



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Z Ng (C1) and Mrs P Ng (C2)

**Respondent:** Lotus Afloat Limited

## RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT:** LONDON CENTRAL

**On:** 20 January 2022

**Employment Judge:** Employment Judge Henderson (sitting alone)

### **Appearances**

For the claimant: Mr C Murray (Counsel)

For the respondent: No attendance

Interpreter: Mr Cheng Au (Mandarin and Cantonese)

## JUDGMENT

### LIABILITY

1. The claimants' claims for unfair dismissal succeed
2. The claimants' claims for statutory redundancy payments succeed
3. The claimants' claims for unpaid holiday pay succeed
4. The claimants' claims for breach of contract (failure to pay notice) succeed.
5. The Tribunal makes a declaration that the respondent has failed to comply with the procedures for collective consultation under section 188 of the Trade Union Labour Relations (Consolidation) Act 1992 and makes protective awards in favour of both claimants as set out below.

**REMEDY**

**C1**

The respondent shall pay the following amounts to C1 (see Reasons for detailed calculation);

Statutory Redundancy Payment of £9969.21;  
Total unfair dismissal compensatory award of £18,624.74 (to include failure to pay notice pay)  
Holiday Pay of £1698.32 (gross)  
Protective Award of 90 days' pay of £6645.60

**Total monetary award made to C1 is £36,937.87**

**Recoupment:** The respondent shall retain £14,928.58 (the Prescribed Element which runs from 30 September 2021 to 20 January 2022) from the total monetary award until the State has clarified the level of recoupment it seeks in respect of benefits paid to C1, whereupon the respondent will pay the balance remaining from the retained sum to C1.

**The amount by which the total monetary award exceeds the Prescribed Element is £22,009.29**

**C2**

The respondent shall pay the following amounts to C2 (see Reasons for detailed calculation);

Statutory Redundancy Payment of £7615.30;  
Total unfair dismissal compensatory award of £17,931.90;  
Holiday Pay of £1592.29 (gross)  
Protective Award of 90 days' pay of £6230.70

**Total monetary award made to C2 is £33,370.21**

**Recoupment:** the respondent shall retain £15,461.94 (the Prescribed Element which runs from 30 September 2021 to 20 January 2022) from the total monetary award until the State has clarified the level of recoupment it seeks, whereupon the respondent will pay the balance remaining from the retained sum to C2.

**The amount by which the total monetary award exceeds the Prescribed Element is £ 17,908.27**

## REASONS

### Background

1. This hearing was listed for 2 days in person (but was dealt with in 1 day).
2. This was a claim by both claimants for unfair dismissal, a statutory redundancy payment/basic award, breach of contract (notice pay), unpaid holiday pay and a protective award. The claimants lodged their claims with the Tribunal on 29 January 2021. Essentially their claim was that they were dismissed without prior consultation, warning or notice on 4 October 2021 along with at least 23 other employees.
3. The respondent was due to file a response with the Tribunal by 19 April 2021. No response was received within that deadline. The respondent filed a response on 27 July 2021 which was not accompanied by any explanation for the late submission nor by an application for an extension of time as required by Rule 18 of the Tribunal Procedure rules 2013.
4. At a Preliminary Hearing held on 15 October 2021 EJ Spencer rejected the response which meant that the respondent could only participate in the Final Hearing insofar as permitted by me. EJ Spencer's decision and reasons were recorded in a written decision dated and sent to the parties on 26 October 2021. That decision included the dates set for today's hearing. Further, the Tribunal administration would have sent a Notice of Hearing to the parties recording the date and noting as ordered by EJ Spencer that the hearing would take place in person because of the need for interpreters in 2 languages (namely Mandarin and Cantonese).
5. The Tribunal Administration (at my request) also sent emails to the parties on 19 January 2022 confirming that the hearing was in person and confirming that the Tribunal would have access to paper bundles at that hearing.

## Conduct of the Hearing

6. The Tribunal was assisted at the hearing by a court-appointed interpreter (in both Mandarin and Cantonese) Mr Sik Chuen Au. He assisted C1 (Mandarin) in giving his evidence. He also translated (Cantonese) for Mr Zhang, the respondent's director during his limited attendance at the hearing (see below). C2 gave her evidence in English.
7. The hearing commenced at 10:20am. The claimants had arrived as requested at around 9:30 a.m. for the hearing to commence at 10. However, as there was no attendance from the respondent at that stage, I asked the clerk to wait for a few minutes in case there was a delay in travel arrangements or in case the respondent had sent a message to the Tribunal.
8. At the commencement of the hearing, Mr Murray explained that he had received information from the claimants' solicitors concerning the respondent's director, Mr Zhang's non-attendance. Mr Zhang's daughter had contacted the solicitor to enquire about the date and time of the hearing and said that the respondent was unaware that the hearing was in person. However, as noted above, the respondent would have had adequate notice of this from the Tribunal.
9. Accordingly, and as the response had been rejected, the respondent's participation in the hearing was restricted to that allowed by the Judge in any event, I decided to proceed with the hearing in Mr Zhang's absence.
10. Mr Zhang arrived at the Tribunal at around 11.15 (during C2's evidence) I asked the interpreter to assist with translation into and from Cantonese for Mr Zhang. Mr Zhang said that he had not realised the hearing was in person. I referred (see above) to the emails sent on 19 January 2022 by the Tribunal, which I had been copied into. Mr Zhang said he had not received the emails and meant no disrespect to the court.

11. I also reminded Mr Zhang that following the Preliminary Hearing in October 2021 he had limited input at this hearing. However, I told him that he was very welcome to stay and observe the hearing and that the interpreter would assist him in understanding what was happening at the hearing.
12. Mr Zhang asked if the hearing would continue even if he were not there. I confirmed that this was the case, but repeated that he was very welcome to remain: the choice was his. Mr Zhang said that he preferred to leave, which he did.
13. I heard evidence from both the claimants, who adopted their written witness statements as their evidence in chief. Both claimants confirmed that their statements had been translated to them in Mandarin. I was also referred to a paper bundle of documents of 281 pages in total. I was presented with Schedules of Loss for both claimants. There was no evidence presented by the respondent
14. I dealt first with liability and having found that the claimants had succeeded in all their claims, went on to deal with remedy. I gave oral reasons at the conclusion of the hearing. However, given the respondent's election not to be present at the hearing, I have put my reasons in writing.

### **Findings of Fact**

15. Both claimants were employed at The Lotus restaurant which is based on a boat on the River Thames. C1 had been employed since 1995 and C2 since 2004. There had been several changes of ownership of the restaurant. When C1 commenced employment, the restaurant was owned by C2's brother. When her brother died in 2012/13 her uncle briefly took over the business affairs of the restaurant and quickly sold it to Helen Green and Paul Deverell in 2013.
16. That sale was a transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). The respondent company, Lotus Afloat Limited was incorporated on 27 February 2013 and took over ownership of the

restaurant. As a result of the TUPE transfer both claimants preserved their continuity of employment.

17. The sale of the restaurant to Mr Zhang was by way of share sale in late September 2020.
18. The claimants produced tax documents showing their national insurance contributions over the relevant periods. Whilst these documents recorded different names for the employer which appeared confusing, both claimants gave very clear evidence that they had worked continuously at the restaurant which had remained open over all the relevant periods and indeed continued to trade.
19. I note in particular (page 184) the letter from HMRC recording National Insurance contributions for C2, which supports the oral evidence given by both claimants.
20. The claimants' employment (and that of their colleagues working at the restaurant) ended on 30 September 2020, as evidenced by the P45's issued by the respondent (page 200-205).
21. The documentary evidence produced in the bundle showed that on 3 October 2020, Mr Zhang sent an email to the employees which notified them that he had purchased the restaurant on 1 October. He said that he would go through the "resignation procedures" with the employees and would "follow the British rules".
22. At the Preliminary Hearing on 15 October 2021, Mr Zhang confirmed that by "resignation procedures" he meant "redundancy procedures". The email confirmed that "this is the final notice" by which was meant that this was the notice of termination of employment. Employees were asked to come to the company to complete the formalities and their salaries and other matters would be calculated in accordance with the law.

23. However, neither of the claimants, nor they said, any of the employees received any payment from the respondent.
24. When C2 enquired further about the payments, Mr Zhang told her on 18 October 2020 (page 92) that he was waiting for further financial information from the restaurant's former manager, pending which he could not pursue the matter further. However, when C2 raised the matter with Helen Green, she replied (using her married name, Packman) on 19 October 2020 (page 93) to confirm that she or her agents had supplied the listed tax and employee information to the respondent.
25. I find that neither the claimants nor their 23 colleagues received any prior notification warning or consultation relating to their redundancy dismissals. At the Preliminary Hearing on 15 October 2021, Mr Zhang told the Tribunal that he had made 30 employees redundant. In any event, I find that the respondent is in clear breach of its obligations under section 188 of the Trade Union Labour Relations (Consolidation) Act 1992 (TULCRA), in that no collective consultation has been carried out as required under that section.
26. I also find that the claimants were dismissed without any prior individual consultation or without being given any warning or notice. They were paid their wages for September 2020 but would have been owed 12 weeks' notice as they were entitled to statutory minimum notice. Given their length of service they would also be entitled to statutory redundancy payments.
27. Both claimants said in their oral evidence that they were owed 23 days' unpaid accrued holiday. This evidence was not challenged and I find that this is owed to them by the respondent.
28. Based on the findings of fact set out above the claimants succeed in their claims of unfair dismissal; statutory redundancy payments; breach of contract (notice pay) and unpaid holiday pay. Given these liability findings I then went on to calculate the remedy payable to the claimants.

## Remedy

29. In calculating the various awards due to the claimant's, I noted that the figures given by the claimants in their ET1 concerning their gross and net weekly wages were not disputed by the respondent in the ET 3 which was submitted late.

### C1

#### Statutory redundancy payment

30. C1's date of birth is 3 March 1965. C1 commenced employment on 1 June 1995. The effective date of termination of employment (EDT) is taken as 29 September 2020. Gross weekly pay £369.23. 14 weeks x 1.5 weeks' pay plus 6 weeks x 1 week's pay = **£9969.21**.

#### Unfair Dismissal

31. There is no basic award as a statutory redundancy payment is awarded.

#### Compensatory award

The relevant period for the loss is 29 September 2020 to the date of the hearing 20 January 2022. C1's net pay per week is £319.07. From 18 February 2021 to 1 April 2021 C1 was advised by NHS to shield as a critically vulnerable person. He would have been entitled to furlough pay during this time. He obtained new work on 1 September 2021, but there is an ongoing shortfall of £161.18 per week.

His loss is calculated as follows

30 September 2020-17 February 2021: 20 weeks x £319.07 = £6381.40

18 February-1 April 2021: 6 weeks x £274.14 = £1644.84

2 April 2021-31 August 2021 21.57 weeks x £319.07= £6882.34

Total loss from EDT to 20 January 2022    **£14,928.58** (the Prescribed Element for the purposes of the Recruitment Regulations)



Future ongoing loss from 1 September 2021-20 Jan 2022: 20.14 weeks x  
£161.18 =£ 3246.16.

Total compensatory award - **£18,174.74**

Loss of statutory rights **£450**

**Total unfair dismissal compensatory award £18,624.74**

#### Holiday Pay

32. C1's daily pay (gross) was £73.84 x 23 days = **£1698.32**. As this is a gross sum, the respondent is required to deduct income tax and national insurance contributions from this amount.

#### Protective Award

33. As over 20 employees were made redundant without any proper consultation, the Tribunal makes a declaration that the respondent has failed to comply with the provisions of section 188 of TULRCA and accordingly makes the maximum protective award of 90 days' pay at £73.84 per day which totals **£6645.60**.

**34. The total monetary award made to C1 is £36,937.87**

#### Recoupment

35. C1 received a one-off payment of £295 from Universal Credit and 2 payments totalling £467.36 of Job-seekers Allowance. I am accordingly required under the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 (the Recoupment Regulations) to allow for the government to recoup the amount paid in benefits as mentioned above.

36. I am required to identify four items of information which will then be provided to the DWP: 1) the Prescribed Element which is that part of the award which will be held back from C1 until the value of any state benefits subject to the Recruitment Regulations is finalised. It is that part of the monetary award as set out above; 2) the Prescribed Period which is the period between the EDT and

the date of the hearing namely 30 September 2020-20 January 2022; 3) the total amount of the award which is £36,937.87 and 4) the Balance, which is the sum within the overall award from which the state may seek recoupment.

37. Therefore, the respondent shall retain £14,928.58 from the total monetary award until the state has clarified the level of recoupment it seeks whereupon the respondent will pay the balance remaining from that sum to C1.

## C2

### Statutory Redundancy Payment

38. C2's date of birth is 17 January 1967. C2 commenced employment on 1 January 2004. The EDT is 29 September 2020. Gross weekly pay is £346.15.  
12 weeks x 1.5 weeks' pay plus 4 weeks x 1 week's pay= **£7615.30**

### Unfair Dismissal

39. There is no basic award as a statutory redundancy payment has been awarded.

### Compensatory Award

40. The relevant period for the loss is 29 September 2020-20 January 2022 (the hearing date). C2's net weekly pay is £303.33. On 24 April 2021 the claimant commenced new employment from which she earns £135 net per week. This leads to an ongoing shortfall of £168.33 per week.

Loss from EDT-23 April 2021: 29.57 weeks at £303.33 per week = £8969.47

Loss from 24 April 2021-20 January 2022: 38.57 weeks £168.33 = £6492.47

Compensatory award to the hearing date £15,461.94 (the Prescribed Element)

Ongoing loss of 12 weeks at £168.33 = £2019.96.

Total compensatory award-**£17,481.90**

Loss of statutory rights **£450**

**Total unfair dismissal compensatory award £17,931.90**

Holiday Pay

41. C2's daily pay (gross) was £69.23 x 23 days = **£1592.29**. As this is a gross sum, the respondent is required to deduct income tax and national insurance contributions from this amount.

Protective Award

42. As over 20 employees were made redundant without any proper consultation, the Tribunal makes a declaration that the respondent has failed to comply with the provisions of section 188 of TULR(C) A and accordingly makes the maximum protective award of 90 days' pay at £69.23 per day which totals **£6230.70**.

43. **The total monetary award made to C2 is £33,370.21**

Recoupment

44. C2 received a one-off payment of £295 from Universal Credit and 2 payments totalling £531.08 of Job-seekers Allowance. I accordingly required under the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 (the Recoupment Regulations) to allow for the government to recoup the amount paid in the benefits mentioned above.

45. I am required to identify four items of information which will then be provided to the DWP: 1) the Prescribed Element which is that part of the award which will be held back from C1 until the value of any state benefits subject to the Recruitment Regulations is finalised. It is that part of the monetary award as set out above; 2) the Prescribed Period which is the period between the EDT and the date of the hearing namely 30 September 2020-20 January 2022; 3) the total amount of the award which is £33,370.21 and 4) the Balance, which is the sum within the overall award from which the state may seek recoupment.

46. Therefore, the respondent shall retain £15,461.94 from the total monetary award until the state has clarified the level of recoupment it seeks whereupon the respondent will pay the balance remaining to C2.

**Employment Judge Henderson**

**JUDGMENT SIGNED ON: 24 January 2022**

**JUDGMENT SENT TO THE PARTIES ON**  
28/01/2022

**FOR THE SECRETARY OF THE TRIBUNALS**