



## EMPLOYMENT TRIBUNALS

Claimant

Respondent

**Mr. M. Jasfrzebski**

v

**Xing Sheng Limited**

**Heard at: Birmingham**

**On: 8 March 2024**

**Before: Employment Judge Wedderspoon**

**Members : Mrs. M. Stewart**

**Mrs. S. Ray**

**Representation:**

**Claimant: In Person**

**Interpreter: Mr. M. Korbel (Polish)**

**Respondents: No attendance**

## REMEDY JUDGMENT

1. A 50% Polkey deduction was made to the compensatory award.
2. A 20% ACAS uplift was made to the compensatory and the holiday pay awards.
3. The claimant was awarded £300 for loss of statutory rights;
4. The claimant was awarded £12,991.83 for past loss of earnings; this is the prescribed element;
5. The prescribed period as to when losses were sustained was from 13 June 2022 to 8 March 2024.
6. The claimant is awarded future loss of earnings of £299.09.
7. The total compensatory award is £13,590.92;
8. The holiday pay claim ACAS uplift is awarded at £32.31.

## REASONS

1. The Tribunal gave judgement on liability on 11 January 2024 and awarded some items of loss consequent upon its findings. The Tribunal was unable to complete the case on the day due to the unavailability of a Vietnamese interpreter. The case was re-listed for today (on 11 January 2024) to complete the assessment of the compensatory award and any ACAS uplift.
2. The Tribunal was greatly assisted by Mr. Korbel, a Polish interpreter. The claimant added wage slips to the bundle of documents.
3. The respondent failed to attend the hearing and failed to notify the Tribunal it would not be attending. The Tribunal clerk tried to contact the respondent by telephone to check whether the respondent intended to participate but did not receive any response. The Tribunal had gone to the time and expense of booking a Vietnamese interpreter, Ms. Marie Doan who had to be sent away.

The Law

4. Section 123 of the Employment Rights Act 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.*”
5. The purpose of the compensatory award is to compensate the employee for their financial losses as if they had not been unfairly dismissed. An immediate loss of earnings is the loss suffered between the date of termination to the date of the remedies hearing. Loss of earnings are calculated on the basis of net take home pay. Future loss of earnings occurs where the employee has failed to secure alternative work prior to the remedies hearing or has obtained a job with a lower salary and benefits than the previous employment. The figure is calculated on a net basis. Dismissals occurring on or after 6 April 2022 are subject to a statutory cap calculated as the lower of £93,878 or 52 weeks gross pay; 52 gross weeks pay in this case amounts to a cap of £28,312.20 (see figures in the ET3 page 19 of the bundle).
6. A Polkey deduction is a deduction to reflect the chance of the claimant having been dismissed fairly (**Polkey v AE Dayton Services Limited 1987 IRLR 50**). The Tribunal’s assessment should be based on findings of fact and should assess the loss flowing from the dismissal using its common sense experience and sense of justice; see **Software 2000 Limited v Andrews 2007 IRLR 568**
7. An ACAS uplift is applied where there is a percentage increase or reduction up to a maximum of 25% to reflect an unreasonable failure by the employer or employee to comply with the ACAS code of practice on disciplinary and grievance procedures (section 207A of the Trade Union and Labour Relations Consolidation Act 1992).

The evidence

8. It is agreed that the claimant was earning net wages per month of £1820 whilst employed as a driver by the respondent. This equates to £420 net per week.
9. Following the claimant’s summary dismissal on 15 May 2022, the claimant took steps to find alternative work as a driver by attending the job centre; undertaking internet research; contacting friends in the industry for potential vacancies and sending emails to businesses enquiring about any potential jobs. He received job seekers allowance in the sum of £1,595.
10. The claimant found work at the end of October 2022 as a driver for Aurora Linen. He received net earnings as follows; on 4 November 2022 £541.75; 7 December 2022 £935; 5 January 2023 £838.75; 9 February 2023 £959.75; 6 March 2023 £869; 5 April 2023 £1,083.56; 31 May 2023 £1,552.665 and on 5 July 2023 £1,293. The work was beginning to dry up and management changed so that the role was no longer suitable for the claimant.
11. The claimant again sought further work by taking steps to find alternative driving jobs. He obtained a job in September 2023 in Birmingham’s China Town; he drives and assists in the shop. He works 20 hours per week because he seeking to obtain a HGV qualification. He will complete his qualification in May 2024 and is very confident he will obtain a well paid HGV driving job immediately such is the demand for HGV drivers. He is also confident he will be earning significantly more than income received whilst employed by the respondent. Since early September 2023 the claimant has earned £189.23 net per week. The claimant has earned since September 2023 to date the sum of

£5109.21 (£189.23 x 27 weeks). If the respondent had retained him he would have earned £11,340 net. There is a net past loss for this period of £6,230.79.

### Conclusions

12. The respondent was seeking to reduce its drivers in May 2022. In the absence of any process at all the claimant was summarily dismissed. The respondent retained one driver in its business. In the absence of the further participation of the respondent, the Tribunal has considered the available evidence. Using its common sense experience and sense of justice (**Software 2000 Limited v Andrews 2007 IRLR 568**) the Tribunal finds that a Polkey deduction should be made to reflect the chance of the claimant having been dismissed fairly (**Polkey v AE Dayton Services Limited 1987 IRLR 50**). The Tribunal's assessment is that the claimant was at least 50% likely to have been dismissed where the Tribunal had a choice of retaining either the claimant or another driver. In the circumstances the Tribunal makes a 50% deduction to the compensatory award.
13. The Tribunal found that following his summary dismissal the claimant took reasonable steps to mitigate his loss by seeking alternative work. He secured alternative work by October 2022. However, he resigned from this job in June 2023 when the work began to dry up and management changed so that the role was no longer suitable for the claimant. The Tribunal determined that it was reasonable for the claimant to give up the job once it became unsuitable (see **Dundee Plant Co Limited v Riddler EAT/377/88**) and there was no counter argument put forward to suggest that the claimant had failed to mitigate his loss in the circumstances.
14. The claimant again sought further work by taking steps to find alternative driving jobs. He obtained a job in September 2023 in Birmingham's China Town; he drives and assists in the shop. He works 20 hours per week because he is seeking to obtain a HGV qualification. The Tribunal again determined that the claimant acted reasonably in the circumstances by taking this job and seeking to obtain further qualifications (see **Hibiscus Housing Association Limited v McIntosh EAT0534/08**). By June 2024 the claimant will be in better paid employment than his driving job with the respondent and there is no further future loss.
15. The respondent followed no procedure whatsoever prior to dismissing the claimant summarily. The claimant was not warned nor consulted, not invited to a meeting for any discussion or provided with any right of appeal. The respondent was fundamentally ignorant about a fair process that ought to be applied. The respondent's director lacked knowledge of employment law rights and her first language was not English. The Tribunal takes all these matters into account and assesses the ACAS uplift at 20%.
16. The Tribunal assessed the claimant's losses as follows noting that first, the compensatory award should be assessed; the Polkey deduction should then be applied; the ACAS uplift should then be applied. Finally, the 52 week gross salary statutory cap (here £28,312.22) is applied.
17. The claimant was entitled to a loss of statutory rights as part of the compensatory award; it will take the claimant some two years to be eligible for the right not to be unfairly dismissed. The Tribunal awards the claimant £500; it applies the 50% Polkey deduction (-£250); this equates to £250 with the ACAS

uplift of 20% (£50) this equate to a total loss of statutory rights award of £300. He is awarded £300 for loss of statutory rights.

18. The Tribunal has already awarded the claimant an award for wrongful dismissal (four weeks' notice). The claimant's unfair dismissal compensation runs from four weeks post dismissal namely from 13 June 2022. If the claimant had been employed by the respondent, he would have earned net to date, 8 March 2024 (90 weeks x £420) £37,800. There was a 50% risk that he would have been dismissed in any event (50% deduction for Polkey). His losses to today's date therefore amount to £18,900 (that is £37,800 x 50%). He actually earned from 4 November 2022 to June 2022 the sum of £8,073.47. The claimant has suffered a past loss of earnings of £10,826.53. This sum is subject to a 20% ACAS uplift (£2,165.30). He is awarded this sum for past loss of earnings of £12,991.83.
19. The claimant continues to suffer loss of earnings from 9 March 2024 to 31 May 2024 (12 weeks). The claimant should have earned £420 x 12 weeks if employed by the respondent which equates to £5,040 net; this sum is subject to 50% Polkey deduction (deduct £2,520); which calculates to £2,520 net future loss. The claimant is earning £189.23; over a 12 week period he will earn £2,270.76. His future loss is £249.24 (£2,520 less £2,270.76). This is subject to a 20% ACAS uplift; that equates to £49.85. He is awarded a total future loss of earnings claim of £299.09.
20. The claimant was previously awarded a holiday pay award of £161.59 gross. This too is subject to an ACAS uplift of 20% which equates to an additional uplift of £32.31. The claimant is awarded £32.31 ACAS uplift on the holiday pay award.
21. The total compensatory award amounts to £13,590.92 (£300 & £12,991.83 & £299.09).

**Employment Judge Wedderspoon**

8 March 2024

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Note - Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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