



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Juncal Pujols Sanchez

**Respondent:** Bay Dining Ltd

**Heard via Microsoft Teams (London Central) On: 18, 19 October 2021**

**Before:** Employment Judge Davidson  
Ms T Shaah  
Mr R Baber

## Representation

Claimant: Mr F Clarke, Caseworker

Respondent: Ms L Phan, Director

Interpreter: Ms F Berta

# JUDGMENT

It is the unanimous decision of the tribunal that:

1. The claimant's claim of unfair dismissal succeeds;
2. The claimant's claim that he was not provided with a statement of terms and conditions of employment succeeds;
3. The claimant's claim for trade union detriment succeeds.

The respondent is ordered to pay the following sums to the claimant:

Basic award	£ 709.70
Compensatory award	£2,554.85
ACAS uplift	£816.14
Failure to provide s1 statement	£601.34
Loss of statutory rights	£300.00
<b>TOTAL</b>	<b>£4982.03</b>

## Notes

Public access to employment tribunal decisions: Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

## Video hearing

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was Microsoft Teams. There were technical issues with Cloud Video Platform (CVP) and

the hearing was changed to a Teams hearing. No members of the public sought to attend. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

# REASONS

## Issues

### 1. The issues in the claims are as follows

#### *Unfair dismissal*

- 1.1. What was the reason for the dismissal? It is the Respondent's case that the Claimant was dismissed for a reason related to his conduct.
- 1.2. Did the Respondent conclude that that was the reason for dismissal following a sufficient investigation and fair process?
- 1.3. The Claimant says that his dismissal was unfair because:
  - 1.3.1. he was singled out unfairly and was not supported sufficiently;
  - 1.3.2. no sufficient process was followed, or any process at all (this does not appear to be in dispute in the Respondent's Response).
- 1.4. Was dismissal 'within the range of reasonable responses' open to an employer in the circumstances?

#### *Remedy for unfair dismissal*

- 1.5. If the procedure was unfair, should any adjustment be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed?
- 1.6. Would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?
- 1.7. Did the Claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

#### *Detriment contrary to s.146 TUCLRA 1992*

- 1.8. Was the Claimant subjected to the detriment of having his invitation to discuss whether he could return to work withdrawn?
- 1.9. If so, did this take place for the sole or main purpose of penalising him from being part of an independent trade union or for activities connected therewith?
- 1.10. if the complaint is well-founded what award of compensation should be made pursuant to section 149 of that Act and should there be any award for injury to feelings?

*Failure to provide written particulars of employment*

- 1.11. Was the Claimant provided with written particulars of employment? If not, what increase should be made to any award pursuant to section 38 of the Employment Act 2002?

*Uplift*

- 1.12. Should any award made by the tribunal be subject to an uplift for failure to comply with the ACAS code on grievance and disciplinary procedure?

Evidence

2. The tribunal heard evidence from Loan Phan (restaurant owner) on behalf of the respondent and from the claimant on his own behalf (via a Spanish interpreter). The tribunal also had a bundle of documents running to 86 pages.

Facts

3. The tribunal found the following facts on the balance of probabilities.
  - 3.1. The respondent operates a restaurant in Central London. The restaurant manager was Lidia. The owner was Loan Phan.
  - 3.2. The claimant worked for the respondent as a kitchen porter from 23 June 2017.
  - 3.3. There was a dispute whether the claimant was given a contract when he started. The claimant confirms that he signed a form asking for information but disputes he was given a contract. The respondent was unable to find the contract when the claimant asked and was also unable to find the form. The respondent was apparently able to find everybody else's contract except the claimant.
  - 3.4. We find on the balance of probabilities that the claimant was not issued with a contract. We find the most likely explanation is that this was overlooked at the start of his employment and never followed up.
  - 3.5. Throughout the claimant's employment, there were instances of conflicts with other members of staff. Although, in his appeal letter dated 11 February 2020, the claimant claims not to have had any incidents during his employment, his own witness statement gives details of a number of issues that arose.
  - 3.6. Even on the claimant's own case, there were arguments with colleagues. His account is that they were not caused by him and that he was unfairly treated but it cannot be said that there were no incidents.

- 3.7. In November 2018, the claimant was in an argument within the kitchen following which Lidia dismissed him. The claimant rang Loan Phan and he was reinstated within a day or two.
- 3.8. There were a number of disciplinary incidents recorded. The disciplinary incidents since his reinstatement are recorded on disciplinary procedure pro-formas and include
  - 3.8.1. An argument with Yen on 18 December 2018;
  - 3.8.2. Brushing up against Yen on 18 June 2019;
  - 3.8.3. An argument with Miguel Rojas about burnt trays on 20 November 2019;
  - 3.8.4. The incident with the water pot on 19 December 2019 (see below).
- 3.9. The claimant alleges that the records are not accurate and that he was never given warnings. We find no reason to dispute the accuracy of the notes and it was not put to the respondent that they were inaccurate. Given the events described (largely accepted by the claimant) a warning would be the expected outcome.
- 3.10. We find that the claimant was aware that he had been given verbal warnings as he was told of these. We note on the occasion the warning was not read to him (on 19 Dec) that fact was noted.
- 3.11. We also note that the claimant told us that he was aware that his job was at risk so he must have been aware that dismissal was a possibility.
- 3.12. On 19 December 2019, the claimant was using one of the two hobs assigned to the Soup Chef during lunchtime service. The claimant states that the Soup Chef agreed to this although the respondent disputes this as it would make his job very difficult during service with a queue of customers if he only had one hob to work with. Another member of staff argued with the claimant about this. The claimant then put the water pot on the floor because he was upset.
- 3.13. There was a dispute about whether the water was hot or cold. It is not material to our decision but we find that, on the balance of probabilities, it was hot. The respondent has maintained it was hot throughout and the claimant has never challenged this. It is not in his witness statement and it was not put to Loan Phan in cross examination.
- 3.14. The claimant was called into a meeting following this incident and was asked for his side of the story. He admitted putting the water pot on the floor and apologized.
- 3.15. The following day he was sent a dismissal letter giving him one week's notice.

- 3.16. In early January 2020, the claimant started having panic attacks which he attributes to the loss of his job. He was referred by his GP to a Talking Therapies unit and received treatment.
- 3.17. On 11 February 2020 the claimant wrote an appeal letter to the respondent. On 18 Feb, in response, Loan Phan emailed the claimant and suggested a meeting to discuss options. She told us she was considering offering him a job in another business of hers in the warehouse where he would largely be working alone. He replied saying that he was unable to make the suggested time and asking her to send him a letter inviting him to an appeal meeting with a new time so that he could let his trade union representative know.
- 3.18. Loan Phan emailed the claimant withdrawing the offer of a face to face meeting because he was pushing for a formal process involving his trade union and she objected to that.
- 3.19. She then had an exchange of communication with the trade union in which Loan Phan said she felt intimidated and that was why she no longer wanted to meet with the claimant to explore other opportunities.

### Determination of the issues

#### *Jurisdiction*

4. We find that there was no break in service in November 2018 and that the claimant has two years' service. We therefore have jurisdiction to consider his UDL claim.

#### *Unfair dismissal*

5. We find that the claimant was dismissed for a reason relating to his conduct. We do not find that the respondent regarded this as gross misconduct at the time but further serious misconduct following a pattern of poor behaviour and a series of warnings.
6. We find that the respondent did not follow a fair procedure. There was no formal disciplinary hearing where the allegations were put to him and he was not offered an opportunity to be accompanied. There was no separation between investigation and disciplinary and he was not given an opportunity to make representations in mitigation. He was not given a right of appeal.
7. Loan Phan was honest enough to admit that she wasn't aware he had these rights but that is no excuse for depriving him of those rights.
8. We therefore find that the dismissal was unfair. We must go on to consider whether, if a fair procedure had been followed, the outcome might have been different. We find that, in the light of the claimant's work history and the seriousness of

the final incident that his job would not have continued at that site even if a different procedure had been followed.

9. We also find that the claimant contributed to his dismissal by his conduct to the degree of 100%.
10. We reject the claimant's submission that he was singled out unfairly and not sufficiently supported. We note that the dismissal was not related to his performance and criticisms of his performance are not relevant.
11. We find that the claimant was given numerous chances to improve his conduct and failed to do so.
12. We find that dismissal was within the range of reasonable response in the context of the claimant's disciplinary history and final act of misconduct.
13. However, we find that failing to give the claimant an appeal prevented him from making representations which might have allowed him to mitigate his loss by taking a warehouse job in another company owned by Loan Phan. Loan Phan accepts that she was considering offering him this work but did not follow up because he appealed. (We accept that she would not have reinstated the claimant to the restaurant, due to his history of conflict with other staff.) If she had understood that having an appeal against his dismissal was his right, she may not have taken the appeal to be a threat or the union involvement to be intimidating.
14. We award the claimant his basic award of £709.70. We also award him a compensatory award consisting of the notice period and the loss flowing from the loss of opportunity to mitigate his loss resulting from Loan Phan's withdrawal of the meeting to discuss other options. We have taken into account the possibility that the offer may not have been made and the possibility that the claimant may not have accepted the role but we find that the offer would most likely have been made and the claimant would most likely have accepted as he needed work. We have assumed a net pay equivalent to his pay as a kitchen porter and deducted the amount he received from other work he did during this period. We calculate the award to be £2554.85.
15. We have uplifted these amounts to reflect the failure to follow the ACAS Code on disciplinary procedures. The amount of the uplift is 25% which amounts to £816.14

*Statement of terms and conditions of employment*

16. We find that the claimant was not issued with a contract and is entitled to a remedy for that failure. We award £601.34 as indicated in the Schedule of Loss.

*Trade Union detriment*

17. We find that the claimant was subjected to a detriment as a result of his attempting to involve his trade union representative in an appeal process. We reject the respondent's submission that the claimant's email was intimidating. On the face of the wording of the email, it is an entirely reasonable request. The respondent's attitude clearly changed once the trade union involvement was mentioned. However, we find that no financial loss followed from this (the loss of opportunity to mitigate the claimant's loss is covered above). We find that the evidence supporting the injury to feelings claim relates to the panic attacks and shows that these happened prior to the issue with the trade union. We find that the claimant's injury to feelings claim relates to his dismissal, not the failure to engage with his trade union and, as such, is not recoverable.

18. We award £300 for loss of statutory rights.

*Conclusion*

19. In conclusion, the amounts awarded to the claimant are as follows:

Basic award	£ 709.70
Compensatory award	£2,554.85
ACAS uplift	£816.14
Failure to provide s1 statement	£601.34
Loss of statutory rights	£300.00
<b>TOTAL</b>	<b>£4982.03</b>

Employment Judge Davidson  
Date 29 October 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
01/11/2021..

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FOR EMPLOYMENT TRIBUNALS