



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr C Pamment

**Respondent:** Renewi Ltd

**Heard at:** East London Hearing Centre (by Cloud Video Platform)

**On:** 19 April 2021

**Before:** Employment Judge Housego

## Representation

**Claimant:** Helena Ifeka, Bar pro bono organisation

**Respondent:** Graham Mitchell, of Counsel instructed by Clyde & Co (Scotland) LLP

# JUDGMENT

1. The Respondent is ordered to reinstate the Claimant on or before 01 June 2021.
2. The Respondent is ordered to pay to the Claimant back pay calculated on the basis of the agreed facts: that the Claimant was paid £496 weekly, gross) including bonus (which was net pay of £390 weekly). There are agreed to be 55 weeks between the dismissal and the date of this hearing. There are a further 5 weeks before 01 June 2021, making 60 weeks' pay in all.
3. The back pay is to be 2% more than £496.00 from the date a company wide pay increase was effected.
4. The pay the Claimant is to receive from that date is to be at the rate of £499.80 weekly (that being 2% more than £490).
5. The Respondent is ordered to pay 6% of that gross sum into the Claimant's pension fund, and to restore him to the pension scheme.
6. The Respondent may deduct from that sum the total amount received by the Claimant in benefits and any earnings of the Claimant before 01 June 2020.

# REASONS

1. In a judgment dated 18 January 2021, following a hearing on 13 January 2021, I decided that the Claimant had been unfairly dismissed and this remedy hearing was listed.
2. The Respondent is appealing the liability decision and applied for this hearing to be adjourned pending the outcome of that appeal. I declined to adjourn the remedy hearing, because if the appeal is unsuccessful there may be no delay in knowing the outcome of the whole case. If either party wishes to appeal this remedy decision that appeal can be listed with the liability appeal.
3. The Claimant seeks reinstatement, and I stated that I would make alternative findings, so that if there is an appeal against the remedy decision, the EAT may be in a position to finalise the case at the appeal hearing.

## The law

4. The Employment Rights Act 1996 provides:

112 The remedies: orders and compensation.

(1) This section applies where, on a complaint under section 111, an employment tribunal finds that the grounds of the complaint are well-founded.

(2) The tribunal shall—

  - (a) explain to the complainant what orders may be made under section 113 and in what circumstances they may be made, and
  - (b) ask him whether he wishes the tribunal to make such an order.

(3) If the complainant expresses such a wish, the tribunal may make an order under section 113.

(4) If no order is made under section 113, the tribunal shall make an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 126) to be paid by the employer to the employee.
5. The Claimant having expressed the wish to be reinstated, it follows that first I must consider whether to make an order under S113. If I decide not to do so, then I make an order for compensation.
6. S113 states:

The orders.

An order under this section may be—

  - (a) an order for reinstatement (in accordance with section 114), or

(b) an order for re-engagement (in accordance with section 115),  
as the tribunal may decide.

7. An order for reinstatement is sought by the Claimant, and so I consider that first. S114 states:

114 Order for reinstatement.

(1) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed.

(2) On making an order for reinstatement the tribunal shall specify—

(a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement,

(b) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and

(c) the date by which the order must be complied with.

(3) If the complainant would have benefited from an improvement in his terms and conditions of employment had he not been dismissed, an order for reinstatement shall require him to be treated as if he had benefited from that improvement from the date on which he would have done so but for being dismissed.

(4) In calculating for the purposes of subsection (2)(a) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of reinstatement by way of—

(a) wages in lieu of notice or ex gratia payments paid by the employer, or

(b) remuneration paid in respect of employment with another employer,

and such other benefits as the tribunal thinks appropriate in the circumstances.

8. If I decide that reinstatement is not possible, I next consider re-engagement, under S115:

115 Order for re-engagement.

(1) An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment.

(2) On making an order for re-engagement the tribunal shall specify the terms on which re-engagement is to take place, including—

- (a) the identity of the employer,
- (b) the nature of the employment,
- (c) the remuneration for the employment,
- (d) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of re-engagement,
- (e) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and
- (f) the date by which the order must be complied with.

(3) In calculating for the purposes of subsection (2)(d) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of re-engagement by way of—

- (a) wages in lieu of notice or ex gratia payments paid by the employer, or
- (b) remuneration paid in respect of employment with another employer,

and such other benefits as the tribunal thinks appropriate in the circumstances.

**9. The Employment Rights Act 1996 sets out how the discretion as to remedy is to be exercised, at S116:**

116 Choice of order and its terms.

(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—

- (a) whether the complainant wishes to be reinstated,
- (b) whether it is practicable for the employer to comply with an order for reinstatement, and
- (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

(2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.

(3) In so doing the tribunal shall take into account—

- (a) any wish expressed by the complainant as to the nature of the order to be made,

(b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.

(4) Except in a case where the tribunal takes into account contributory fault under subsection (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement.

(5) Where in any case an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining, for the purposes of subsection (1)(b) or (3)(b), whether it is practicable to comply with an order for reinstatement or re-engagement.

(6) Subsection (5) does not apply where the employer shows—

(a) that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement, or

(b) that—

(i) he engaged the replacement after the lapse of a reasonable period, without having heard from the dismissed employee that he wished to be reinstated or re-engaged, and

(ii) when the employer engaged the replacement it was no longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement.

10. S117 sets out the process to be followed if I decide upon a reinstatement order:

117 Enforcement of order and compensation.

(1) An employment tribunal shall make an award of compensation, to be paid by the employer to the employee, if—

(a) an order under section 113 is made and the complainant is reinstated or re-engaged, but

(b) the terms of the order are not fully complied with.

(2) Subject to section 124 . . . , the amount of the compensation shall be such as the tribunal thinks fit having regard to the loss sustained by the complainant in consequence of the failure to comply fully with the terms of the order.

(2A) There shall be deducted from any award under subsection (1) the amount of any award made under section 112(5) at the time of the order under section 113.

(3) Subject to subsections (1) and (2) . . . , if an order under section 113 is made but the complainant is not reinstated or re-engaged in accordance with the order, the tribunal shall make—

(a) an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 126), and

(b) except where this paragraph does not apply, an additional award of compensation of an amount not less than twenty-six nor more than fifty-two weeks' pay,

to be paid by the employer to the employee.

(4) Subsection (3)(b) does not apply where—

(a) the employer satisfies the tribunal that it was not practicable to comply with the order, . . .

(b). . . . .

(5). . . . .

(6). . . . .

(7) Where in any case an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining for the purposes of subsection (4)(a) whether it was practicable to comply with the order for reinstatement or re-engagement unless the employer shows that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement.

(8) Where in any case an employment tribunal finds that the complainant has unreasonably prevented an order under section 113 from being complied with, in making an award of compensation for unfair dismissal . . . it shall take that conduct into account as a failure on the part of the complainant to mitigate his loss.

11. McBride v Scottish Police Authority (Scotland) UKSC 27 at paragraph 37:

“37. At the stage when it is considering whether to make a reinstatement order, the tribunal's judgment on the practicability of the employer's compliance with the order is only a provisional determination. It is a prospective assessment of the practicability of compliance, and not a conclusive determination of practicability. This follows from the structure of the statutory scheme, which recognises that the employer may not comply with the order. In that event, section 117 provides for an award of compensation, and also the making of an additional award of compensation, unless the employer satisfies the tribunal that it was not practicable to comply with the order. Practicability of compliance is thus assessed at two separate stages - a provisional determination at the first stage and a

conclusive determination, with the burden on the employer, at the second: *Timex Corp v Thomson* [1981] IRLR 522, 523-524 per Browne-Wilkinson J and *Port of London Authority v Payne* [1994] ICR 555, 569 per Neill LJ.”

12. In *British Airways Plc v Valencia (Unfair Dismissal : Reinstatement or re-engagement)* [2014] UKEAT 0056\_14\_2606 there is some guidance as to the way the decision whether to exercise the discretion to make such an order should be approached, and it refers with approval to *Oasis Community Learning v Wolff (Unfair Dismissal : Reinstatement/re-engagement)* [2013] UKEAT 0364\_12\_1705. These relate mainly to contributory conduct and relationship difficulties caused by the claimant in those cases. Indeed, at para 44 of *Oasis* is the observation that every case depends on its own facts.

## Approach

13. I decide that S116(1)(a) and (c) are met: the Claimant has always wanted to be reinstated (he ticked that box in his ET1). I decided that there would be no reduction in compensation by reason of the Claimant's conduct (paragraphs 86-89 of the judgment). The words of S116 are different, but in considering the conduct of the Claimant I decide it would be just to order reinstatement, for the same reasons as are in the liability judgment.
14. There has been no permanent replacement for the Claimant. Agency staff are used, and so S116(6) does not apply.
15. Therefore, I must decide whether such an order is practicable (S116(1)(b)). This is a provisional determination, as the Respondent may decide not to comply with such an order, and then has the opportunity to show that it was not reasonably practicable to comply with it (S117(4)(a)).
16. Nevertheless, at this stage, if I am satisfied, as set out in S116(1)(b) on the basis of the evidence before me at this hearing I make the order. If it is not complied with then I award compensation, as if such a reinstatement order had not been made. I must then also order the Respondent to pay further compensation of not less than 26, nor more than 52, weeks' pay (S117(3)(b)), unless the Respondent shows that it was not reasonably practicable to comply with the order to reinstate the Claimant (S117(4)(a)).

## The Claimant's case

17. The Claimant's case is:
  - 17.1. He had not fallen out with any of his colleagues, and was in touch with some of them still.
  - 17.2. He had only really had this one job, and he was fully expecting to stay with the Respondent until he retired.
  - 17.3. He had not taken cannabis since the test taken at work.

- 17.4. He was entirely happy to be tested as often and whenever the Respondent wished, in whatever way they wanted.
- 17.5. There had never been any question about the way he acted at work, either behaviourally, or in the quality or competence of his work.
- 17.6. He had been apologetic and remorseful throughout.
- 17.7. He had been fully cooperative.
- 17.8. He had not fallen out with management, and in any event he did not have much face to face contact with management.
- 17.9. He has not been replaced, and an agency worker makes up the team instead.
- 17.10. Marc Congdon, who dismissed the Claimant, only recently joined the Respondent, and was not with the Respondent at the time he was tested, so there was no personality difficulty there.
- 17.11. While the Claimant was understandably upset at his dismissal, there was no outburst such as could lead to it being impracticable for him, in personal terms, to work with management in the future.
- 17.12. The Claimant had not hurt anyone, and his performance at work had not caused any concern. There was no reason to think that he would not work well, as he had for the 10 years he had worked there.
- 17.13. It was irrational for the Respondent to say that they had lost trust in the Claimant, when he had given a clear (and unchallenged) explanation of pain relief as the reason for taking cannabis at night.
- 17.14. This was not hedonistic drug use, and he never took it at work.
- 17.15. The levels of opiate in his system were large, but of no concern to the Respondent, so it was the illegality, not the effect of the drug that was concerning to them. There was no reason for them to doubt that he would do this again, particularly as his prescribed pain relief was now effective.
- 17.16. The Respondent's own policies were that people with substance abuse problems were, where possible, to be helped. It was not a sound argument that the Claimant should be in a worse position because he was not addicted than if he was. The cause of taking the drug was pain, not addiction, but that was no reason why he should face dismissal and not be helped, which was highly supportive of reinstatement.



## The Respondent's case

18. The Respondent's opposition to an order for reinstatement is:
  - 18.1. This was an illegal drug in high concentrations. To permit the Claimant to remain an employee would send entirely the wrong message to others: that drug use was not a zero tolerance matter, when it was.
  - 18.2. This was an industry which was high risk – only fishing/agriculture was more dangerous. The Respondent regarded all roles as safety critical. It was a matter of luck that the Claimant had not caused injury to the public, colleagues or himself.
  - 18.3. The liability judgment had been in error as to the level of cannabis in his system, and looked at objectively, it was not right to allow someone with such a high level of cannabis in his system to return to work.
  - 18.4. While the Claimant said he could be trusted in future, that trust was gone, because he had taken cannabis for some 3 months without telling them.
  - 18.5. That he had been co-operative with the test was neither here nor there, as he really had no choice but to take it.
  - 18.6. The tests were random and carried out by an external provider, at the various locations the company had around the country. It was onerous to expect them to carry out frequent tests on one individual.
  - 18.7. The trust issue was about everything, not just about drugs. He had concealed his drug use. They did not know what else he would not tell them in future.
  - 18.8. It would make it difficult to enforce any policy. Most disciplinary issues were safety related, and this was a safety related issue.
  - 18.9. The role did require driving on occasion, and he was way over the driving limit (which was nearly zero), and involved heavy machinery. The consequence of having this level in his system was that it was wrong in principle for him to return.
  - 18.10. If he returned to work and someone was injured those involved in letting him back would feel a heavy weight of responsibility.
  - 18.11. He had been a Team Leader, and so in a position of responsibility and trust, which he had broken, and the consequence of that was that he should not return.
  - 18.12. All 3 of the Respondent's witnesses stressed concern at safety should the Claimant return.

## Conclusions

19. The Respondents provided evidence from Kevin Bell, contract director for the East London Waste Authority Contract (the division where the Claimant worked), Iain George, Senior Operations Manager, to whom the Claimant reported) and from Nicola Howe of human resources.
20. In Mr Bell's oral evidence he was asked about the prescription drugs in the Claimant's system. His very firm view was that the Claimant had failed to tell them about the prescription medication, and this was not open and honest and was a breach of trust. This is highly irrational, as there was no return to work interview, and no reason for the Claimant to say so, and this was in flat contradiction to the evidence at the liability hearing, which was that it was solely the illegal cannabis use that was the concern.
21. The Respondents were of the view that there could have been a problem with interaction of cannabis and opiates to cause a safety issue. They produced no evidence that this is the case.
22. The Respondents do not have a logical reason why it is that the humane approach taken in regard to alcoholism – a chance to resolve the issue – does not apply to the Claimant. It cannot be illegality as the policy applies to all addictions, including to illegal drugs.
23. The safety issue is plainly important in the waste industry. It is in every workplace but is worthy of great focus in industries more intrinsically dangerous such as waste management. However, the concerns of the witnesses were not logically based. Mr George referred to 1,000 litre bins at schools and danger to pupils. It is not remotely likely that school children will be able to get anywhere near waste removal operations. Such bins are always in separated securely fenced compounds, and it is inconceivable that either the schools or the Respondent would permit the removal of waste containers with pupils anywhere near them.
24. Mr Bell referred to the possibility of waste bags igniting immediately they hit the shredders. The Claimant has never worked with shredders and his job does not involve going anywhere near them. He referred to needle injuries and toxic contamination. The Claimant carried out his role for many years without incident, and there was absolutely no concern about his work after he returned from his long term absence. The dismissal was about illegality and not prompted by safety concerns. The fact that the Claimant was allowed to work with very high levels of opiates in his system and that (at the time of dismissal) this was said not to be of concern belies the safety objections to his return.
25. It would be of concern if the Claimant were again to take drugs, but he offers guarantees that he would not, in the form of testing. The Respondent objects that regular testing can be ineffective as drug use can be immediately after the test to have dissipated before the next. It says that frequent random testing is too onerous on them.

26. The random testing is of urine. The Respondent agreed that if someone fell within the substance abuse policy there would be random testing, so there is no difficulty with frequent random testing of an individual. The Respondent did not consider the use of hair testing, which will reveal cannabis use within the last 90 days (I have judicial knowledge of this). I asked the Respondent about this, and it was not something they had considered.
27. The Respondent's witnesses accepted that their objections were primarily backward and not forward looking, save that they all said that they had lost trust in the Claimant being truthful about anything.
28. It is almost always the case that an employer found to have unfairly dismissed an employee will not want to reinstate that employee. If that objection was reason not to make an order for reinstatement then such orders would never be made.
29. The Respondent says that its policy on drugs will be undermined by reinstatement. Of the 7 people who have tested positive all have been dismissed if they had not resigned. That one individual, after a full Employment Tribunal hearing and a very long delay, was able to be reinstated does not undermine the policy. No one could view such an outcome in this case as being an open door to escaping dismissal for drug abuse.
30. The Claimant has not been permanently replaced. The agency worker can be released.
31. The Respondent says that it now operates without a team leader, as the agency worker is not a team leader. I do not see that as an obstacle to reinstatement.
32. In all, I conclude that the objections put forward are all manifestations of reluctance to have the Claimant back, based on the use of illegal drugs in the past, and not a genuine loss of trust in him. There is, in my judgment at this point, no reason why it is not practical to reinstate the Claimant.
33. Accordingly, I make an order for reinstatement. I have not been able to provide in the order one particular, which is the date of the 2% pay increase, which was not known to Ms Howe at the remedy hearing. It will not be a contentious date, and will be easily determinable.
34. It may be that the agency worker has a minimum period of notice, and so I give an implementation date of 01 June 2021.
35. It must be that the Claimant should not be better off by being reinstated, and so he will have to account in full to the Respondent as to the amount of benefits he received and for any earnings before 01 June 2021, which are deductible from the back pay. It does not appear that the Recoupment Regulations apply to money paid under a reinstatement order.

## **Compensation**

36. Had I not made a reinstatement order, I would have had to assess compensation. Should the Respondent fail to comply with the reinstatement order I will need to assess compensation in any event.
37. Using Bath Publishing Ltd's employmentclaimstoolkit program, I arrive at the following:

<b>IN THE EMPLOYMENT TRIBUNALS CASE NO: 3201672/2020 BETWEEN Carl Pamment AND Renewi Ltd CLAIMANT'S SCHEDULE OF LOSS</b>	
<b>1. Details</b>	
Date of birth of claimant	19/08/1988
Date started employment	01/10/2010
Effective Date of Termination	01/04/2020
Period of continuous service (years)	9
Age at Effective Date of Termination	31
Date new equivalent job started or expected to start	01/12/2021
Remedy hearing date	19/04/2021
Date by which employer should no longer be liable	01/12/2021
Contractual notice period (weeks)	9
Statutory notice period (weeks)	9
Net weekly pay at EDT	390.00
Gross weekly pay at EDT	496.00
Gross annual pay at EDT	25,792.00
<b>2. Basic award</b>	
Basic award Number of qualifying weeks (9) x Gross weekly pay (496.00)	4,464.00
Less amount for unreasonable refusal to be reinstated	0.00
Less contributory fault (basic award) @ 0%	0.00
Less redundancy pay already awarded	0.00

<b>Total basic award</b>	<b>4,464.00</b>
<b>3. Damages for wrongful dismissal</b>	
Loss of earnings Damages period (9) x Net weekly pay (390.00)	3,510.00
Plus failure by employer to follow statutory procedures @ 0%	.00
Less failure by employee to follow statutory procedures @ 0%	0.00
Less accelerated payment (wrongful) @ 0%	0.00
Plus interest (damages) @ 0%	0.00
<b>Total damages</b>	<b>3,510.00</b>
<b>4. Compensatory award (immediate loss)</b>	
Loss of net earnings Number of weeks (45.7) x Net weekly pay (390.00)	17,823.00
Plus loss of statutory rights	500.00
Plus loss of commission and/or bonus	0.00
Less payment in lieu	0.00
Less ex-gratia payment	0.00
Less non-recoupable benefits	0.00
Less early payment of compensation	0.00
Plus loss of pension	1,627.87
Pension loss	1,627.87
Pension loss from EDT (01/04/2020) to tribunal hearing (19/04/2021) Weeks (54.7) x Gross weekly pensionable pay (496.00) x % contributions from employer (6) x % for contingencies (0)	1,627.87
<b>Total compensation (immediate loss)</b>	<b>19,950.87</b>

<b>5. Compensatory award (future loss)</b>	
Loss of future earnings Number of weeks (32.3) x Net Weekly pay (390.00)	12,597.00
Plus loss of pension	1,041.60
Number of weeks (35) x Gross weekly pensionable pay (496.00) x % contributed by employer (6) x % deduction for contingencies (0)	1,041.60
<b>Total compensation (future loss)</b>	<b>13,638.60</b>
<b>6. Adjustments to total compensatory award</b>	
Less Polkey deduction @ 0%	0.00
Plus failure by employer to follow statutory procedures @ 0%	0.00
Less failure by employee to follow statutory procedures @ 0%	0.00
Less deduction for making a protected disclosure in bad faith @ 0%	0.00
Less contributory fault (compensation award) @ 0%	0.00
Accelerated payment @ 0%	0.00
<b>Compensatory award before adjustments</b>	<b>33,589.47</b>
<b>Total adjustments to the compensatory award</b>	<b>0.00</b>
<b>Compensatory award after adjustments</b>	<b>33,589.47</b>
<b>7. Summary totals</b>	
Basic award	4,464.00
Wrongful dismissal	3,510.00
Compensation award including statutory rights	33,589.47
<b>Total</b>	<b>41,563.47</b>
<b>8. Grossing up</b>	

Tax free allowance (£30,000 - any redundancy pay)	30,000.00
Basic + additional awards	4,464.00
Balance of tax free allowance	25,536.00
Compensatory award + wrongful dismissal	37,099.47
Figure to be grossed up	11,563.47
<b>GROSSED UP TOTAL</b>	<b>49,272.45</b>
<b>AFTER COMPENSATION CAP OF £25,792.00 (GROSS ANNUAL PAY)</b>	<b>£33,766.00</b>

38. The Recoupment Regulations apply, and that program gives the following detail:

IN THE EMPLOYMENT TRIBUNALS CASE NO: 3201672/2020

BETWEEN  
CARL PAMMENT  
AND  
RENEWI LTD  
  
RECOUPMENT

Recoupment

Prescribed period 04/06/2020 to 19/04/2021

Compensation cap applied

Total award £33,766.00

Prescribed element £12,213.95

Balance £21,552.05

Compensation cap not applied

Total award £49,272.45

Prescribed element £17,823.00

Balance £31,449.45

39. I considered that the Claimant had made every reasonable effort to find employment in this most extraordinary of times. I considered that he would need a further period after restrictions are due to end on 21 June 2021. The Claimant is a person without qualifications, who happened into a job he liked and was good at. It is hard to see him getting another such job easily, particularly given the reason for dismissal and his history of back problems, when his work is of a physical nature.

40. Given the cap on awards for unfair dismissal, these matters are of limited relevance: whichever way the calculation is made, the loss will exceed the cap of one year's pay. The total award would, as above, have been £33,766.00.
41. If either party considers that there is any error in principle (there is unlikely to be an error of arithmetic, given the use of a reputable program to calculate it) I invite that party to apply for a reconsideration of the calculation (or agree it themselves, for it is hypothetical at this stage).

**Employment Judge Housego**  
**Date 29 April 2021**