



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Monir Nasserredine

**Respondent:** Safetycare (UK) Ltd

**Heard at:** London South Employment Tribunal (by CVP)  
**On:** 24 June 2021

**Before:** Employment Judge Abbott (sitting alone)

## **Representation**

Claimant: In person

Respondent: Ms Winnie Whately, on behalf of the Respondent company

# JUDGMENT

The judgment of the Tribunal is that:

1. The claim succeeds – the Claimant was unfairly dismissed.
2. The Respondent is ordered to pay to the Claimant compensation in the sum of £88,519.

# REASONS

## Introduction

1. The Claimant, Mr Monir Nasserredine, was employed by the Respondent, Safetycare (UK) Ltd, as a Salesperson. His employment with the Respondent began on 2 September 2013 and ended with him being dismissed by reason of redundancy on 1 May 2020.
2. The Claimant brought a claim for unfair dismissal. The Respondent initially denied the Claimant's claim, but by the time the case came before me for Final Hearing on 24 June 2021, the Respondent no longer contested liability. The sole issue that fell to be determined by me, therefore, was the amount of compensation payable to the Claimant, as the Claimant did not seek an order for reengagement or reinstatement.

3. The hearing was held fully remote through the Cloud Video Platform. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.
4. The Claimant represented himself. He provided a witness statement and gave oral evidence. The Respondent was represented by Ms Winnie Whately, its Chief Financial Officer. I was also provided with a 266-page Bundle of Documents.
5. At the end of the hearing, I gave a reasoned oral judgment awarding the Claimant £88,519 in compensation. The Claimant requested written reasons – these are those reasons. I apologise for the delay in their preparation, which is the result of workload constraints.

#### Issues for determination

6. At the outset of the hearing, I outlined to the parties the various steps that the Tribunal must go through in order to calculate an appropriate award of compensation for unfair dismissal. It emerged that the only step that involved any dispute was in respect of mitigation.

#### Findings of fact

7. The relevant facts are, I find, as follows. Where it has been necessary for me to resolve any conflict of evidence, I indicate how I have done so at the relevant point. Only findings of fact relevant to the issues, and those necessary for me to determine, have been referred to in this judgment.
8. At the time of his dismissal on 1 May 2020 the Claimant's base monthly salary was £7,765.75 gross.
9. The Claimant was paid the sum of £21,505 gross / £11,687 net in lieu of notice, and a redundancy payment in the sum of £4,304.
10. The Claimant applied for numerous jobs from 1 May 2020 but had no success, even in reaching interview stage, likely as a consequence of the global pandemic. A list of jobs applied for was provided in the hearing bundle. Alongside his search for employment, the Claimant also explored opportunities with a friend to set-up businesses. The printouts in the bundle were not completely clear on when jobs were applied for, but I accept the Claimant's evidence that job applications continued through to obtaining his new employment, including lowering his sights as to salary expectations.
11. The Claimant did not start a new job until 17 June 2021, on a reduced salary compared to his salary with the Respondent. The Claimant claimed (and, subject to the question of mitigation, the Respondent accepted) that he lost earnings for the full period 1 May 2020 to 17 June 2021, amounting to a total of £105,733.67 gross / approximately £71,129 net, less his payment in lieu of notice.

#### The law

12. Section 118 of the Employment Rights Act 1996 ("**ERA**") provides that

where a tribunal makes an award of compensation for unfair dismissal, the award shall consist of a basic award and a compensatory award.

*Basic award*

13. The amount of the basic award is calculated in accordance with section 119 ERA. In the Claimant's case that would result in a basic award of £3,497 (a maximum week's pay of £538 x 6.5). However, where the reason for dismissal is redundancy, the amount of the basic award shall be reduced by the amount of any redundancy payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy. Here the Claimant received a redundancy payment in the sum of £4,304.
14. Accordingly, in the Claimant's case, the basic award is £0.

*Compensatory award*

15. Section 123 ERA provides that the amount of 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 in so far as that loss is attributable to action taken by the employer. Section 124 ERA provides that, in the Claimant's case, the compensatory award shall not exceed £88,519 (this being lower than 52 multiplied by a week's pay of the Claimant).
16. The correct approach to the calculation of a compensatory award was set out by the Court of Appeal in *Digital Equipment Co Ltd v Clements (No.2)* [1997] ICR 237, CA as modified to include, at the appropriate point, adjustments that fall to be made under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 in respect of breaches of the Acas Code of Practice on Disciplinary and Grievance Procedures. In summary the approach requires the Tribunal, first, to ascertain the employee's total loss in consequence of the dismissal, insofar as that loss is attributable to the employer's actions. Deductions and adjustments (if applicable) should then be made in the following order:
  - (1) deduction of any payment already made by the employer as compensation for the dismissal – to include payment in lieu of notice but not any enhanced redundancy payment;
  - (2) deduction of sums earned by way of mitigation, or to reflect the employee's failure to take reasonable steps in mitigation;
  - (3) 'just and equitable' reductions, including reductions in accordance with the principle in *Polkey v AE Dayton Services Ltd* [1988] ICR 142, HL to reflect the chance that, notwithstanding procedural unfairness, a dismissal would have happened in any event;
  - (4) increase or reduction of up to 25 per cent where the employer or employee failed to comply with a material provision of the Acas Code of Practice;
  - (5) adjustment of up to four weeks' pay in respect of the employer's

- failure to provide full and accurate written particulars;
- (6) percentage reduction for the employee's contributory fault;
  - (7) deduction of any enhanced redundancy payment to the extent that it exceeds the basic award;
  - (8) grossing up the figure to allow for the incidence of tax; and
  - (9) finally, application of the statutory cap (in this case, of £88,519).
17. As noted above, the Claimant is obliged to mitigate his loss. Where, as here, there is a substantial issue as to failure to mitigate the Tribunal is obliged to consider three questions (per *Gardiner-Hill v Roland Berger Technics Ltd* 1982 IRLR 498, EAT):
- (1) what steps were reasonable for the claimant to have to take in order to mitigate his or her loss;
  - (2) whether the claimant did take reasonable steps to mitigate loss; and
  - (3) to what extent, if any, the claimant would have actually mitigated his or her loss if he or she had taken those steps.
18. While these three questions are logically distinct, they are linked, and the evidence that bears upon them overlaps. The burden of proof is on the employer in respect of all three.

#### Conclusions on the compensatory award

19. As already stated, it was common ground that the Claimant's total loss in consequence of the dismissal was £71,129 net. To that I add the sum of £500 in respect of the Claimant's loss of statutory rights, a sum I consider to be reasonable in the circumstances.
20. From that loss figure must be deducted the sum that the Claimant was paid in lieu of notice, being £11,687 net.
21. The next question is whether the Claimant mitigated his loss. This was the only issue on which there was a live dispute between the parties. My factual findings in this regard are set out above.
22. On the first *Gardiner-Hill* question, in my judgement it would be reasonable to expect the Claimant to apply for alternative employment. It would not be reasonable for the Claimant to have immediately lowered his sights for example in terms of salary expectations, though the longer the period after dismissal, the more reasonable it would be to expect such an approach to be taken.
23. On the second *Gardiner-Hill* question, I am satisfied on the evidence that the Claimant did take reasonable steps to seek alternative employment, as well as seeking other earning opportunities through potential business ventures. I accepted the Claimant's evidence that he was pursuing alternative employment and/or business opportunities throughout the period

1 May 2020 to 17 June 2021. The Respondent has not discharged its burden to prove otherwise.

24. On the third *Gardiner-Hill* question, I accept that the Claimant, having taken reasonable steps, was unable to mitigate his loss. I recognise that the circumstances of the global pandemic have seriously affected the opportunities that are available to individuals looking for work. Whilst a period of unemployment of 59 weeks is lengthy in normal times, I do not consider it to be exceptional in the present climate. I also note, and accept, the Claimant's evidence that the role he has not taken is on a greatly reduced salary. While it could be argued that the Claimant should have lowered his sights earlier, the consequence of him doing so would be to extend the period of loss as the Tribunal must consider how long it would fairly take for the claimant to get back to his previous level of earnings. I also do not accept the Respondent's submission that the Claimant should be criticised for not seeking help from government-backed schemes (if, indeed, he would be entitled to such help) – the Respondent did not bring forward any evidence of specific opportunities it says the Claimant should have explored.
25. I therefore make no deduction for failure to mitigate.
26. The next step is to consider whether there should be any '*Polkey*' deduction, to account for the chance that the Claimant would have been fairly dismissed at some point in any event. The Respondent did not argue for such a deduction, and I will not make one.
27. Next, I must consider whether an uplift is appropriate for the Respondent's (admitted) failure to comply with the ACAS Code. The maximum uplift is 25%. In circumstances where there was a total failure to comply with the Code, I am satisfied that the full uplift is appropriate. The Respondent did not resist that.
28. There is no basis for any adjustment for failure to provide full and accurate written particulars of for any deduction in respect of contributory fault.
29. I must then deduct the amount by which the Claimant's redundancy payment exceeded his basic award, that being £807.
30. This brings the total net award to:

Lost earnings	£71,129
<i>plus</i> loss of statutory rights	£500
<i>less</i> payment in lieu of notice	(£11,687)
<i>less</i> failure to mitigate	(£0)
<i>less</i> 'Polkey' reduction	(£0)
<u><i>Sub-total</i></u>	<u>£59,942</u>

<i>plus</i> ACAS uplift of 25%	£14,985.50
<i>plus</i> failure to provide written particulars	£0
<i>less</i> contributory fault	(£0)
<i>less</i> redundancy payment in excess of basic award	(£807)
<u>Total before grossing-up</u>	<u>£74,120.50</u>

31. This sum must be grossed-up before the statutory cap is applied. Even on an approximate basis, it is clear that, after grossing-up, the award will exceed the statutory cap, which is £88,519 for someone whose date of termination is 1 May 2020. Accordingly, it is not necessary for me to explore the precise parameters of how the figures will be grossed up.
32. The Claimant is entitled to an award of compensation in the sum of £88,519.
33. The compensatory award is treated as a payment made in connection with termination and subject to section 401 of the Income Tax (Earnings and Pensions) Act 2003. The Respondent is therefore entitled to make appropriate deductions in respect of income tax, with the first £30,000 of the award being tax-free. The award is exempt from employee NICs. The Respondent is liable to pay to HMRC employer NICs on the part of the award above £30,000.

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**Employment Judge Abbott**

**Date: 11 October 2021**

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