



# EMPLOYMENT TRIBUNALS

**Heard at:** London South **On:** 5 June 2023

**Claimant:** Mr L Savage

**Respondent:** Abellio London Limited

**Before:** Employment Judge Ramsden

**Representation:**

**Claimant** In person

**Respondent** Mr W Griffiths, Counsel

## JUDGMENT ON REMEDY

1. The Respondent shall pay the Claimant compensation as follows:
  - a. For underpayment of notice pay: £1,029.40;
  - b. For underpayment of holiday pay: £243.98;
  - c. The basic award for unfair dismissal: £4,896; and
  - d. The compensatory award for unfair dismissal: £14,307.25.
  
2. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply to the compensatory award for unfair dismissal. For the purposes of those Regulations:
  - a. The monetary award is: £14,307.25;
  - b. The prescribed element is: £12,225;
  - c. The prescribed period is: 18 January 2022 to 25 July 2022; and
  - d. The monetary award exceeds the prescribed element by: £14,182.25.

# REASONS

## Context

1. This judgment on remedy follows a hearing on 5 June 2023 which found in the Claimant's favour on his complaints of:
  - a) unfair dismissal;
  - b) unlawful deduction from his wages in the payment of his notice pay; and
  - c) unlawful deduction from his wages in the payment made to him in lieu of his accrued but untaken holiday entitlement at the time of his dismissal.
2. Oral judgment on liability, setting out reasons for finding the Claimant's claims made out, was given on 5 June 2023, but judgment on remedy was reserved.

## Background

3. The Respondent is a bus operator, employing approximately 2,500 people in Great Britain, with over 600 buses running across 40 routes. The Claimant worked for the Respondent as a Bus Driver from June 2015 until his dismissal on 18 January 2022. At the time of his dismissal, the Claimant had been suffering from mental ill health, which had resulted in him not attending work since 6 October 2021.
4. The Claimant brought three complaints against the Respondent of:
  - a) unfair dismissal;
  - b) unlawful deduction from wages by the Respondent's failure to pay him adequate notice pay; and
  - c) unlawful deduction from his wages by the Respondent's failure to pay him a sufficient amount for his accrued but untaken annual leave at the date of his dismissal.
5. The Claimant seeks compensation.

## The hearing

6. The Respondent was represented in the hearing by Counsel, Mr Griffiths. The Claimant presented his own case.
7. The Respondent served hearing bundle of 116 pages in advance of the hearing.
8. The Tribunal heard evidence from Ms Leszczynska and Ms Fanibi on behalf of the Respondent, and by the Claimant on his own behalf, firstly in relation to liability, and following judgment on liability in the Claimant's favour on all three complaints, in relation to remedy.

**Evidence relevant to remedy**

9. The following facts relevant to remedy were agreed by the parties (or asserted by one party and not disputed by the other):
- a) The Claimant's age on the date of his dismissal was 61;
  - b) The Claimant had worked for the Respondent for six complete years at the date of his dismissal;
  - c) Because of his length of service, the Claimant was entitled to company sick pay of 18 weeks' full pay followed by 18 weeks' half pay;
  - d) The Claimant had not exhausted that sick pay by the date of his dismissal;
  - e) When in the Respondent's employment, the Claimant's pay before tax was £750 gross per week, which after deductions was £600 net per week;
  - f) The Claimant had been provided with written terms and conditions of employment when his employment with the Respondent commenced, but neither party had a copy of those;
  - g) The Claimant was in a role where he was entitled to statutory minimum notice from the Respondent to terminate his employment, which in his case, was six weeks' notice; and
  - h) The Claimant was a member of the Respondent's defined contribution pension scheme, to which the Respondent contributed £35 for each week of his employment.

*Notice pay and holiday pay*

10. The Claimant's schedule of loss did not include any information about these complaints. The Claimant's Claim Form asserted that he was entitled to be paid for 38 days' holiday, being 32 days from the holiday year in which his dismissal took place and six days rolled over from the previous year.
11. The witness statements of all three witnesses centred on the fairness of the Claimant's dismissal – none of them referred to the Claimant's claims for pay in respect of his notice period or accrued but untaken holiday at the time of his dismissal.
12. When asked, prior to the judgment on liability, about the payments made to the Claimant on the termination of his employment, neither of Ms Lesczynska nor Ms Fanibi for the Respondent could say what had been paid to him or the basis for calculating any such payments.
13. The Claimant said that he received £2,013 in June 2022 (approximately six months after his employment terminated, and approximately two months after he filed his Claim Form with the Tribunal), but without any itemised pay statement or

letter setting out what that sum of money was for, how it had been calculated, or what deductions had been made from it.

14. After evidence on liability had been heard, when Ms Lesczycynska was giving oral evidence for the Respondent in relation to remedy, she read out an email she had received from the Respondent's HR team in the break while the Tribunal was considering liability judgment. In light of the relevance of the contents of that email and the lack of evidence on these subjects, that evidence was admitted by the Tribunal. The email read out by her set out that the Respondent had paid the Claimant:

- a) £993.52 gross on 11 February 2022 in respect of seven days' holiday, which after deductions amounted to £440.10 net; and
- b) £3,470.60 gross on 10 June 2022 in respect of pay in lieu of notice, which after deductions amounted to £2,013.60,

and that these sums were calculated based on:

- c) The Claimant's holiday entitlement being 25 days' per holiday year, calculated pro-rata based on the number of weeks of the holiday (calendar) year worked; and
- d) The earnings value used for these calculations by the Respondent's HR team was based on the Claimant's earnings in the prior 12 months.

#### *Unfair dismissal*

15. While his claim form referred to his seeking reinstatement, in oral evidence the Claimant amended his position to say he is only seeking compensation.

16. The Claimant's evidence relevant to the value of unfair dismissal compensation was that:

- a) In his view, he was well enough to return to work around May/June 2022;
- b) His psychiatrist advised that he should return to work on a phased basis, resuming work fully in August 2022;
- c) His return to health was, in his view, slowed "a bit" by the termination of his employment by the Respondent;
- d) He commenced employment as a bus driver with a different employer at the end of July 2022. He is engaged on a "zero hours" basis, but his evidence is that his earnings through that work are the same as his earnings with the Respondent; and
- e) He was in receipt of benefits related to his unemployment for a month and a half in the period between the termination of his employment by the Respondent and his commencement of employment with his new employer.

## Analysis and resultant compensation

### *Notice pay*

17. The parties agree that the Claimant was entitled to six weeks' notice, and that his gross weekly earnings were £750 per week, so the gross sum that should have been paid to him is £4,500. The Respondent's evidence is that it in fact paid him £3,470.60 gross. This represents an underpayment of **£1,029.40** gross.

### *Holiday pay*

18. There is contradictory factual evidence about the Claimant's entitlement to outstanding holiday on the date of his dismissal, with the Claimant claiming that he should have been paid for 38 days and the Respondent countering that he was in fact paid for seven.
19. There appears to be some consistency between them, though, because pro-rating the Claimant's entitlement to holiday for the portion of 2022 that he worked (as the Respondent said it did) does not equate to the seven days that the Respondent says it paid him for – so there appears to be agreement between them that the Claimant had rolled over unused holiday of six days from 2021.
20. The dispute between them therefore appears to centre on whether, when his employment was terminated 18 days into the new leave year, the Respondent was entitled to pay him pro-rata for that year's holiday entitlement, or had to pay him the entire amount. There is no written contract of employment which answers the question of his contractual entitlement, or answers the question of how any pro-rating is to be done. A common sense approach therefore seems appropriate.
21. It is highly likely – given that it is standard practice for holiday entitlement to be pro-rated, and the Respondent is a large employer that would likely see a relative turnover of staff in consequence - that the written contract of employment setting out the Claimant's holiday entitlement *did* provide for that holiday to be pro-rated. I find it more likely than not that it did in the Claimant's case.
22. The Claimant was employed for only a small proportion of the Respondent's 2022 leave year – 18 calendar days. Taking a common sense approach to this, 18 days is 2.6 weeks. The Claimant was employed for 2.6 out of 52 weeks of the 2022 holiday year, so the relevant calculation would be  $(2.6/52) \times 25$ , plus any bank holidays that fell in the period 1 to 18 January 2022, which was one (for New Year's Day).
23. I therefore find that the Claimant's 2022 holiday entitlement was to 2.25 days' holiday. This, together with his rolled over leave, brings his total entitlement to 8.25 days.
24. If his weekly gross pay was £750, and he worked five days a week, that is £150 gross per day, so his payment in lieu of accrued but untaken holiday should have been 8.25 days each at £150, so £1,237.50 gross. As the Respondent's evidence

– which I accept as it is unchallenged - is that he was paid £993.52 gross in respect of this, that represents an underpayment of **£243.98** gross.

*Unfair dismissal*

25. Compensation for unfair dismissal comprises various elements:

- a) A basic award, the amount of which depends on the claimant's age, length of service and weekly earnings. None of those inputs are disputed by the parties; and
- b) A compensatory award, to compensate the claimant for financial loss suffered as a result of the unfair dismissal, capped at the lower of (i) 52 weeks' of the claimant's pay or (ii) (at the time of the Claimant's dismissal) £89,493.

*Unfair dismissal – basic award*

26. For the basic award, the Claimant's age at the date his employment was terminated was 61. He earned £750 per week gross, and so the statutory cap of (at that time) £544 applies to him. He had worked for the Respondent for six years on the date his employment terminated. Because all of his service with the Respondent was when he was aged 41 or older, the Claimant is entitled to one-and-a-half week's pay for each complete year of service, so nine weeks' pay, at £544 per week. His basic award is therefore **£4,896**.

*Unfair dismissal – compensatory award*

27. As noted above, the compensatory award is designed to compensate the Claimant for financial loss suffered as a result of the unfair dismissal. His evidence is that he fully mitigated his losses with effect from the commencement of his new employment at the end of July 2022 (he could not be precise about the exact date). There were 27 weeks between the date of the termination of his employment and Monday 25 July 2022, so that seems to be a reasonable period to take as the period during which the Claimant suffered financial loss as a consequence of his dismissal.
28. The next question is whether reasonable mitigation of his losses would have seen him reemployed earning equivalent sums to those he earned when employed by the Respondent at an earlier date – I find that it would not be. The Claimant's evidence is that he remained too unwell to work until May/June 2022, and that his psychiatrist advised him not to return to full-time hours until August 2022. Therefore the period over which his financial losses for the purposes of a compensatory award should be assessed is 18 January to 25 July 2022 (inclusive).
29. The Claimant's evidence is also that the termination of his employment slowed his return to full health "a bit". Taking account of that evidence, which the Respondent has not questioned, I find that, had he not been dismissed, the Claimant would have returned to work in the middle of April.

30. At the time of his dismissal, the Claimant had been absent from work due to illness since part-way through 7 October 2021. His enhanced sick pay entitlement was to 18 weeks' full pay and 18 weeks' half pay. His period of full pay, had he remained employed by the Respondent, would have expired on 9 February 2022, and his period of half pay would have expired on 15 June 2022.
31. I therefore consider it appropriate to calculate the compensatory award as follows:
- a) The period 18 January to 9 February 2022: full pay;
  - b) The period 10 February to 15 April 2022: half pay; and
  - c) The period 16 April to 25 July 2022: full pay.
32. This equates to:
- a) Three weeks and two days' pay, so  $(3 \times £750) + (2 \times £150)$ , coming to £2,550;
  - b) Nine weeks and two days' at half pay, so  $(9 \times £375) + (2 \times £75)$ , coming to £3,525; and
  - c) 14 weeks and one working day's pay, so  $(14 \times £750) + (1 \times £150)$ , coming to £10,650.
33. This comes to £16,725 in aggregate. However, the Claimant was paid in lieu of his notice period (and while the Respondent underpaid him in respect of that, a separate award in this judgment compensates him for that underpayment), and that payment compensated him for his notice period which covers some of the period covered by the compensatory award calculation above. Consequently, the notice pay amount (as corrected by this judgment) needs to be deducted from the aggregate sum above, which takes that sum to £12,225.
34. The Claimant will have to work in another role for two years before he qualifies for the right not to be unfairly dismissed, and so a sum of £350 is added to his compensatory award in light of the loss of that protection, taking that sum to £12,575.
35. The Claimant participated in a defined contribution pension scheme while in the Respondent's employment, and benefited from employer contributions.
36. The Respondent's witnesses were not able to comment on his pension entitlement, but the Claimant's oral evidence was that employer contributions were calculated as a percentage of his gross earnings. On his schedule of loss he said that he benefited from £35 of employer pension contributions a week, which is just under 5% of his gross weekly pay. I consider it reasonable to assume that the Respondent made contributions equal to 5% of his gross pay.
37. Based on the methodology of the compensatory award above (i.e., the periods within which the Claimant would have earned full and half-pay), but using a gross pay figure of £750 per week, the Claimant should be awarded 5% of £16,725 for

the loss of employer pension contributions, amounting to £836.25. Again, this is added to his compensatory award, bringing that to £13,411.25.

38. In the liability hearing, the Respondent contended that if the Claimant was found to have been unfairly dismissed following an unfair procedure, the value of compensation awarded to him should be adjusted to reflect the fact that he could fairly have been fairly dismissed in any event had an appropriate procedure been followed, as per the decision in *Polkey v AE Dayton Services Ltd* 1988 ICR 142, HL. Here, as I have found the Claimant's dismissal to have been both substantively and procedurally unfair, no adjustment on this basis is appropriate.
39. As the Claimant's (unchallenged) oral evidence was that he was advised by his psychiatrist not to resume work until August 2022, and he in fact resumed work in late July 2022, no argument was made by the Respondent that the Claimant had failed to mitigate his loss.
40. There is no question of any adjustment to compensation awarded to the Claimant for unreasonable non-compliance with the ACAS Code of Practice on disciplinary and grievance procedures. That Code was not applicable to the events leading up to the Claimant's dismissal here as, according to the evidence of the Respondent, it acted under a capability procedure separate from its disciplinary procedure.
41. The next stage of assessment is to ensure that, after the Respondent has deducted tax from the payment to be made to the Claimant, the same net amount is received by the Claimant as the award the Tribunal wishes for him to receive.
42. As the Claimant's unfair dismissal award totals £14,307.25 (being £4,896 + £13,411.25), it falls below the £30,000 threshold above which termination payments are subject to tax, and so no grossing up is required.
43. Consequently, the Claimant's compensatory award for his unfair dismissal is **£14,307.25**.

*Recoupment: the Claimant claimed State benefits for a short period*

44. The Claimant's evidence was not very clear on this point, but he said that he was "on benefits for one and a half months" in the period following the termination of his employment by the Respondent and his taking up work with another bus company via an agency. The fact that he was in receipt of benefits (depending on their type could) engage the Employment Protection (Recoupment of Benefits) Regulations 1996 (the **1996 Regulations**).
45. The 1996 Regulations provide, in summary, that the Secretary of State has a right to seek reimbursement of certain benefits (previously paid to the Claimant) from (in this case) the compensatory award made to the Claimant as part of his unfair dismissal award of £16,725.
46. For the purposes of Regulation 4(3) of the 1996 Regulations:



- a) The monetary award to the Claimant - in this case, the Claimant's total unfair dismissal award - is £21,621;
- b) The amount of the prescribed element in this case is £17,025;
- c) The dates of the period to which the prescribed amount is attributable are 18 January 2022 to 25 July 2022; and
- d) The amount by which the monetary award exceeds the prescribed element is £5,246.
47. The effect of Regulation 7 of the 1996 Regulations is that the Respondent must withhold paying £16,725 (the "prescribed element" for the purposes of the 1996 Regulations, amounting to the compensatory award for the Claimant's unfair dismissal) to the Claimant until either the Secretary of State has served a recoupment notice on the Respondent, or the Secretary of State has notified the employer in writing that he does not intend to serve a recoupment notice. This withholding does not apply to any other part of the award payable to the Claimant.
48. The effect of Regulation 8 of the 1996 Regulations is that the Secretary of State may serve a recoupment notice on the Respondent, claiming a full or partial payment from the Respondent for the value of benefits paid to the Claimant in the period in respect of which the compensation award was calculated. In other words, because the compensation award is designed to compensate the Claimant for his losses over this period, as he received some State benefits in that same period, the sum payable to him should first be subject to recovery by the Secretary of State of the amount paid to him by way of (relevant) State benefits. Once the Secretary of State has identified how much it is claiming from the compensation award by way of recoupment (or that it is not seeking recoupment), the remaining portion of that compensation award (or all of it, if no recoupment is sought) should be paid by the Respondent to the Claimant.
49. The Secretary of State has 21 days from the date this decision is sent to the parties to serve a recoupment notice on the Respondent.

*Total*

50. The sums awarded to the Claimant are therefore as follows:

Underpayment of notice pay	£1,029.40
Underpayment of holiday pay	£243.98
Unfair dismissal - basic award	£4,896
Unfair dismissal - compensatory award	£14,307.25
<b>TOTAL</b>	<b>£20,476.63</b>

Employment Judge Ramsden

Date 19 June 2023