RM

EMPLOYMENT TRIBUNALS

Claimant: **Miss Rubichen Attarwala**

Respondent: **The Newham Hotel Limited**

JUDGMENT ON RECONSIDERATION

The judgment of the Tribunal is that: -

1. **It is necessary in the interests of justice for the original judgment dated 14 October 2021 to be reconsidered.**

2. **On reconsideration, the Claimant's claim for failure to provide a written statement of reasons for dismissal is well-founded and succeeds.**

REASONS

1. In her ET1 claim form, at section 8.1, the Claimant ticked the box to indicate "*I am making another type of claim which the Employment Tribunal can deal with"* and wrote *"Failure to Provide Written Letter of Dismissal".* In a document appended to her ET1 titled "*Claimant's Submissions"* she wrote:

   '72. In addition to the above, as an employee of 2 years service I was entitled to receive a written statement of reasons for my dismissal from the Respondent. Said letter was required to adequately explain or otherwise provide an accurate and substantive reason for my dismissal.

   Authority: Employment Relations Act 1999[1] ss.93(1)

   73. I expressly requested this in my Appeal letter which I sent on 14 April 2021. I have yet to receive a response.'

[1] *The Claimant has explained in her Remedy Statement that she intended to refer to the Employment Rights Act 1996.*

2. In the Claimant's witness statement she said:

'18. … I sent an Appeal letter which simultaneously asked for a copy of my letter of termination. Although this was acknowledged by the Respondent, it stated that it was confused by my request.

19. My Appeal was clearly written. I have yet to receive any termination letter…'

3. The Claimant's appeal letter of 14 April 2021 was included in the evidential documents she provided to the Tribunal. That letter stated:

'I have not been told why I have been dismissed… I have not been provided with a dismissal letter advising me of the dismissal and the reason for it. I … ask that I be provided with a dismissal letter within the next 14 days.'

4. At a hearing on 12 October 2021, I accepted the Claimant's unchallenged evidence. This included her evidence that no dismissal letter was ever provided. The Respondent has not disputed this (or any) aspect of her claim.

5. Following the hearing and by a judgment sent to the parties on 14 October 2021, the Claimant succeeded in her claims for unfair dismissal, wrongful dismissal, holiday pay and arrears of pay. Her claim for a redundancy payment was dismissed. Her claim for failure to provide a written statement of reasons for dismissal was not determined. Having reviewed my notes of the hearing, I am satisfied that it was overlooked due to error on my part, having misunderstood what the Claimant told me about this element of her claim.

6. The Claimant did not expressly request reconsideration of the liability judgment but by letter of 29 October 2021 she asked for written reasons to be provided so that she could understand the basis on which her claim for failure to provide a written statement of reasons for dismissal was not upheld.

7. On receipt of that letter, I proposed to treat the request for written reasons as an application for reconsideration or alternatively to reconsider the liability judgment of my own motion. Rules 70-73 of the Employment Tribunal Rules provide:

'70. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

71. Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

72.—(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the

parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

73. Where the Tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused).'

8. The Tribunal wrote to the parties on my instruction on 8 March 2022 as follows:

'My provisional view is that it would be in the interests of justice to reconsider the judgment sent to the parties on 14 October 2021 to include a decision and reasons in relation to the Claimant's claim for failure to provide a written statement giving particulars of the reasons for dismissal within 14 days of a request, in breach of section 92 of the Employment Rights Act 1996. Reviewing my note of the hearing on 12 October 2021, I can see that I did not record and deal with this claim. I can also see that it was raised in the Claimant's ET1, described as a claim for "failure to provide a written Jetter of dismissal".

I take the provisional view that it would be in accordance with the overriding objective to deal with the matter without a hearing and issue a reconsideration judgment together with the judgment and written reasons on remedy for all the claims.

If the Respondent wishes to respond to the proposal for reconsideration, it must do so by writing to the Tribunal within 7 days. If either party considers that a hearing is needed to determine the application, they must write to the Tribunal within 7 days.'

9. Neither party requested an oral hearing, and the Respondent did not respond to the proposal for reconsideration. In the circumstances I concluded that a hearing was not necessary in the interests of justice, the point being a matter of oversight on my part and no objection having been made by the Respondent.

10. I conclude that it is necessary to reconsider the original judgment in the interests of justice and that on reconsideration the Claimant's claim for failure to provide a written statement of reasons for dismissal must succeed.

11. Section 92 of the Employment Rights Act 1996 provides:

92.— Right to written statement of reasons for dismissal.

(1) An employee is entitled to be provided by his employer with a written statement giving particulars of the reasons for the employee's dismissal…

(2) … an employee is entitled to a written statement under this section only if he makes a request for one; and a statement shall be provided within fourteen days of such a request.

12. Section 93 of the Employment Rights Act 1996 provides that a right of action in the Employment Tribunal where an employer unreasonably failed to provide a written statement under section 92. If the Tribunal finds such a complaint well founded it may make a declaration as to the reasons for dismissal, and it must make an award that the employer pays to the employee a sum equal to the amount of two weeks' pay.

13. The Claimant made a request for reasons in her 14 April 2021 appeal letter, and no reasons were provided by the Respondent. That lack of response was unreasonable. The request was clear and straightforward. There are no surrounding circumstances which would explain or justify the failure to respond. The Claimant's complaint is therefore well-founded. The award is dealt with together with other remedy issues in the remedy judgment below.

REMEDY JUDGMENT

The judgment of the Tribunal is that: -

1. **The Respondent shall pay the Claimant the sum of £18,445.90, comprising:**
    a. **A basic award of £596.98;**
    b. **A compensatory award of £11,941.50;**
    c. **A net sum in respect of the amount unlawfully deducted from the Claimant's wages, comprising:**
        i. **£3,486.50 for arrears of pay;**
        ii. **£1,723.94 for holiday pay;**
        iii. **£100.00 for a deposit due to be returned in the Claimant's final pay cheque;**
    d. **An award for failure to provide a written statement of reasons for dismissal of £596.98.**
2. **For recoupment purposes:**
    a. **Monetary award: £18,445.90;**
    b. **Prescribed element: £8,827.20;**

c. **Period of prescribed element: 1 March 2021 to the date this judgment is sent to the parties;**[2]

d. **Balance of the monetary award in excess of the prescribed element: £9,618.70.**

REASONS

Introduction

1 Following a hearing on 12 October 2021 and by a judgment sent to the parties on 14 October 2021, the Claimant succeeded in her claims for unfair dismissal, wrongful dismissal, holiday pay and arrears of pay. Her claim for a redundancy payment was dismissed. Following reconsideration of the liability judgment (above) her claim for failure to provide a written statement of reasons for dismissal was also upheld.

2 The Respondent had not submitted an ET3 and was not represented at the 12 October 2021 hearing. Following consideration of the principles under rule 21 of the ET Rules I decided that the Respondent should have the opportunity to make submissions on remedy. I directed that by 9 November 2021, both parties must send to the Tribunal and each other any written submissions and further documentary evidence they wished to have considered in relation to remedy. I noted that should either party consider that an oral remedy hearing would be necessary in the interests of justice, they could apply to the Tribunal in writing and the application would be considered.

3 The Claimant sent by the 9 November 2021 deadline a helpful remedy statement, an updated schedule of loss and 218 pages of documentary evidence including evidence relating to her search for alternative employment.

4 The Respondent has not sent in any submissions or further evidence.

5 Neither party has requested an oral hearing. In the circumstances this decision on remedy is made on the papers.

Compensation for unfair dismissal

6 The Claimant was employed from 1 September 2018 to her dismissal on 1 March 2021. She worked 33.5 hours over 4.5 days per week at a rate of £8.91 per hour. Her gross weekly pay was £298.49, and her net weekly pay was £273.16. Her employer pension contributions at 3% of salary amounted to £2.69 per week.

7 The Claimant made significant efforts to find new employment and attended several interviews. She incurred costs of £226.00 retraining to work in the healthcare sector.

[2] See the bottom of the judgment.

8 The Respondent has not raised any issue regarding failure to mitigate loss. I am satisfied in any event that the Claimant took reasonable steps to seek alternative employment.

9 The Claimant obtained a new job which commenced on 9 October 2021. The new job is on a zero-hour contract with an arrangement to work 2 days per week. The gross rate of pay is £9.50 per hour.

10 The Claimant says in her remedy statement that had her employment with the Respondent continued, she would have made a flexible working request to drop her hours to two days per week, although she does not know whether the request would have been granted. She says in her schedule of loss:

'I would have been happy to reduce my hours to 2 days per week to account for my childcare responsibilities after the birth of my child. Nonetheless I leave for the discretion of the Tribunal whether it wishes to include the difference between my current wage and my old wage with the Respondent.'

11 I consider that on the balance of probabilities it is likely that the Claimant would either have reduced her hours with the Respondent or looked for alternative employment which allowed her to work for 2 days per week and moved jobs at around the time she in fact found her current role. On that basis, I find that the Claimant's loss of earnings ended on 9 October 2021. The period of loss of earnings flowing from the dismissal was 32 weeks.

12 The Claimant is entitled to a basic award. The statutory formula given her age is 2 years' service multiplied by gross weekly pay of £298.49, amounting to **£596.98.**

13 The Claimant is entitled to a compensatory award comprising:

a. Loss of net earnings (£273.16) and pension contributions (£2.69) amounting to £275.85 per week, over a period of 32 weeks: £8,827.20.

b. Costs of retraining at £226.00.

c. Compensation for the loss of statutory rights, which will take time to accrue in new employment: £500.00.

14 The compensatory award prior to adjustments therefore totals £9,553.20.

15 There is no basis for making any deduction to reflect the chance of a fair dismissal (*Polkey v AE Dayton Services Ltd* [1987] IRLR 50).

16 The Claimant seeks an uplift of 25% on her compensatory award to reflect the Respondent's unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. Section 207A Trade Union and Labour Relations (Consolidation) Act 1992 provides in relation to certain claims including unfair dismissal, that where an employer has failed to comply with the ACAS Code and that failure was unreasonable, "*the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."* In this case, the Respondent failed to comply with the ACAS Code, follow any sort of procedure, communicate with the Claimant or to consider her appeal. In the circumstances, a full 25% uplift is merited.

17 This gives an adjusted compensatory award of **£11,941.50**.

18 The Claimant received Job Seeker's Allowance during the period between 11 February and 12 August 2021. These sums are not set off against the compensatory award because they are susceptible to recoupment by HMRC; see the recoupment section below.

Compensation for wrongful dismissal

19 The Claimant's entitlement to notice pay is included above in the compensatory award for loss of earnings.

Unauthorised deductions from wages

Arrears of pay

20 The Claimant was on maternity leave from 21 January 2020 and received Statutory Maternity Pay (SMP) until 5 October 2020, at which point her pay was reduced to nil without explanation. She was entitled to be paid SMP for up to 39 weeks, which would have elapsed on 20 October 2020. The weekly rate of SMP in 2021 was £151.97.

21 The Claimant emailed the Respondent's Hotel Manager in the second week of November 2020 to ask why she had not been paid. On 9 December 2021, she emailed the Respondent's HR department asking to return to work "*as soon as possible*", although she wished to be placed on furlough until the end of February 2021.

22 The Claimant's schedule of loss is premised on her returning to work from 5 October 2020. However, based on her witness evidence and the email of 9 December 2020, I find that she sought to end her maternity leave and return to work on 10 December 2020. As set out above, her net weekly pay was £273.16.

23 The Respondent made deductions by way of failure to pay wages totalling **£3,486.50**, comprising:

a. Between 5 and 20 October 2020, 2.14 weeks' SMP amounting to £325.65;

b. Between 10 December 2020 and 1 March 2021, 11.57 weeks' net pay amounting to £3,160.85.

24 Regardless of the Claimant's indication on 9 December 2020 that she was willing to be furloughed, there was no agreement between the parties to vary the Claimant's contractual entitlement to pay. Therefore, no adjustments are made to the calculations in respect of furlough pay.

Holiday pay

25 The Claimant's leave year ran from 1 January to 31 December. She was entitled to 5.6 weeks' holiday per year *pro rata* to her 4.5 day working week, amounting to 25.2 days per year.

26 During the 2020 leave year, the Claimant took 1 day's annual leave. She was unable to take the remainder of her holiday entitlement because she was on maternity leave for most of that year, and thereafter the Respondent failed to

communicate with her regarding a return to work. She therefore claims 24.2 days' pay.

27 During the 2021 leave year, the Claimant took no annual leave. She was employed until 1 March 2021 and so accrued 2 months' annual leave by the time her employment terminated, amounting to 4.2 days' holiday.

28 I conclude that the Claimant is entitled to be paid compensation for unauthorised deductions from wages in respect of the 4.2 days' holiday accrued in the 2021 leave year and 25.2 days' holiday rolled over from the 2020 leave year, totalling 28.4 days.

29 The Claimant's net daily pay was £60.70 (£273.16/4.5). Her award in respect of unpaid holiday pay therefore amounts to **£1,723.94**.

Deposit

30 The Claimant was charged a 'deposit' of **£100.00** when she started working for the Respondent which she was told would be returned to her in her final pay cheque. She has not been reimbursed to date and therefore claims this sum. I accept that there was an unauthorised deduction in that amount from the Claimant's final pay.

Failure to provide a written statement of reasons for dismissal

31 In accordance with s.93(2)(b) Employment Rights Act 1996, the Respondent must pay the Claimant a sum equal to the amount of two weeks' pay, namely **£596.98**.

Recoupment

32 Because 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:

a. The monetary award;

b. The amount of the prescribed element, if any;

c. The dates of the period to which the prescribed element is attributable;

d. The amount, if any, by which the monetary award exceeds the prescribed element.

33 The prescribed element for the purposes of the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 is **£8,827.20**. This represents the Claimant's loss of net earnings from the date of her dismissal on 1 March 2021 until she started her new job on 9 October 2021; a loss of £273.16 per week for 32 weeks. 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.

34 The prescribed period is the period from dismissal on 1 March 2021 until date this remedy judgment is sent to the parties.

35 The total amount of the monetary award is, as set out above, **£18,445.90**.

36 The balance of the award is **£9,618.70,** 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.

37 The parties' attention is drawn to the Annex to this judgment which explains the effect of the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996.

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Employment Judge Barrett

Dated: 18 May 2022

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.