional training to undertake work with a broader remit than his previous role at the Respondent. However, he is determined, intelligent and well able to obtain and succeed in future employment.

#### The law

14. A basic award will be ordinarily reduced by the amount of any redundancy payment that has previously been made to employee. Section 122(4)(b) Employment Rights Act 1996 provides:  
  
**"The amount of the basic award shall be reduced or further reduced by the amount of... any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy..."**
15. However, in *Allmakes Ltd v Boorman* [1995] ICR 842, the Court of Appeal held that set-off provision does not apply where a purported redundancy payment was made and the reason for dismissal was not redundancy. In that case, Mr Boorman was dismissed, the reason given by his employer at the time was redundancy and he accepted a redundancy payment. The industrial tribunal later found the reason for his dismissal was not redundancy, and he had been unfairly dismissed. The Court of Appeal held that in such circumstances, the purported redundancy payment was not made "*by reason of redundancy*" and therefore did not have to be deducted from the basic award. As Evans LJ explained, the predecessor provision to s.122(4)(b):  
  
**"was intended to apply in cases of redundancy in fact, not in other cases which the employers choose to describe as redundancy, even if the employee accepted that description at the time."**
16. However, he went on to clarify that:  
  
**"The full amount of the payment could of course be deducted from the amount of compensatory damages."**

17. This is further confirmed in *Digital Equipment Co Ltd v Clements* [1998] ICR 258: a payment made in respect of a dismissal which is not a statutory redundancy payment, such as a contractual redundancy payment in excess of the statutory entitlement, or an *ex gratia* payment, falls to be deducted from the compensatory award.
18. Section 123(1) of the Employment Rights Act 1996 provides that the compensatory award shall be:  

**“...such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer.”**
19. Under s.124(4):  

**“In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law ...”**
20. The duty to mitigate loss referred to in that subsection means the Claimant is expected to take reasonable steps to minimise the losses suffered because of the unfair dismissal. The burden of proof lies with the Respondent to show that the Claimant has unreasonably failed to take steps he ought to have taken to mitigate his losses: *Wright v Silverline Car Caledonia Ltd* UKEATS/0008/16.
21. In accordance with the principle in *Dench v Flynn & Partners* [1998] IRLR 653, a subsequent period of employment by the Claimant will not break the chain of causation of losses flowing from a dismissal if he left the subsequent employment for a non-culpable reason.
22. The order of adjustments to the compensatory award applicable in this case is:
  - 22.1. Deduct the sum the Claimant has earned in mitigation of his loss, or any sum to reflect failure to mitigate under s.123(4) Employment Rights Act 1996;
  - 22.2. Deduct the wrongly labelled redundancy payment of £1,157.00;
  - 22.3. Reduce the sum (in this case, by 50%) to reflect the chance that the Claimant would have been dismissed in any event had the employer acted fairly, under the principle in *Polkey v AE Dayton Services Ltd* [1987] IRLR 50;
  - 22.4. Apply the statutory cap under s.124 Employment Rights Act 1996 of (in this case) 52 weeks' gross pay.
23. Where the Claimant has received state benefits which are potentially recoupable from a Tribunal award by the Secretary of State for Work and Pensions, the Tribunal is obliged under reg.4(3) of the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 to record the following information:
  - 23.1. the monetary award;

- 23.2. the amount of the prescribed element, if any;
- 23.3. the dates of the period to which the prescribed element is attributable;
- 23.4. the amount, if any, by which the monetary award exceeds the prescribed element.

## Discussion and conclusions

### Basic award

- 24. The Claimant agreed with the Respondent's submission that his claim for a basic award of £1,157.00 should be set off against the redundancy payment he had already received in that amount. During the hearing, my own understanding was this was an appropriate concession.
- 25. However, on review of the case of *Allmakes Ltd v Boorman* [1995] ICR 842, I have learned that where a redundancy payment is made and accepted, but the Tribunal later finds that the reason for dismissal was not redundancy, the correct approach is to set that payment off against the compensatory award rather than the basic award.
- 26. At paragraph 80 of the liability judgment in this case, I concluded that the Claimant's dismissal was not wholly or mainly attributable to the genuine redundancy situation which existed at the Respondent council at the time, but rather to the application of a competency standard which was unrelated to the needs of the redundancy situation. Therefore, I am bound to follow the approach in *Allmakes Ltd v Boorman*.
- 27. The Claimant did note that his CAB advisor had told him to include the basic award in his schedule of loss despite having received the equivalent amount by way of a redundancy payment; that advice was correct.
- 28. The Respondent's calculation of the basic award was **£1,159.74** which I adopt as the correct figure.

### Compensatory award – loss of statutory rights

- 29. The Claimant claimed a sum of £500.00 in respect of the loss of his statutory rights.
- 30. The Respondent relied on *Dugdale PLC v Mr G Cartlidge* UKEAT/0508/06 as authority for the proposition that this award should be based on the £100 awarded in *SH Muffett Ltd v Head* [1986] IRLR 488 in 1986, increased in line with inflation. An inflation calculation was provided showing that the equivalent sum today would be £300.00.
- 31. Since the case of *Dugdale*, the qualifying period for unfair dismissal rights has increased to 2 years, and so it will take longer for the Claimant to regain that right once he has found alternative employment. I conclude that an appropriate sum to award is **£400.00**.

### Compensatory award – past loss of earnings

32. The Claimant's net weekly loss of £386.58 per week over the 123 weeks between his dismissal and the remedy hearing amounts to £47,659.79. Deducting: (a) his month's notice pay of £1675.18; and (b) earnings in mitigation of £7,323.11, results in a past loss of earnings of £38,661.50.
33. The Respondent submits that there should be a further reduction to reflect the Claimant's alleged failure to mitigate his losses. The Respondent takes no issue with the period the Claimant took to find alternative work between June and September 2019. However, it submits that the Claimant unreasonably failed to take reasonable steps to find new work after March 2020.
34. The Respondent relies on 9 job adverts showing grounds maintenance and gardener vacancies in August and September 2021. This does appear to include one role that was advertised on three occasions. The Claimant says that only one of the advertised jobs would have been suitable for him as he did not have the relevant training for others which required, e.g., maintaining sports pitches. I accept that the job adverts show that over the past few months there have been a small number of roles the Claimant could have applied for. There is no evidence to show that this was also the case during the lockdown period.
35. The Claimant is obliged to take reasonable steps to mitigate his losses. Eight job applications over the period the Claimant has been unemployed is not a high number. However, what is reasonable must be assessed in light of the surrounding circumstances. The Claimant commenced his search for replacement work after his factory job ended in March 2020, at a time when few employers were focussed on recruitment. Thereafter, from at least November 2020 he suffered a period of ill-health which meant he could only apply for roles which were compatible with the then-applicable shielding restrictions. I conclude that the Claimant's failure to apply for more roles was not unreasonable in those circumstances. I therefore make no deduction for failure to mitigate.
36. The Claimant must give credit for the mislabelled redundancy payment of £1,157.00. This further reduces the figure for past losses to **£37,504.50**.

Compensatory award – future loss of earnings

37. In relation to future loss, the Claimant submits it will take him a further two years to find another job. The Respondent's position is that he should not be awarded any compensation for future loss because (on the Respondent's case) he ought reasonably to have obtained alternative employment already.
38. I have found that the Claimant is determined, intelligent and well able to succeed in future employment. He faces some barriers to obtaining his next role; he has been out of work for a lengthy period and may need to find a new employer who would be willing to offer the opportunity of retraining. I anticipate the Claimant will be able to find such a role within a further 6 months (26 weeks).
39. This gives a total future loss at £386.58 per week for 26 weeks of **£10,051.08**.

Polkey deduction and statutory cap

40. The compensatory award prior to adjustments therefore totals £47,955.58 (being £400 plus £37,504.50 plus £10,051.08).
41. Applying a 50% *Polkey* deduction to reflect the chance the Claimant could have been fairly dismissed gives a reduced total of £23,977.79.
42. This is higher than the Claimant's gross annual salary of **£20,102.00**. His compensatory award is therefore further capped under s.124 Employment Rights Act 1996 to that amount.
43. The compensatory award has been reduced by 58% on application of the *Polkey* principle and the statutory cap.
44. Adding the compensatory award of £20,102.00 to the basic award of £1,159.74 gives a total award of **£21,261.74**.

*Information required in relation to recoupment*

45. The prescribed element for the purposes of the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 is **£15,721.12**. This is calculated as past loss of earnings of £37,504.50 reduced by 58%, to reflect the proportion by which the compensatory award was reduced. Payment of this part of the award is deferred to allow the Secretary of State time to serve a recoupment notice or notify the Respondent that no recoupment notice will be served.
46. The prescribed period is the period from dismissal on 5 June 2019 to the remedy hearing on 15 October 2021.
47. The total amount of the monetary award is, as set out above, **£21,261.74**.
48. The balance of the award is **£5,540.62**, being the difference between the total award and the prescribed element. This part of the award is immediately payable by the Respondent to the Claimant.
49. The effect of the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 was discussed at the hearing and the parties' attention is drawn to the explanation contained in the Annex to this judgment.

**Employment Judge Barrett**

**22 October 2021**

## ANNEX TO THE JUDGMENT (MONETARY AWARDS)

### Recoupment of Benefits

The following particulars are given pursuant to the Employment Protection (Recoupment of Benefits) Regulations 1996, SI 1996 No 2349.

The Tribunal has awarded compensation to the Claimant, but not all of it should be paid immediately. This is because the Secretary of State has the right to recover (recoup) any jobseeker's allowance, income-related employment and support allowance, universal credit or income support 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 was sent to the parties.

The Tribunal's judgment states: (a) the total monetary award made to the claimant; (b) an amount called the prescribed element, if any; (c) the dates of the period to which the prescribed element is attributable; and (d) the amount, if any, by which the monetary award exceeds 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 Secretary of State sends the Recoupment Notice, the Respondent must pay the amount specified in the Recoupment Notice to the Secretary of State. 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 Secretary of State informs the Respondent that it is not intended 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 Secretary of State. If the Claimant disputes the amount in the Recoupment Notice, the Claimant must inform the Secretary of State in writing within 21 days. The Tribunal has no power to resolve such disputes, which must be resolved directly between the Claimant and the Secretary of State.