# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs C Kenworthy

**Respondent:** Think Employment Limited

**Heard at:** Manchester (by CVP) **On:** 5 November 2021

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

**REPRESENTATION:**

**Claimant:** Mrs Davies (Friend and Adviser)
**Respondent:** Mr R Hallam (Managing Director)

# JUDGMENT ON REMEDY

The judgment of the Tribunal is that:

1. The respondent is ordered to pay the claimant the total amount of £3,815.29. That should be paid without deduction for tax and national insurance

2. The total amount consists of:

    a. Compensation for wrongful dismissal of £1,203.16

    b. An unfair dismissal basic award of £1,903.85

    c. An unfair dismissal compensatory award of £708.28.

3. The recoupment regulations apply:

    a. The prescribed period is from 7 February 2020 to 3 December 2021.

    b. The prescribed element is £578.14.

    c. The amount by which the total compensation exceeds the prescribed element is £3,237.15.

# REASONS

## Introduction

1. This remedy judgment arises as a consequence of my decision in the liability hearing in this case. That decision and Judgment which was sent to the parties on 18 August 2021 found that the claimant had been wrongfully dismissed and unfairly dismissed.

2. In relation to the unfair dismissal, the primary elements were failures in relation to the investigatory procedure, specifically in terms of interviewing all relevant witnesses, and secondly in relation to expanding the scope of the disciplinary matters being considered.

3. In relation to the fairness of the dismissal more generally, there were two particular findings: the first reflected the failings in the procedure i.e. the expansion of matters taken into account beyond the single incident of shouting at a service user; and the second was that I found that there were flaws in the way the decision maker at the disciplinary hearing (Mr Hallam) had deal with matters. First, I found that he had to some extent prejudged his decision as a result of a conversation he had had with his colleague, Ms Kay, prior to the disciplinary hearing. Second, I found that in conducting the disciplinary hearing itself he had not given an opportunity for the claimant to deal with the allegations proceeding from a position of an open mind. Instead I found that the claimant had been asked to refute findings from the investigation which Mr Hallam had effectively taken as proven.

## The hearing

4. The Case Management Order dated 6 September 2021 set out the List of Issues relating to remedy. For convenience I have included that List of Issues at the Annex to this judgment.

5. The parties had prepared a supplementary bundle of documents which included the claimant's wage slips in her new employment and an updated Schedule of Loss.

6. At the hearing I made the further findings of fact set out below. I heard submissions from Mr Hallam for the respondent and from Mrs Davies on behalf of the claimant. As neither party is legally represented we divided the issues into three main categories ("Polkey", contribution, and breach of the ACAS Code). I briefly explained what the legal issues in each category were and then heard the parties' submissions about it.

7. I gave my decision orally at the hearing. Mrs Davies requested it in writing. The delay in sending the judgment to the parties has arisen from the need to write up these reasons.

## Relevant Law

8. S.118(1) of the Employment Rights Act 1996 ("ERA") says that:

> "Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—
>
> (a) a basic award (calculated in accordance with sections 119 to 122 and 126, and

(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126)."

9. The basic award is calculated based on a week's gross pay, length of service and the age of the claimant.

10. The compensatory award is "such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal" (s.123(1) ERA).

11. A just and equitable reduction can be made to the compensatory award where the unfairly dismissed employee could have been dismissed at a later date or if a proper procedure had been followed (the so-called **Polkey** reduction named after the House of Lords decision in **Polkey v AE Dayton Services Ltd [1988] ICR 142**).

12. When it comes to the correct approach to a **Polkey** reduction, the EAT in **Granchester Construction (Eastern) Ltd v Mr S A Attrill** confirmed that the test for a Tribunal is not to ask in general what a reasonable employer would do but to focus upon the employer that is in fact before it.

13. Section 122(2) ERA, under the general heading "Basic Award: Reductions", provides as follows:

> "Where the tribunal considers that any conduct of the complainant before the dismissal […] was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

14. Section 123(6) ERA, under the general heading "Compensatory Award", provides:

> "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

15. In **Rao v Civil Aviation Authority [1994] ICR 495**, the Court of Appeal considered the interrelationship of a deduction for contributory conduct and an award that was reduced by **Polkey**. It said that the extent of a deduction to represent the chances of a fair dismissal subsequently being made (i.e. a **Polkey** deduction) might have a "very significant bearing" on what further deduction might fall to be made under the heading of contributory conduct.

16. However, that reasoning is irrelevant where what is in issue is the basic award, because that is not subject to a **Polkey** deduction except in exceptionally rare cases which do not apply in this case.

17. In **Steen v ASP Packaging (Limited UKEAT/0023/13/LA)** the then President of the EAT pointed out that where a reduction on account of culpable or blameworthy conduct is made to the basic award, the question under S.122(2) is simply whether it is 'just and equitable' to make such a reduction. But when it comes to a reduction of the compensatory award by reason of contributory conduct under S.123(6), there is an additional question for the Tribunal which is whether the conduct in question caused or contributed to the dismissal to any extent. If it did not do so, then there

can be no reduction no matter how blameworthy in other respects the tribunal might think the conduct to have been.

18. The EAT in **Steen** also said that where reductions are made to both the basic and compensatory awards, although it is very likely that what a tribunal will regard as being a just and equitable basis for reducing the compensatory award will also have the same or a similar effect in respect of the basic award, this is not inevitable: in some circumstances, different levels of reduction may be appropriate.

## Findings of Fact

19. I base my judgment on remedy on the findings of fact in my liability judgment and the further findings of fact set out in this section.

20. There was agreement between the parties as to some key elements of remedy. The first was that the gross weekly pay for the claimant was £423.08 and that her net weekly pay was £343.58.

21. Mrs Davies for the claimant also accepted that as from 20 June 2020 the claimant did not have any continuing loss – that was because (as the updated Schedule of Loss showed, and the wage slips in the remedy bundle corroborated), the claimant from that date was earning more than she was when she worked for the respondent.

22. There was also agreement that the claimant's length of service was 6 years and that her notice entitlement was six weeks' notice. Given that her age at dismissal was 51, that meant that her basic award calculation should be based on 1½ x 6 weeks' pay, i.e. 9 weeks' gross pay.

## Issues in Dispute

23. Turning to the three main issues in dispute, these related to the extent to which reductions or adjustments should be made to the compensation payable to the claimant. Dealing with each of those in turn.

### The **Polkey** reduction

24. The first issue was whether there should be a reduction in the compensation to take into account the chance the claimant would have been fairly dismissed anyway if a fair procedure had been followed.

25. I have already briefly referred to my findings about the flaws in the disciplinary procedure and in the decision to dismiss. Mr Hallam in his submissions on this very fairly conceded that with hindsight while a decision to dismiss would still have been made, it would have been made with notice rather than without notice. He said that given the finding that the incident involving the service user had indeed happened, and given my findings as to the seriousness of that sort of incident to the respondent's business, it would have been fair for the respondent to have dismissed the claimant had it followed a fair procedure.

26. For the claimant Mrs Davies said that the sanction of dismissal was, even given those factors, not a fair one. She pointed to the fact that the claimant had a clean employment record at the time that the decision to dismiss was made and that no consideration appeared to have been given to other sanctions.

27. When it comes to **Polkey** reductions the legal authorities tell me that I can choose the most appropriate approach. That could either be saying that I find that the dismissal would have taken place in any event but at a later date, or alternatively reducing the compensation by a percentage figure to reflect the chance that a dismissal would have fairly taken place. I considered whether this was a case where the flaws in the disciplinary procedure were such that I could say that had a fair procedure been carried out the outcome would have been the same, i.e. dismissal without notice, justifying a 100% reduction in compensation. I also considered whether, as Mr Hallam suggested, the outcome would have been the same other than the dismissal being with notice rather than without notice. Taking into account my findings in the liability judgment, however, I take the view that there are some aspects of the flaws in the dismissal which mean that I cannot take that approach. This relates particularly to my finding that Mr Hallam had pre-determined the decision to dismiss before the disciplinary hearing.

28. Given my finding that Mr Hallam had to some extent predetermined the outcome, it seems to me I have to make a decision about what would have happened had he not done so. This is of necessity a speculative exercise but I find that given the evidence that he had in front of him and given the seriousness for the business of the incident concerned, it does seem to me that a significant reduction to reflect the chance that a dismissal would have taken place in any event is just and equitable.

29. I remind myself that the authorities say that what I have to decide is what this employer would have done had it followed a fair procedure. On that basis I find that had a fair procedure been followed there is still a significant risk that Mr Hallam would have decided to dismiss. I do not think there is a 100% risk of that being the case, but I do think that there is a 75% chance that that would have happened.

30. In those circumstances I have decided that in calculating compensation I should apply a **Polkey** reduction of 75% to the compensatory award for financial loss under the unfair dismissal claim. I deal later with the actual calculation of compensation based on that finding.

<u>Contributory conduct by the claimant</u>

31. The legislation says that I should consider whether there is conduct by the claimant which is culpable or blameworthy and caused or contributed to the dismissal.

32. Mr Hallam's submission was that there clearly was such conduct and therefore there should be the maximum possible reduction to reflect that contribution.

33. Mrs Davies said that while my finding was that there had been conduct contributing to the dismissal, the claimant's position was that she had been asked by the Job Centre to approach the service user in this case to raise with that service user her failure to attend sessions at the times when she was required. I find that there was clearly conduct by the claimant which, with her experience, she knew or should have known was inappropriate and which could seriously damage the reputation and business of the respondent, given the limited number of referrers of business to it. On the other hand I do accept that while the way the claimant did speak to the service user was inappropriate, approaching of the service user to raise matters does seem to have been instigated, at least in part, by the Job Centre's

instruction and was not a malicious act out of the blue motivated solely by the claimant herself.

34. Taking all those matters in the round, when it comes to the compensatory award I have decided that the appropriate reduction under s.123(6) ERA is 50% of the compensatory award after the **Polkey** deduction. In reaching that conclusion I take into account the fact I have already made a deduction of 75% to reflect the **Polkey** chance that there would have been a dismissal in any event.

35. The legislation at s.122(2) ERA says that I need to take into account conduct on the part of the claimant and decide whether it would be just and equitable to reduce the basic award to any extent. In this case I do accept that there was conduct on the part of the claimant which means that a reduction is appropriate. I have considered whether that reduction should be more than the 50% applied to the compensatory award. The reason it might me more is because my 50% reduction to the compensatory award already took into account the **Polkey** reduction I made. There is no equivalent **Polkey** reduction to the basic award.

Should I therefore award more than 50% reduction to the basic award? I have decided not to do so. The reason for that is it seems to me appropriate to recognise the fact that in this case there was an unfair dismissal. I do reduce the basic award by 50% but find that any further reduction is not just and equitable.

<u>The ACAS Code of Practice</u>

36. I also needed to decide whether it was appropriate in this case to increase the compensation awarded to take into account any unreasonable failure by the respondent to comply with the ACAS Code. I did in my liability Judgment find that there were such failings.

37. I heard submissions from Mr Hallam and Mrs Davies on this point. I accept, as did Mrs Davies, that the respondent is a relatively small business. However, as Mr Hallam himself submitted, it is a business which has access to advice on HR matters, and he told me that he himself had experience over a number of years as a small business adviser.

38. I take into account the fact that this was not a case where the employer completely failed to carry out any kind of disciplinary process. However, the flaws which I identified, including in particular the failure to be clear about the incidents giving rise to the dismissal and also the element of predetermination, do seem to me to amount to an unreasonable failure to comply with the ACAS Code. The evidence from Mr Hallam and Mrs Dennehy was that they did not have knowledge of the ACAS Code. Mr Hallam today submitted that Mrs Dennehy would not be expected to have knowledge of that Code, but I agree with Mrs Davies' submission that if she was dealing with an appeal against a dismissal it could have been expected that she did do so.

39. I have decided that there was an unreasonable failure to comply with the ACAS Code in this case. As to what uplift it is appropriate to apply, the maximum I can award is 25%. I do not think that this is such a case. I accept Mr Hallam's submissions that this is not a large organisation or one with an inbuilt HR resource to which it had ready access. I do think however that given the availability of advice

and the apparent complete lack of awareness by the decision makers of the Code, this is a case where an increase of 15% is appropriate.

**Application of findings to calculation of compensation**

40. Starting with the wrongful dismissal claim, I find that the claimant was entitled to six weeks' notice. With the net pay of £343.58 that makes £2,061.48. However, she will also have received pension of £12.20 per week. Adding six weeks of pension at £12.20, which gives us a total of £73.20, that means the total notice pay before any deductions would be £2,134.68. However, during that notice period the claimant did earn monies from agency work. Those earnings amounted to a total of £1,088.42, which means that the net loss for the notice period is £1,046.26.

41. As I have said, I have decided that it is appropriate to apply an uplift of 15% to compensation to reflect the unreasonable failure to comply with the ACAS Code. 15% of £1,046.26 is £156.90, so that means that the total compensation to be awarded for wrongful dismissal is £1,203.16.

42. Turning then to the basic award, the basic award is based on gross weekly pay, which in this case is £423.08. Nine times that figure, to reflect six weeks for six years' length of service, and times 1½ for the claimant's age, gives £3,807.72. I have said that I have decided to reduce that by 50% under s.122(2) ERA to reflect the claimant's contribution. That means that the basic award after that reduction is £1,903.85.

43. When it comes to the compensatory award, there are two elements of this. The first is the statutory rights award which reflect the fact that the claimant has lost her right to claim unfair dismissal and will have to be employed for a further two years by another employer to regain it, and I award £500 for that. In terms of financial loss, I find that the claimant's financial loss beyond the notice period, i.e. from 22 March 2020 to 20 June 2020, amounts to 13 weeks. The financial loss for that period is 13 weeks at £343.58 which makes £4,466.54. The pension loss is 13 weeks x £12.20, which makes £158.60. That gives a starting point before any deductions of £5,125.14 (£500.00 + £4466.54 +£158.60). Because recoupments will apply to this element of the award, I do not deduct the Universal Credit which the claimant received. Instead what will happen is that that amount will need to be repaid to the DWP through the recoupment process. However, the claimant also did earn £197.96 during that period which must be deducted, and that gives a net loss before any adjustments of £4,927.18.

44. I have said that I then reduce that by 75% to reflect the chance that there would have been a fair dismissal. Deducting 75% leaves a figure of £1,231.79. I then increase that by 15% for the failure to comply with the ACAS Code. That 15% amounts to £184.76, which means before reducing again for contributory conduct the compensatory award figure is £1,416.55. Reducing that figure by 50% under s.123(6) to take into account the claimant's contribution gives a final figure for the compensatory award of £708.28.

45. Putting all those figures together gives a total figure payable by the respondent to the claimant of £3,815.29. That is made up of a wrongful dismissal award of £1,203.16, a basic award of £1,903.85 and the compensatory award of £708.28.

46. The recoupment regulations do apply because I have made a monetary award in the unfair dismissal claim and the claimant did receive relevant benefits. That means that I need to identify what is called the "prescribed period" and the "prescribed element" in addition to the amount of benefits.

47. The prescribed period in this case is from 7 February 2020 to 3 December 2021 i.e. the date of this Judgment. The prescribed element is that element of the compensatory award which reflects loss of earnings, so disregarding the statutory rights of £500, but reduced to take into account the various adjustments I have made.

48. After making those adjustments the prescribed element is £578.14. The amount of benefits in question is Universal Credit of £437.95. The amount by which the total award of compensation exceeds the prescribed element is £3,237.15. That is the figure which must be paid by the respondent to the claimant without waiting for the recoupment notice from DWP. The prescribed element of £578.14 must be retained by the respondent pending receipt of notification from the DWP of the amount repayable to it.

49. I have calculated the compensation for financial loss on the net basis on the understanding that the claimant will not be taxed on it because it falls within the £30,000 tax exemption for termination payments. If that is not correct and the claimant is taxed on the award ordered then she should apply for reconsideration of this judgment so that the relevant amounts can be grossed up.

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Employment Judge McDonald

Date: 3 December 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

9 December 2021

FOR THE TRIBUNAL OFFICE

**Public access to employment tribunal decisions**
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

# Annex
# Complaints and Issues

## 1. Remedy for unfair dismissal

1.1 The claimant is not seeking reinstatement or reengagement

1.2 What basic award is payable to the claimant, if any?

1.3 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

1.4 If there is a compensatory award, how much should it be? The Tribunal will decide:

1.4.1 What financial losses has the dismissal caused the claimant?

1.4.2 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason (“the “Polkey reduction”)?

1.4.3 If so, should the claimant’s compensation be reduced? By how much?

1.4.4 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

1.4.5 Did the respondent or the claimant unreasonably fail to comply with it?

1.4.6 If so is it just and equitable to increase any award payable to the claimant? By what proportion, up to 25%?

1.4.7 If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

1.4.8 If so, would it be just and equitable to reduce the claimant’s compensatory award? By what proportion?

1.4.9 Does the statutory cap of fifty-two weeks’ pay?

## 2. Wrongful dismissal / Notice pay

2.1 What was the claimant’s notice period?

2.2 How much compensation should be awarded for her wrongful dismissal?

2.3 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

2.4 Did the respondent or the claimant unreasonably fail to comply with it?

2.5 If so is it just and equitable to increase any award payable to the claimant? By what proportion, up to 25%?

## 3. Recoupment

3.1 Does recoupment apply, i.e. did the claimant received a relevant state benefit?

3.2 What is the prescribed period and the prescribed amount to which recoupment applies?

# NOTICE

## THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2406091/2020**

Name of case: **Mrs C Kenworthy** v **Think Employment**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: 9 December 2021

"the calculation day" is: 10 December 2021

"the stipulated rate of interest" is: 8%

For the Employment Tribunal Office

**Claimant:** **Mrs C Kenworthy**

**Respondent:** **Think Employment**

**ANNEX TO THE JUDGMENT**
**(MONETARY AWARDS)**

Recoupment of Benefits

The following particulars are given pursuant to the Employment Protection (Recoupment of Benefits) Regulations 1996, SI 1996 No 2349.

The Tribunal has awarded compensation to the claimant, but not all of it should be paid immediately. This is because the Secretary of State has the right to recover (recoup) any jobseeker's allowance, income-related employment and support allowance, universal credit or income support paid to the claimant after dismissal. This will be done by way of a Recoupment Notice, which will be sent to the respondent usually within 21 days after the Tribunal's judgment was sent to the parties.

The Tribunal's judgment states: (a) the total monetary award made to the claimant; (b) an amount called the prescribed element, if any; (c) the dates of the period to which the prescribed element is attributable; and (d) the amount, if any, by which the monetary award exceeds the prescribed element. Only the prescribed element is affected by the Recoupment Notice and that part of the Tribunal's award should not be paid until the Recoupment Notice has been received.

**The difference between the monetary award and the prescribed element is payable by the respondent to the claimant immediately.**

When the Secretary of State sends the Recoupment Notice, the respondent must pay the amount specified in the Recoupment Notice to the Secretary of State. This amount can never be more than the prescribed element of any monetary award. If the amount is less than the prescribed element, the respondent must pay the balance to the claimant. If the Secretary of State informs the respondent that it is not intended to issue a Recoupment Notice, the respondent must immediately pay the whole of the prescribed element to the claimant.

The claimant will receive a copy of the Recoupment Notice from the Secretary of State. If the claimant disputes the amount in the Recoupment Notice, the claimant must inform the Secretary of State in writing within 21 days. The Tribunal has no power to resolve such disputes, which must be resolved directly between the claimant and the Secretary of State.