



# EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102676/2019  
Held in Glasgow on 3 July 2019  
Employment Judge: Rory McPherson

Miss N Pirnie

Claimant  
Represented by  
R Wallace -  
Solicitor

Liquor Barn (Bridgeton) Ltd

Respondent  
No appearance and  
No representation

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

1. (1 ) the claimant was dismissed in breach of contract (in respect of notice pay) and the respondent is ordered to pay damages to the claimant in the sum of **One Thousand and Fifty Six Pounds (£1,056.00)**; and
2. the respondent is ordered to pay the claimant the monetary award for unfair dismissal in the sum of **Three Thousand Five and Eighty One Pounds and Seventy Five Pence (£3,581.75)**. The prescribed element of this award is **One Hundred and Twenty Five Pounds and Twenty Eight Pence (£125.28)** and as the monetary sum exceeds the prescribed element by **Three Thousand Four Hundred and Fifty Six Pounds and Forty Seven Pence (£3,456.47)** and this sum is payable immediately to the claimant.
3. both those sums are payable immediately to the claimant.

## REASONS

### Introduction

### Preliminary Procedure

1 . This claimant brought a complaint for unfair dismissal and breach of contract in respect that the claimant was not paid notice pay. The claimant's claim of unfair dismissal succeeded by judgment of the Tribunal of 13 May 2019. The

respondent had not submitted an ET3, did not appear and was not represented.

## **Evidence**

2. The Tribunal heard evidence from the claimant.

## **Findings in fact**

3. The claimant was employed by the respondent from 1 January 2004 to 31 November 2018 as a shop assistant with Liquor Barn (Bridgeton) Ltd working at 505 Great Western Road, Glasgow G12 8HN.

4. The claimant was dismissed by the respondent in connection with a conduct allegation on 31 November 2018 without the respondent having carried out any investigation.

5. There was no reasonable belief on which the respondent could have based the allegation. The allegation against the claimant was denied by the claimant and the claimant challenged the respondent at the time to carry out an investigation and or refer the matter beyond the employer.

6. The respondent did not have a reasonable belief in relation to the allegation.

7. The claimant was not invited to a disciplinary hearing in relation to the allegation, she was not notified of any right to be accompanied, she was not notified of any right to appeal and no appeal was provided.

8. Although the claimant had been employed since 1 January 2004 she had not been provided with written terms and conditions of employment.

9. The claimant was paid £125.28 per week gross; the claimant's level of pay was such that there was no deduction of tax. The claimant's payslip however identified that the respondent was reporting as at August 2018 that it had made the relevant pension contribution required in terms of section 3 of Pensions Act 2008.

10. The claimant had sought to obtain alternate employment upon dismissal but encountered difficulty owing to the circumstances of the respondent's dismissal. The claimant did not apply for Job Seekers Allowance. The claimant received Income related ESA for a period of 6 weeks.

11. The claimant's dismissal the claimant successfully obtained alternate employment at broadly the same rate of £125 per week on 11 February 2019.

12. The Tribunal hearing was notified to the parties on 21 May 2019 as scheduled to start on 3 July 2019.

## **Submissions**

13. The claimant provided oral submissions seeking an uplift as set out in broad calculation prepared by the claimant.

## **Breach of Contract and Unfair Dismissal**

### **Reduction under Polkey principle.**

## Relevant Law

14. The Tribunal is required to consider whether it is appropriate to make any deduction under the principle derived from **Polkey v AE Dayton Services Ltd** [1988] ICR 142, which requires an assessment of the possibility of a fair dismissal had the procedure adopted been a fair one. That requires an assessment of whether in all the circumstances a fair dismissal could have been decided upon by a reasonable employer.

### Reduction under Polkey principle.

## Discussion and Decision

15. In these circumstances no reasonable employer would have dismissed. The issue was one of conduct. It is considered that no reasonable employer would have dismissed having afforded an opportunity to the claimant to respond to the allegation.

## Relevant Law

### Has the claimant contributed to the dismissal?

16. ERA 1996 s 122(2) provides in relation to basic awards that *“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.*

17. ERA 1996 s 123 (6) provides in relation to compensatory awards that *“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.”*

**(4)** In the Court of Appeal decision in **Nelson v BBC (No 2)** [1980] ICR 110 (**Nelson**) LJ Brandon stated that *“an award of compensation to a successful complainant can only be reduced on the ground that he contributed to his dismissal by his own conduct if the conduct on his part relied on for this purpose was culpable or blameworthy”*

## Discussion and decision

### Had the claimant contributed to the dismissal?

18. In the circumstances of this case I do not consider that the claimant’s conduct was culpable or blameworthy. The claimant did not commit the act of conduct as alleged by the respondent.

## The claimant’s losses

### Breach of Contract

## Notice Pay, Relevant Law, Discussion and Decision

19. Section 86 of ERA 1996 provides for the minimum period of notice. There was

no basis for the respondent to have failed to give notice. The claimant was dismissed in breach of contract (in respect of notice pay) and the respondent is ordered to pay damages to the claimant in the sum of 12 weeks' notice x 128.28 being £1,539.36.

### **Relevant Law**

#### **Adjustment of award resulting from failure to comply with Code of Practice**

20. Section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992) provides for an adjustment in unfair dismissal awards of up to 25% where there has been an unreasonable failure to comply with the ACAS Code. The ACAS Code of Practice on Disciplinary and Grievance Procedures came into effect on 11 March 2015: Code of Practice (Disciplinary and Grievance Procedures) Order 2015

### **Basic Award**

#### **Relevant Law, Discussion and Decision**

21. Section 119 of ERA 1996 sets out the provision for a basic award. Having regard to s 207 of TULR(C)A 1992 and in all the circumstances I am satisfied that it is just and equitable that the basic award be increased by 25% in respect of the respondent's failure to comply with the above ACAS Code. The claimant would be entitled to a basic award equating to statutory redundancy payment of £1,753.92; being 14 full years' service x 1 having regard to the claimant's age x £125.28. This gives a total basic award of **£2,192.40**

### **Compensatory Award**

#### **Relevant Law**

22. Section 123(1) of ERA 1996 provides " ... *the amount of 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 in so far as that loss is attributable to action taken by the employer*".

### **Mitigation of Loss**

#### **Relevant Law**

23. Section 123(4) ERA 1996 provides that in ascertaining the loss "*... 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 of England and Wales or (as the case may be) Scotland.*"

24. I have reminded myself that in **Cooper Constructing Ltd v Lindsey** [2016] ICR D3 the Honourable Mr Justice Langstaff (President) (**Cooper**) confirmed that the burden of proof is on the wrongdoer; a Claimant does not have to prove that he has mitigated loss.

### **Provision of terms and conditions**

#### **Relevant Law**

25. In terms of s1 ERA 1996 each employee is entitled to receive from his

employer not later than two months after the beginning of the employee's employment a written statement of the major terms upon which he is employed. The Employment Act 2002 provides as s127 that where the matter is before the Tribunal, it is required to increase an award by at least 2 weeks' pay and may if it is just and equitable increase that award to 4 weeks' pay.

## **Recoupment of benefits**

### **Relevant Law**

26. The Employment Protection (Recoupment of Jobseekers Allowance and Income Support Regulations 1996 (the Recoupment Regs 1996) applies where the claimant had been paid a recoupable benefit. The claimant received Income Related ERA. This is recoupable under Reg 18 of the Recoupment Regs 1996.

27. I have reminded myself that the Employment Protection (Recoupment of Jobseekers Allowance and Income Support Regulations 1996 (the Recoupment Regs 1996) have been considered by the EAT in **Homan v Al Bacon Ltd** [1996] ICR 721 (**Homan**) which stated "*In our view the prescribed element deals with the element in the award which is attributable to loss of wages and the only period to which it can apply was the period for which compensation was awarded*".

### **Compensatory Award Discussion and Decision**

28. The claimant is entitled to a Compensatory Award.

### **Discussion**

#### **Mitigation of Loss**

29. There was no evidence that the claimant had failed to minimise her loss.

30. The claimant secured alternate equivalent paid employment by 11 February 2019 against a background that the circumstances of the claimant's dismissal was such that it restricted her ability to secure employment. In the circumstances I am satisfied that the claimant mitigated her loss.

31. The claimant was entitled to 12 weeks' statutory notice pay. I consider that it is just and equitable to calculate her loss beyond that notice period to 11 January 2019 being a further one month at **£125.28**.

32. I consider that it is just and equitable to award the claimant £450 for loss of statutory rights having regard to the full circumstances of this case.

33. The claimant was not provided with a written statement of the terms of her employment. As such the claimant is entitled to 2 weeks' pay. In all the circumstances it is considered just and equitable to increase that to 4 weeks' pay. The claimant is entitled to an increase to reflect the failure of the respondent to issue statement of particulars of employment (£125.28 x4) **£501.12**.

34. The claimant is entitled to pension loss for the period of loss. The respondents made employer pension contribution required in terms of section 3 of Pensions

Act 2008, by reference to the 4<sup>th</sup> edition (August 2017) of the Principles for Compensating Pension Loss the pension loss arising from the unfair dismissal is (£125.28 x 0.02 x 14) being **£35.08**.

35. The ACAS Code sets out the standard of reasonableness and fairness for handling disciplinary issues and grievances. The Code suggests that in disciplinary matters, the employer should carry out an investigation, inform the employee, hold a meeting with the employee, at which the employee may be accompanied and at which the employee should have the opportunity to respond and then the employer should decide on appropriate action and give the employee an opportunity to appeal. The Code applies to dismissal in this case. There was a significant failure on the part of the respondent in terms of its obligations under the ACAS Code. I am satisfied that the respondent's failure was unreasonable. In all the circumstances it is considered just and equitable that an uplift to the compensatory award of 25% be awarded.

36. The total Compensatory Award including the uplift is **£1 ,389.35**.

37. The claimant was in receipt of Income Related ESA. This is a recoupable benefit in terms of Reg 8 of the Recoupment Regs 1996. The Recoupment Regs 1996 apply to the period for which the claimant is awarded compensation. The prescribed period is **13 November 2018 to 11 February 2019**. The Prescribed amount is £125.28. The total compensation award for unfair dismissal (£2,192.40 plus £1,389.35) exceeds the prescribed element by £3,456.47 and this sum is payable immediately.

38. The total compensation award for unfair dismissal is **(£2,192.40 plus £1 ,389.35) £3,581.75** and is payable immediately.

### **Conclusion**

39. The claimant is awarded the sums set out above.

**Employment Judge: R McPherson**  
**Date of Judgment: 9 July 2019**  
**Entered in register: 11 July 2019**  
**and copied to parties**