



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. W Tsang

**Respondent:** Spoon Basildon Limited

**Heard at:** London South Hearing Centre

**On:** 4 April 2022

**Before:** Employment Judge McLaren

## Representation

Claimant: In Person

Respondent: Did not attend

# JUDGMENT

The decision of the tribunal is that

- 1) The claim for unfair dismissal succeeds and the claimant is awarded a total of £19,013 calculated as:-
  - (i) a basic award of £958 (2 weeks x £479, being the maximum week's pay in August 2017)
  - (ii) a compensatory award of £18,055 calculated as follows:-
    - a. 14 week's loss from 17.8.17-29.11.17 based on a weekly net pay of £600 a week less £1,100 net earned during this period (£7,300);
    - b. 35 week's loss from 29.11.17- 1.7.18 when the claimant earned £240 net a week less (£8,400); and
    - c. Acas uplift at 15% (£2,355).
- 2) The respondent failed to provide written particulars of employment and the claimant is awarded 4 weeks pay (calculated as 4 x £479) £1,916.
- 3) The claim for breach of contract succeeds. The claimant is awarded 2 week's gross pay for the period 3.8-16.8 2017, being £1,580. Although damages are calculated on a net basis, since the claimant will be liable for tax on the element of the notice pay

relating to pay, I have used the gross figure in the calculation. The respondent is entitled to make any deductions which are due for tax and national insurance contributions before payment of this sum is made to the claimant.

- 4) The respondent made unlawful deductions from wages by not paying the claimant his last week's pay, holiday pay and overtime for 2017.
- 5) The respondent is ordered to pay the claimant **£10,372.91** in respect of the financial loss attributable to the unlawful deductions from wages (I calculate the amount of payment on a gross basis, but the respondent is entitled to make any deductions which are due for tax and national insurance contributions before payment is made to the claimant):-
  - (i) 1 week's gross unpaid wages being **£790**;
  - (ii) Unpaid holiday pay of 16 days being **£2,106.66**; and
  - (iii) Unpaid overtime for 450 hours at a gross hourly rate of **£16.45** an hour being **£7,406.25**.
  - (iv) **£70** unpaid tolls for 28 and 29 July 2017

The total compensation is **£32,881.91**.

## REASONS

### Background

1. This claim, which was brought in November 2017, has had an unfortunate history with the employment tribunal. Its history is set out in the judgment on a preliminary hearing given by Employment Judge Prichard on the 21 January 2022.
2. Case Management orders were made by the Judge on 21 January 2022 at a hearing attended by both the claimant and the respondent's representative. At this hearing he set out a timetable for the parties to prepare the bundle of documents and to exchange witness statements. The claimant had noted these dates and had complied with them.
3. Unfortunately the written summary recording the Orders made was not sent to the parties until 16 March 2022, which is the date by which the last action was to have been taken by the parties.
4. The claimant contacted the tribunal on 25 March to identify that the respondent had not prepared a bundle and exchange of witness statements had not taken place. Solicitors acting for the respondent contacted the tribunal on 31 March to advise that they were not instructed to attend the hearing on behalf of the respondent. They provided an email address for the respondent and asked the tribunal to send the cvp link directly. There was nothing to suggest that the respondent had not been made aware by their lawyers of the date of the hearing or the Orders made.

5. This morning the respondent did not attend. I asked the clerk to email the address we had been given. The clerk also telephoned the only direct telephone number the tribunal had for the respondent. This was in fact for the respondent who was no longer a party to the proceedings although they share a common director, the individual identified by the lawyers as the person to contact. The tribunal has no telephone number for the respondent who remains a party to this litigation.
6. No response was received from the email. I concluded that it was appropriate to go ahead today. I considered I was entitled to rely on professional advisors having advised their client of relevant dates and I concluded the respondent was aware of the hearing, had not attended and had given no reason for this. The claimant attended and was ready to go ahead, having provided a witness statement. A bundle of relevant documents had been provided for the hearing in January 2022 and the claimant had provided a schedule of loss. I had in front of me the necessary documents.
7. This is a dismissal that occurred in August 2017 and in accordance with the overriding objective, to deal with the case in a proportionate way and to avoid further delay, I heard the case in the absence of the respondent.

#### Issues

8. In his claim form the claimant brings a number of claims. These are a claim for unfair dismissal, a claim for wages and unpaid holiday pay, and a claim for wrongful dismissal /notice pay. He also brings a claim for breach of the duty to provide a written statement of employment particulars.
9. The legal issues were set out in an Order dated 21.1.2022 as follows

#### Unfair dismissal

- 1 What was the reason or principal reason for dismissal? The Respondent says the reason was conduct. The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct.
- 2 If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:
  - 2.1 there were reasonable grounds for that belief;
  - 2.2 at the time the belief was formed the Respondent had carried out a reasonable investigation;
  - 2.3 the Respondent otherwise acted in a procedurally fair manner;
  - 2.4 dismissal was within the range of reasonable responses.

#### Remedy for unfair dismissal

- 3 If the Tribunal finds that the Claimant was unfairly dismissed, the Tribunal will be required to determine the question of remedy as follows.
- 4 Does the Claimant wish to be reinstated to their previous employment?
- 5 Does the Claimant wish to be re-engaged to comparable employment or other suitable employment?
- 6 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- 7 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- 8 What should the terms of the re-engagement order be?
- 9 If there is a compensatory award, how much should it be? The Tribunal will decide:
- 9.1 What financial losses has the dismissal caused the Claimant?
- 9.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
- 9.3 If not, for what period of loss should the Claimant be compensated?
- 9.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
- 9.5 If so, should the Claimant's compensation be reduced? By how much?
- 9.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 9.7 Did the Respondent or the Claimant unreasonably fail to comply with it?
- 9.8 If so, is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?
- 9.9 If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
- 9.10 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?
- 9.11 Does the statutory cap of fifty-two weeks' pay or the statutory cap applicable at the date of dismissal apply?
- 9.12 What basic award is payable to the Claimant, if any?
- 9.13 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

Wrongful dismissal / Notice pay

- 10 What was the Claimant's notice period?

- 11 Was the Claimant paid for that notice period?
- 12 If not, was the Claimant guilty of gross misconduct? This will require the Respondent to show that the Claimant did something so serious that the Respondent was entitled to dismiss without notice.

Claim for wages

- 13 Did the Respondent make unauthorised deductions from the Claimant's wages, alternatively were the wages paid to the Claimant less than the wages he should have been paid?
- 14 If so, how much is the Claimant owed?

Holiday pay

- 15 Did the Respondent fail to pay the Claimant for annual leave the Claimant had accrued but not taken when their employment ended?
- 16 The Tribunal may be required to consider the following:
  - 16.1 What was the Claimant's leave year?
  - 16.2 How much of the leave year had passed when the Claimant's employment ended?
  - 16.3 How much leave had accrued for the year by that date?
  - 16.4 How much paid leave had the Claimant taken in the year?
  - 16.5 Were any days carried over from previous holiday years?
  - 16.6 How many days remain unpaid?
  - 16.7 What is the relevant daily rate of pay?

Further considerations relating to remedy for wrongful dismissal/wages/holiday pay

- 17 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 18 Did the Respondent or the Claimant unreasonably fail to comply with it?
- 19 Is it just and equitable to increase or decrease any award payable to the Claimant?
- 20 By what proportion, up to 25%?

Failure to provide a written statement of employment particulars

- 21 When these proceedings were begun, was the Respondent in breach of its duty to give the Claimant a written statement of employment particulars or of a change to those particulars?
- 22 If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks'

pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

23 Would it be just and equitable to award four weeks' pay?

### Evidence

10. I heard evidence today from the claimant on his own behalf. I was provided with a 15-page bundle. In reaching my conclusion I considered the evidence I heard and the documents I was taken to as well as the Reply submitted by the respondent.

### Finding of facts

11. The claimant told me, and I accept that the respondent has a number of restaurants and is part of a Group. He told me that each restaurant had between 35 and 40 staff.

### The dismissal

12. The claimant had explained in his claim form, his witness statement and in his evidence before me today, that on 1 August he was sent a text message asking him if he was in the area as the respondent wanted to give him a letter and pay for his previous week of work.

13. On the following day, 2 August, the claimant then received a text message telling him that his employment had stopped due to serious misconduct items and he was to check his email for the termination letter.

14. The letter was in the bundle at p15. It specified that the claimant had committed a number of acts of misconduct as follows: –

- playing mobile phone games during business hours,
- Frequently late for work and leaving work early,
- Allowing to have breaks in prohibited times,
- allowing staff to consume prohibited foods
- giving wrong information to staff about last entry time
- reducing restaurant seating covers without company authorisation
- huge complaints about telephone booking and phones being engaged or switched off
- huge sales drop since April 2017.,

15. The letter made no reference to any prior warnings, although the respondent in its Reply stated that the claimant had been given numerous warnings or notice of these issues. The claimant was adamant this was not the case. The claimant said there was no meeting to discuss this, nor was he provided with any evidence. I accept his evidence, which is not disputed by the respondent in its Reply, that there was no disciplinary meeting with the claimant.

16. While the letter of termination refers to an investigation of the claimant's misconduct, no evidence had been provided with this. I accept the claimant's evidence and find there was no process of any sort and there were no previous warnings. Instead, the decision letter was produced and given to him recording the decision.
17. The letter of termination refers to a right to appeal the termination decision within two weeks. In his evidence today, the claimant explained that there was a text exchange following the termination letter and on 4 August he received a text in which the respondent said the decision could not be revoked and he was asked to collect his final payment. The claimant believes that the respondent had already determined the outcome of any appeal and for this reason did not submit a formal request for appeal. I accept his evidence on this point. There was no valid right of appeal.

Wrongful dismissal/ Breach of contract

18. The termination letter refers to car park and toll charges which are paid by the company stopping immediately. I find that as part of his remuneration package the respondent paid the Dartford Tunnel toll charge. The claimant said that in fact they stopped the toll charge payment on the 20<sup>th</sup> and 29<sup>th</sup> of July and he was therefore subjected to fines for travelling on these two days. I find that these fines arose as a direct result of the claimant breaching its contract with the claimant to pay these.
19. I also accept the claimant's evidence that not only were none of the matters relied on ever raised with him, they did not happen. I therefore find that the claimant had not committed any of the acts of misconduct which the respondent cites as acts of gross misconduct. I find that there were no grounds to terminate his employment contract. He was not paid his notice money. He had two years continuous service.

Holiday pay

20. The claimant in his claim form states that he was entitled to 3 weeks accrued but unpaid holiday at the rate of £600 net weekly pay. The respondent denies this and said he was entitled to 1.5 weeks holiday pay and was in fact paid 11 days pay at the dismissal to compensate him for this holiday pay. Reference is made to a document prepared by the respondent for the previous hearing which evidenced this.
21. The previous judgment in this matter had concluded that the pay slips put forward by the respondent should be treated with some suspicion. The judgment records that the tribunal did not accept the wage slips provided were an accurate reflection of the wages actually paid to the claimant. In the absence of the respondent and in light of this previous finding I prefer the claimant's evidence as to his holiday to the respondent's account.
22. I find that the claimant would have been entitled to 28 days holiday per annum. 16 days leave had accrued. While he had taken one week's leave, he had not been paid for this and therefore, at the date his employment ended, he was entitled to 16 days pay.

Deduction from Wages- overtime

23. The claimant explained that when he was hired, he was told he would earn £600 a week net and would work six days a week for eight hours a day. He worked overtime throughout his employment, but the respondent did not pay this as it went along. Instead on 24 December each year the claimant was given a payment for his holiday pay and for any overtime.
24. The claimant told me that he had been paid his holiday pay and overtime on 24 December 2016 for that calendar year. In 2016 his overtime had been around £2000. However, in 2017 as another manager relocated to a different restaurant, the claimant had to take on significantly more duties and his overtime hours therefore increased.
25. The claimant stated that he was required to attend to open up the premises and also had to wait for the kitchen porter to complete the washing up at the end of the evening and then he had to lock the premises. The restaurant was open for four hours for lunch and 5 ½ hours in the evening, being a nine ½ hour day. However, in 2017 the claimant had to work 11 hours a day, although this included two unpaid 15 minute breaks. He was therefore paid for eight hours a day but worked 10 ½ hours. He did this every week of his employment in 2017.
26. . The claimant took one week's leave during this period, which was not paid at the time. He therefore worked overtime for 30 weeks. The claimant was uncertain as to his gross weeks pay. I carried out a calculation and concluded that based on £600 a week net, considering the tax position in 2017, this would give a gross weekly pay £790. The claimant agreed these calculations and I find this was his gross pay.
27. I accepted the claimant's figure. The claimant was a credible witness throughout and I prefer this to the documentary evidence provided by the respondent as the previous judgment had noted that the wage slips prepared by the respondent were not an accurate record of the sums paid to the claimant.
28. I therefore find that the claimant had worked 450 hours overtime at a gross hourly rate of £16.45 an hour.

Failure to provide a written statement of particulars

29. . The claimant told me, as is set out in his claim form, that at no point during his employment had he been given a written statement of particulars. The Reply makes no reference to this.
30. I accept the claimant's evidence and find that he was not given appropriate employment documentation.

Mitigation

31. The claimant explained that the Chinese community is a small one and after his dismissal from the respondent he was contacted by a number of people who seemed to be aware of the fact he had been dismissed in a way that was characterised as misconduct.
32. He explained that it was difficult for him to find employment with other Chinese restaurants. He did succeed in getting a job relatively quickly, but



after two weeks working there the employer let him go because of what they had heard about his previous dismissal. He was therefore unemployed for a total of 16 weeks, although this includes two weeks which he is seeking as notice period, and also two weeks in which he was working. During the two weeks he was working he earned £1,100 net.

33. The claimant therefore had to look for work outside his local community. On 29 November 2017 he was so much in need of money that he took a much lower paid job, being only £260 net instead of the £600 net per week he had been earning. He did this job until 1 July 2018, a period of 35 weeks. At that time, he was successful in obtaining a better paid job although he had to relocate to Middlesbrough to achieve this

34. He is seeking his loss until 29<sup>th</sup> November and the difference in pay until 30 July 2018.

### Relevant Law

#### Unfair Dismissal

35. There are five potentially fair reasons for dismissal under section 98 of ERA 1996: capability or qualifications, conduct, redundancy, breach of a statutory duty or restriction and "some other substantial reason" (SOSR). The respondent has identified misconduct as the reason for the dismissal.

36. Section 98(4) of ERA 1996 provides that, where an employer can show a potentially fair reason for dismissal:

*"... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -*

*(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

*(b) shall be determined in accordance with equity and the substantial merits of the case.*

37. By the case of Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 23 tribunals were reminded that throughout their consideration in relation to the procedure adopted and the substantive fairness of the dismissal, the test is whether the respondent's actions were within the band of reasonable responses of a reasonable employer. In this case the Court of Appeal decided that the subjective standards of a reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. The tribunal is not required to carry out any further investigations and must be careful not to substitute its own standards of what was an adequate investigation to the standard that could be objectively expected of a reasonable employer.

#### Remedy for Unfair Dismissal

38. s123 of the ERA 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’.

39. The object of the compensatory award is to compensate the employee for their financial losses as if they had not been unfairly dismissed - it is not designed to punish the employer for their wrongdoing.
40. There is a duty to mitigate. The burden of proof regarding failure to mitigate is on the wrong doer and it is not for the claimant to show that she acted reasonably. The claimant must be shown to have acted unreasonably. Determination of unreasonableness is a question of fact, taking account of the claimant’s views and wishes, but the assessment must be objective. The tribunal should not put the claimant on trial losses with their fault, bear in mind the central cause of loss is the act of the wrongdoer.
41. I refer to Polkey v AE Dayton Services Ltd [1987] IRLR 503 (HL) which established the following principles: Where a dismissal is procedurally unfair, the employer cannot invoke a "no difference rule" to establish that the dismissal is fair, in effect arguing that the dismissal should be regarded as fair because it would have made no difference to the outcome. This means that procedurally unfair dismissals will be unfair. Having found that the dismissal was unfair because of the procedural failing, the tribunal should reduce the amount of compensation to reflect the chance that there would have been a fair dismissal if the dismissal had not been procedurally unfair.

#### Acas Uplift

42. An award for compensation can be increased or reduced, by up to 25%, if the employer/employee has unreasonably failed to comply with a relevant code of practice relating to the resolution of disputes (see s207(A) TULRC(A)).
43. In Slade and Oanor v Biggs and Ors EAT 0296/19 the Eat set out that the Tribunal may choose to apply a four stage test when considering whether compliance with the ACAS code section 207 TULR C A.
44. Has there been non compliance such as to make it just and equitable to award any uplift? If so, what does the tribunal consider to be a just and equitable percentage, not exceeding, possibly equalling, 25%? Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what is the appropriate adjustment, if any, the percentage of those awards in order to avoid double counting? Finally, is the sum of money represented by the application of the percentage uplift arrived at by the tribunal disproportionate in absolute terms and, if so, what further adjustment needs to be made.

#### Contributory conduct

45. The basic award may be reduced 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 as it would be just and equitable to reduce or reduce further the amount of the award to any extent...’. In respect of other awards ‘where the tribunal finds that the [act] was to any extent caused or contributed to by any action of the complainant,

[the tribunal] shall reduce the amount of the compensatory award by such proportion as it considers just and equitable...’.

- 46. For the basic award (but not other awards), conduct which was not known to the employer and cannot have caused or contributed to the dismissal can still be taken into account .
- 47. To fall into this category, the claimant’s conduct must be ‘culpable or blameworthy’. Save in respect of the basic award, such conduct must cause or contribute to the claimant’s dismissal, rather than its fairness or unfairness. Such conduct need not amount to gross misconduct.

Wrongful dismissal

- 48. The claimant brings a claim for breach of contract – failure to pay notice pay. The tribunal has to consider whether the employment contract has been breached. The tribunal is concerned with the factual question: Was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract without payment of notice?
- 49. As a claim for wrongful dismissal has also been made, the number of weeks for the unfair dismissal immediate loss of earnings should be calculated from the date at which the wrongful dismissal damages period ends through to the date of the hearing, new job or expectation of a new job

Deductions

- 50. The statutory prohibitions on deductions from wages are contained in Part II of the Employment Rights Act 1996 (ERA). The general prohibition on deductions is set out in s.13 and the exceptions in s. 14

*“13.— Right not to suffer unauthorised deductions.*

*(1) An employer shall not make a deduction from wages of a worker employed by him unless—*

*(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*

*(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*

.....

*(4) (Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.*

*Excepted deductions.*

*(Section 13 does not apply to a deduction from a worker’s wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—*

- (a) an overpayment of wages, or*
- (b) an overpayment in respect of expenses incurred by the worker in carrying out his employment,*
- made (for any reason) by the employer to the worker.”*

### Holiday Pay

51. The Working Time Regulations 1998 provide workers with a statutorily guaranteed right to paid holiday. Subject to certain exclusions all workers are entitled to 5.6 weeks' paid holiday in each leave year beginning on or after 1 April 2009 — comprising four weeks' basic annual leave under Reg 13(1) and 1.6 weeks' additional annual leave under Reg 13A(2). The entitlement to 5.6 weeks' leave is subject to a cap of 28 days. Reg 13(1).
52. Compensation related to entitlement to leave is set out in regulation 14
- 14.—(1) This regulation applies where—*
- (a) a worker's employment is terminated during the course of his leave year, and*
- (b) on the date on which the termination takes effect (“the termination date”), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.*
- (2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).*
- (3) The payment due under paragraph (2) shall be—*
- (a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or*
- (b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—*
- where—*
- A is the period of leave to which the worker is entitled under regulation 13(1);*
- B is the proportion of the worker's leave year which expired before the termination date, and*
- C is the period of leave taken by the worker between the start of the leave year and the termination date.*
- (4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.*

### Failure to provide written particulars of employment

53. The legal requirement to provide workers with a written statement of their employment particulars is contained in Ss.1-6 of the Employment Rights Act 1996 (ERA). The obligation to provide a S.1 statement applies to employees who commenced their employment on or after 30 November 1993.

54. The remedy for a breach of the statutory rules regarding written statements is by means of a reference to an employment tribunal under S.11 ERA. However, this provision does not give tribunals power to make a monetary award for breach of the requirements to provide a written statement. Tribunals do, however, have the power to award compensation under S.38 of the Employment Act 2002 (EA 2002) where, upon a successful claim being made under any of the tribunal jurisdictions listed in Schedule 5 to that Act, it becomes evident that the employer was in breach of its duty to provide full and accurate written particulars under S.1 ERA. Schedule 5 is fairly extensive and includes unfair dismissal.
55. Where the tribunal finds that the employer breached its duty to provide full and accurate employment particulars, it must award the 'minimum amount' of two weeks' pay (subject to exceptional circumstances which would make an award or increase unjust or inequitable), and may, if it considers it just and equitable in the circumstances, award the 'higher amount' of four weeks' pay.

### Conclusion

56. Applying the relevant law to the findings of fact I have made; I conclude as follows.

### Unfair dismissal

57. I have found that the claimant had not committed any of the acts upon which the respondent relied as its grounds for dismissal. I conclude that the respondent did not genuinely believe the claimant had committed misconduct. There is therefore no fair reason for dismissal.
58. I have found that no process whatsoever was followed. Instead the claimant was given a letter which was a *fait accompli* and even the right of appeal was not a genuine one. The dismissal was therefore procedurally unfair.

### Remedy for unfair dismissal

59. I have found there can be no question of contributory conduct or any Polkey reduction as I have found that the claimant had not committed any of the acts complained of. He would not have been dismissed had a fair procedure been followed.
60. The ACAS code of conduct would apply to this dismissal and it was not followed at all. I have found that the employer is part of a Group and I concluded it has resources it could access to should understand what a process look like. I also conclude that termination letter show some understanding of the requirement for process as it refers to an investigation and a right of appeal. In the circumstances, I conclude that it would be just and equitable to award an ACAS uplift. I have considered the appropriate amount and, taking into account the proportionality of any award I conclude that 15% is an appropriate percentage uplift.
61. I have concluded that there was no valid right of appeal offered and so there was no failure on the claimant's part to follow the ACAS code.

62. The claimant gave evidence of mitigation. I conclude that he made reasonable efforts to mitigate and accepted a lower paid job within four months in order to earn some money. I am therefore awarding him his lost wages for 14 weeks. The first two weeks after his employment was terminated compensated by way of a payment in lieu which I have awarded and therefore that means a balance of 14 weeks loss which deducted £1100 he earned. The calculation is therefore  $14 \times £600 - £1100$ .
63. I have also awarded ongoing loss from the 29 November 2017 to 30 July 2018 as I conclude the claimant acted reasonably in obtaining a low-paid job as quickly as he could. I accept that his reputation had been damaged within the local community because of the manner of his dismissal and therefore it was difficult for him to get a job. He was only able to achieve employment at the same financial level by relocating to another part of the country. I conclude it was reasonable for him not to take this step for the first 12 months after he lost his job.

#### Wrongful dismissal

64. I have found that the claimant had not committed any of the the acts of misconduct which the respondent's complained of. The claim for wrongful dismissal therefore fails. The client was entitled to his notice pay. I have calculated this as two weeks pay based on his length of continuous employment.
65. The claimant is also asking for compensation for the fines he incurred because the respondent failed to meet its obligation to pay the Dartford Tunnel crossing toll. I have found that there was a contractual obligation to pay the toll that the respondent breached this obligation which directly resulted in the fines. I therefore concluded that the claimant is entitled to claim these sums as an unlawful deduction from wages.

#### Holiday pay

66. The respondent in its termination letter accepted that some holiday pay was due to the claimant. I have found that none was paid and therefore calculated that, based on 28 days a year, 16 days leave accrued. I have therefore awarded 16 days holiday pay.

#### Unpaid wages

67. I have accepted that the claimant worked the hours he describes in 2017 and that the respondent customarily paid overtime. It also found that he was not paid the overtime to which he was entitled when his employment was terminated. I have therefore awarded him overtime pay at his gross hourly rate for the additional hours he worked every week throughout 2017.
68. I also accept that the claimant was not paid for his last week of work. This also amounts an unlawful deduction and I have therefore awarded him one week's pay.

#### Failure to provide written particulars of employment

69. I have found that the claimant was not provided with any written particulars employment. To succeed in a claim of unfair dismissal he can also pursue

this claim. I have concluded that it would be just and equitable to award four week's pay. This is an employer with a number of different restaurants and between 35 to 40 staff in each. It is part of a group. It was sufficiently aware of employment your obligations to send a written letter termination to make reference in that to investigations and appeals, although neither was in fact carried out. In those circumstances an award of four week's pay seems appropriate.

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**Employment Judge McLaren  
Dated: 04 April 2022**