



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondent

Mr. Qasim Quraishi

Waterstones Booksellers Limited

Heard at: London Central Employment Tribunal **On:** 2 October 2023

Before: Employment Judge Coen

Members: Mr. D Shaw

Mr. L Tyler

Representations

For the Claimant: In Person

For the Respondent: Mr. K Wilson, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Tribunal has assessed the reduction to the basic award to reflect conduct as set out at section 122(2) of the Employment Rights Act 1996 in the sum of 50%;

2. The Tribunal does not consider it just and equitable to reduce the compensatory award in respect of contributory fault in accordance with section 123(6) of the Employment Rights Act 1996;
3. The Claimant's compensatory award and damages for wrongful dismissal should be increased by 12.5% to take account of the Respondent's failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures;
4. The basic award (for the purposes of the Claimant's unfair dismissal claim) is £1,996.80.
5. The compensatory award (for the purposes of the Claimant's unfair dismissal claim) is £5,799.35.
6. Damages for wrongful dismissal are £3,675.65.
7. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply. For the purposes of the Regulations:
 - a) the total monetary award made to the Claimant is £11,471.80;
 - b) the prescribed element is £1,742.53;
 - c) the date of the period to which the prescribed element is attributable is 29 April 2022 to the date on which this remedy judgment is sent to the parties;
 - d) the amount by which the total monetary award exceeds the prescribed element is £9,729.27.

REASONS

Introduction, Procedure, Documents

1. The Tribunal's judgment and written reasons dated 3 April 2023 found that the Claimant's claims for unfair dismissal and wrongful dismissal succeeded. A hearing to consider the issue of remedy was held in person at London Central Employment Tribunal on 2 October 2023.
2. The Claimant appeared in person and the Respondent was represented by Counsel. As the Claimant appeared in person, the Tribunal took steps to ensure that it allowed additional time to answer questions the Claimant raised about practice and procedure, and to clarify some of the legal tests.
3. Witness statements were provided by the Claimant and by two of his Union representatives (Deborah McSweeney and Bryan Kennedy). A bundle of documents was provided to the Tribunal.

4. The Tribunal took the Claimant's witness statement into account as a continuation of his evidence. Both parties made submissions. By an oversight, the Tribunal omitted to ask the Claimant to swear an oath or give an affirmation or to remind him that he was still under oath as a result of the evidence provided at the liability hearing in January 2023. This had no material impact on the hearing.

5. Counsel for the Respondent raised the fact that at an earlier preliminary hearing in 2022 one of the Claimant's claims (no. 2201710/2022) had been withdrawn but that the Respondent did not have a copy of the judgment on withdrawal. The Tribunal said that it would arrange for the parties to be sent a further copy of the judgment on withdrawal.

6. The background facts and the Tribunal's findings are set out in the written reasons accompanying the Tribunal's judgment dated 3 April 2023.

7. The Tribunal raised the issue of reinstatement or re-engagement with the Claimant and he indicated that he did not wish to pursue either remedy.

Issues to be decided by the Tribunal

8. The issues which fell to be determined by the Tribunal in respect of remedy are set out below.

- a) whether a deduction should be made to the basic award to reflect conduct and/or to the compensatory award to reflect contributory fault on the part of the Claimant;
- b) whether the compensatory award should be uplifted to reflect the Respondent's failure to follow the Acas Code of Practice on Disciplinary and Grievance Procedures (the "Acas Code");
- c) the issue of recoupment;
- d) whether certain expenses of the Claimant in respect of security guard training fell within the remit of the compensatory award;
- e) the compensation to which the Claimant was entitled in respect of his Waterstones staff discount card;
- f) the relevant calculations in relation to both the basic award and the compensatory award.

Law

Contributory Fault

9. A reduction for contributory fault can affect the basic award and/or the compensatory award.

10. Section 122(2) of the Employment Rights Act 1996 provides that 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. There is no need for the conduct to have caused or contributed to the dismissal.

11. The compensatory award may also be reduced by reason of contributory fault. Section 123(6) of the Employment Rights Act 1996 provides that 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.

12. In **Nelson v BBC (No. 2) [1979] IRLR 346 (CA)**, the Court of Appeal set out three factors that must be present for the compensatory award to be reduced for contributory fault: the claimant's conduct must be culpable or blameworthy; it must have actually caused or contributed to the dismissal; and the reduction must be just and equitable.

13. In **Steen v ASP Packing Ltd UKEAT/23/13**, the Employment Appeal Tribunal stated that a tribunal must consider four questions in respect of a reduction in the compensatory award for contributory fault:

- a) identifying the conduct which was said to give rise to possible contributory fault;
- b) whether that conduct was blameworthy, irrespective of the employer's view on the matter;
- c) for the purposes of section 123(6), whether the blameworthy conduct caused or contributed to the dismissal;
- d) if so, to consider to what extent the award should be reduced and to what extent it would be just and equitable to reduce it.

14. In assessing any reduction to the compensatory award for contributory fault, a tribunal must consider whether the claimant's conduct was blameworthy and not be influenced by the respondent's conduct (**Steen v ASP Packaging Ltd UKEAT/23/13**).

15. A tribunal can make a deduction for **Polkey** and contributory fault. Where a **Polkey** deduction has been made, a deduction for contributory fault is intended to express the sum by which the compensatory award should be reduced to take account of the claimant's conduct (**Rao v Civil Aviation Authority [1994] ICR 495 (CA)**). If both Polkey and contributory fault deductions are to be made, the Tribunal must explain why both deductions are being made and the basis for each. It is necessary to avoid any element of double-counting of the same factors in a way which is unfairly detrimental to the claimant (**Wilkinson v Driver and Vehicle Standards Agency [2022] EAT 23**).

16. If a tribunal reduces the basic and compensatory awards by different proportions, it should give its reasons for the differing proportions (**RSPCA v Cruden 1987 ICR 205 EAT** and **Dee v Suffolk County Council [2018] UKEAT/0180/18**).

Acas uplift

17. Where the employer has failed to follow the Acas Code and the tribunal considers that the failure was unreasonable, it may increase the compensatory award and/or the damages for wrongful dismissal that would otherwise have been payable by no more than 25% if it considers it just and equitable to do so (section 207A and Schedule A2 of Trade Union and Labour Relations (Consolidation) Act 1992).

18. It is necessary for the tribunal to consider the failure to be unreasonable. In **Rentplus UK Ltd v Coulson [2022] EAT 81** the Employment Appeal Tribunal provided guidance when considering an Acas uplift.

- a) Is the claim one which raises a matter to which the Acas Code applies?
- b) Has there been a failure to comply with the Acas Code in relation to that matter?
This involves consideration of which provisions of the Acas Code have been breached and which, if any, have been complied with.
- c) Was the failure to comply with the Acas Code unreasonable?
- d) Is it just and equitable to award an uplift because of the failure to comply with the Acas Code and, if so, by what percentage up to 25%?

19. In **Slade and another v Biggs and others [2022] IRLR 216, EAT** the Employment Appeal Tribunal gave guidance in relation to the percentage uplift:

- a) Is the case such as to make it just and equitable to award any Acas uplift?
- b) If so, what does the tribunal consider a just and equitable percentage, not exceeding, although possibly equaling, 25%?
- c) Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings? If so, what in the Tribunal's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double counting?
- d) Applying a final sense check, is the sum of money represented by the application of the percentage uplift arrived at by the tribunal disproportionate in absolute terms? If so, what further adjustment needs to be made?

Recoupment

20. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 (SI 1996/2349) govern recoupment and allow the state to recover from the respondent the value of certain state benefits paid to the claimant. The tribunal must in its judgment identify four items of information that will then be provided to the Department for Work and Pensions, being the amount of any prescribed element, the prescribed period, the total amount of the award, and the balance.

21. The prescribed element is the amount ordered to be paid in respect of compensation for loss of wages for a period before the conclusion of the tribunal proceedings. The prescribed element will be reduced in line with any deduction for contributory fault that

may have been made to the compensatory award. The prescribed element is held back from the claimant until the value of any state benefits subject to the recoupment procedures is known.

22. The prescribed period, for concurrent wrongful and unfair dismissal claims, is the period between the end of the period over which damages for breach of contract have been awarded and the date on which the parties were sent the remedy judgment.

23. The total amount of the award is the total sum awarded by the tribunal across all causes of action.

24. The balance is the difference between the total award and the prescribed element and must be paid to the claimant.

Expenses

25. Section 123(2)(a) of the Employment Rights Act 1996 permits the recovery of expenses which are reasonably incurred in consequence of the dismissal. Expenses that fall within the realm of this section include expenses relating to the search for a new job, for example, training expenses. In broad terms, the liability of the employer to fund these expenses will depend on the remoteness of damage and the extent to which it is just and equitable for the employer to pay for the relevant expense. Generally, it is necessary for there to be a reasonable connection between the expenses and the dismissal, and the expenses need to be reasonable in amount.

Employee Benefits

26. Damages for wrongful dismissal are intended to put the employee in the position they would have been in had the contract not been breached. The employee is entitled to the benefits they would have received had they been allowed to work out their notice. Therefore, the starting point for calculating damages for wrongful dismissal is the amount which the employee would have earned in the notice period. In the case of benefits such as medical insurance, staff discounts, or a company car, the value of those benefits will generally be assessed in terms of how much it would cost the employee to make similar arrangements during the notice period.

27. Damages for wrongful dismissal can, in limited circumstances, be awarded for losses extending beyond the notice period where the employee's loss has resulted from a breach of contract by the employer which is not the dismissal itself. In **Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) [1997] ICR 606, HL** the Court held that the employer bank was in breach of the implied term of trust and confidence which, in turn, caused losses to staff in the form of reputational damage. In that case, the loss occurred after the contract had been brought to an end. **Johnson v Unisys Ltd [2001] ICR 480, HL** also held that losses needed to be specifically attributable to a breach other than the dismissal itself.

28. The compensatory award in the context of an unfair dismissal claim aims to reflect the actual losses which an employee suffers as a consequence of unfair dismissal. For the purpose of the compensatory award in an unfair dismissal claim, section 123(1) of the Employment Rights Act 1996 provides that the employee can be awarded “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”.

29. The compensatory award can, therefore, include the loss of any benefit which the employee might be expected to have had but for the dismissal. This can include bonuses or other benefits. It is necessary to establish a reasonable expectation to the benefit in question (**York Trailer Co Ltd v Sparkes [1973] ICR 518**).

Loss of Statutory Rights

30. Tribunals may award compensation for the loss of statutory rights (in respect of unfair dismissal and redundancy). This compensation is usually a nominal amount between £300 and £500.

Analysis

Contributory fault

31. The Respondent accepted liability for the Claimant’s unfair dismissal on the basis that a fair procedure was not followed. In assessing the Claimant’s basic and compensatory awards, it is necessary to consider whether either or both should be reduced to take account of contributory fault.

32. In considering contributory fault, it is necessary for us to consider the conduct of the Claimant which was culpable or blameworthy. In our view, the blameworthy aspect of the Claimant’s conduct relates to the role he played in the deterioration of the relationship between the parties. It is clear that the relationship between the parties worsened significantly in the period between the Claimant’s return to work in April 2021 after the COVID-19 pandemic and his dismissal on 3 February 2022. In May 2021, the Claimant queried the start time of a team briefing at 11.29 (as being too early and thereby taking up his personal, rather than working, time). In November 2021 he refused to sign a letter confirming his flexible working request. At a staff briefing on 25 January 2022, the Claimant made comments about having to wait after closing time for managers to let staff out of the store. The Tribunal’s findings (at paragraphs 118, 123 and 125 of the liability judgment) in relation to the dismissal meeting itself were that the Claimant was not engaging fully and gave brief and obtuse responses to direct questions, thereby demonstrating that he had adopted a siege mentality and that the Claimant had ceased engaging directly with management but had instead resorted to formal complaints.

33. In summary, therefore, there was blameworthy conduct on the part of the Claimant in the form of unreasonable behaviour. For the purposes of the compensatory award, it is

necessary to consider whether the conduct contributed to the dismissal. In the Tribunal's view (expressed in the liability judgment) it is clear that the conduct identified contributed to the Claimant's dismissal, partly because it had an adverse impact on the relationship between the parties, but also because (given the way in which the Claimant interacted at the meeting on 3 February 2022) it served to precipitate the Claimant's dismissal.

34. We are of course aware that there were blameworthy aspects of the Respondent's conduct, including the lack of process followed at the meeting on 3 February 2022 which meant that the Claimant was not given proper notice of the meeting and was not able to exercise his right to be accompanied. However, consideration of contributory fault only permits us to consider the Claimant's conduct with the Respondent's conduct not being taken into account.

35. The Tribunal is required to consider whether the basic and/or the contributory award should be reduced to take account of contributory conduct. We deal first with the compensatory award.

36. In its judgment on liability the Tribunal considered the effect of Polkey on the compensatory award. This involved consideration of what the Respondent would have done had it followed a fair process in connection with the Claimant's dismissal. The Tribunal's view was that the Respondent would have been required to invite the Claimant to a disciplinary meeting to consider his conduct at the staff meeting on 25 January 2022 and that such a meeting would have been held by early March 2022. The Tribunal's further view was that the Respondent would not have been able successfully to make out grounds for dismissal on the basis of misconduct or 'Some Other Substantial Reason' (being an irreconcilable difference or a breach of the implied term of trust and confidence) at that meeting. However, taking account of the Claimant's lack of understanding of the cumulative negative impact of his appeals and grievances, the Tribunal's view was that he would either have brought further (possibly vexatious) grievances or committed misconduct which would have enabled the Respondent, where necessary using a final warning, fairly to dismiss him.

37. The Tribunal's findings in the liability judgment (paragraph 118) in respect of the dismissal meeting were that the Claimant did not engage fully during the meeting and gave brief and obtuse responses to direct questions, partly as a result of anxiety about the process, but also because the relationship between the parties had become significantly more difficult with the Claimant having adopted a siege mentality and being unwilling to engage with the Respondent except through formal processes. The Tribunal also found (at paragraph 123) that Mr Green did seek to engage with the Claimant at the dismissal meeting but became frustrated resulting in a situation where Mr Green felt that there was no option but to dismiss the Claimant. We also found (at paragraph 124) that the Claimant was dismissed because of the lack of constructive dialogue between the parties at the dismissal meeting, when combined with long historic difficulties between the Claimant and the Respondent, particularly the Claimant's challenges at the meetings in May 2021 and January 2022 and the Respondent's perception that the Claimant had

ceased engaging directly with management but had instead resorted to formal complaints.

38. It is clear, therefore, that the Tribunal's decision in relation to Polkey takes account of the Claimant's conduct, both by referring to the state of the relationship between the parties as at the date of the dismissal meeting on 3 February 2022, but also the historic difficulties in the relationship. We are mindful not to create a situation where the Claimant is penalised twice in respect of the same conduct and are therefore of the view that any reduction to the compensatory award to reflect contributory conduct would not be just and equitable in the circumstances of this case.

39. In respect of the basic award, we do consider that there was relevant conduct on the part of the Claimant as outlined above. We are aware that, for the purposes of the basic award, there is no need for the conduct to have contributed to the dismissal. We are of the view that the Claimant's basic award should be reduced by 50% to take account of this conduct. The reduction reflects the fact that, as we found in the liability judgment, the Claimant's conduct had a negative impact on the relationship between the parties and hindered a satisfactory resolution of the issues as the Claimant resorted to dealing with management via formal processes, rather than via dialogue and constructive communication. That said, we are of the view that it would not be appropriate to reduce the award further given that the Claimant had a long employment history with the Respondent with significant difficulties arising only in the latter years of employment and that, while his conduct was blameworthy (by virtue of being unreasonable), it cannot be categorised as gross misconduct.

Acas Uplift

40. The Tribunal is permitted to increase the Claimant's compensatory award and the Claimant's damages for wrongful dismissal by up to 25% to take account of failure to follow the Acas Code in respect of the Claimant's dismissal.

41. It is necessary to consider the relevant breaches of the Acas Code. The meeting on 3 February 2022 was framed as an investigation meeting and the Claimant was not provided with notice of the meeting but was informed shortly before it. The Claimant asked to bring a Union representative to the meeting but was told that he had no right to be accompanied at an investigation meeting. The meeting resulted in the Claimant's dismissal. To that extent, the breaches of the Acas Code on the part of the Respondent related to: (1) the fact that an investigatory meeting resulted in a dismissal (which should not be the case); and (2) the fact that the Claimant was not accompanied at a meeting which resulted in the taking of disciplinary action (in this case, his dismissal).

42. We, therefore, propose an uplift of 12.5% to the Claimant's compensatory award and his wrongful dismissal claim. This sum reflects the fact that there were clear and unreasonable breaches of the Acas Code by the Respondent, such that it admitted liability in respect of the procedural aspects of the unfair dismissal claim. The Claimant was not provided with sufficient notice, he was not entitled to bring a companion to the meeting

and the meeting (which was framed by the Respondent as an investigatory meeting) resulted in his dismissal. In awarding this sum, we are satisfied that there is no overlap with other awards and that the sum of money is proportionate in overall terms. We considered awarding a higher percentage figure, but have rejected this on the basis of our findings at liability stage (at paragraphs 123 and 124 of the judgment) which were that Mr Green did not come to the meeting determined to dismiss the Claimant but that the parties failed to engage with each other throughout the meeting resulting in the Claimant's dismissal. We have also considered the fact that (in accordance with the Acas Code) the Respondent supervised a detailed appeal process.

Recoupment

43. The Claimant received Job Seeker's Allowance from 25 February 2022 to 14 June 2022.

44. The first twelve weeks following the Claimant's dismissal are not taken into account in respect of recoupment, as they fall within the Claimant's successful claim for wrongful dismissal.

45. The prescribed element therefore amounts to the Claimant's net weekly wage (£272.27) from 29 April 2022 (being the end of the Claimant's notice period) to 13 June 2022 (being the date when the Claimant started new employment) and is £1,742.53.

46. The prescribed period is the period between 29 April 2022 (being the end of the Claimant's notice period) and the date on which this remedy judgment is sent to the parties.

Expenses

47. Following his dismissal on 3 February 2022, the Claimant retrained and incurred expenditure to enable him to work in the construction industry where he started work in June 2022. He also enrolled on a small number of courses to obtain a security guard qualification. The Claimant has been employed as a security guard since March 2023.

48. As a result of the Polkey deduction, the Claimant is entitled to claim his expenses for a period of six months from the date of dismissal, meaning that expenses are allowable until 2 August 2022.

49. In the circumstances, the Claimant claimed a total of £213.53 of construction industry-related expenses in the period between 3 February 2022 and 2 August 2022. The Claimant also claimed the sum of £324.99 for a security guard training course in the same period.

50. The Respondent argued that the Claimant could have sought an alternative role in retail immediately following his dismissal, which would not have required any expenditure. The Respondent also argued that the security guard expenses should not be allowed, on

the basis that the Claimant was effectively changing career twice and that this should not be funded by the Respondent.

51. The Claimant submitted that he was very upset following his dismissal and that he did not want to work again in a bookshop (which was where his experience lay). He explained that he had identified the construction sector as a means of obtaining a new role without undergoing significant training in circumstances where he had been dismissed from his previous role. He said that he would have gone straight to a security guard role if he had the money to fund the training. He further explained that he was awaiting the outcome of his appeal against the dismissal and had hoped to be reinstated.

52. The Tribunal awards the Claimant the sum of £213.53 for construction industry expenses and the sum of £324.99 for security guard training, on the basis that both expenses are reasonably incurred and flow directly from the dismissal. The Claimant's explanation about the employment choices he made immediately following his dismissal is coherent and reasonable in light of his circumstances. The expenditure in question is minimal and there is no question that the Claimant has acted frivolously or capriciously.

Employee Benefits

53. The Claimant had a Waterstones staff discount card. The card was framed as a discretionary benefit which did not form part of an employee's contract of employment. The card provided a 50% discount on books and other products during the period of employment. An employee who was employed for ten years was entitled to retain the card for ten years post-employment. The policy governing the staff discount card provided that if employment ended due to gross misconduct the card would be deactivated. In the circumstances the Claimant's card was deactivated following his dismissal on the incorrect ground that he had been dismissed for gross misconduct.

54. At the hearing the Respondent expressed itself as unwilling to reactivate the card with a view to providing the Claimant with the discount following termination of employment. The Claimant's submission was that he spent approximately £300 per year on the card. The Respondent subsequently indicated that the retail price of books bought by the Claimant was £221.32 in 2021, £615.59 in 2020 and £2,130.04 in 2019. The Respondent submitted that the substantially larger sum in 2019 may have reflected the fact that the system underlying the card was changed in 2019. Taking an average of the figures provided by the Respondent for 2020 and 2021, we have assumed an annual spend of £420 on the discount card.

55. The Claimant's claim for wrongful dismissal allows him to recover the benefit of the discount card during his notice period. The Claimant's compensatory award for unfair dismissal permits him to recover benefits lost. Given the Polkey reduction, the Claimant could, therefore, claim the loss of the benefit for a total period of six months. This sum amounts to £105 (reflecting the value of a 50% discount on a six-month spend of £210).

56. The ability to claim sums to cover the loss of the benefit beyond August 2023 requires consideration in the context of wrongful dismissal. It is possible, as the case law indicates, for a claimant to claim damages which flow from issues other than the dismissal itself. However, in these circumstances, the Claimant has only brought a claim for wrongful dismissal and not for other breaches of contract and, accordingly, the Tribunal has not determined liability in respect of a claim for a breach of contract other than the dismissal itself. To that extent, the Tribunal does not have jurisdiction to award sums for loss beyond the sums awarded in respect of wrongful dismissal and unfair dismissal.

Loss of Statutory Rights

57. In his Schedule of Loss the Claimant claimed £600 in respect of loss of statutory rights. The Tribunal awards the Claimant £500 in respect of loss of statutory rights.

Breakdown of Calculations

The Tribunal sets out a breakdown of calculations below.

Gross weekly pay - £307.20

Net weekly pay - £272.27

Effective date of termination - 3 February 2022

Period of continuous service – 13 years

Claimant’s age at effective date of termination – 36 years

Basic Award	
Basic award (£307.20 x 13)	£3,993.60
Deduction for conduct – 50%	£1,996.80
Total Basic Award	£1,996.80
Compensatory Award	
Prescribed Element	
Loss of wages from 29 April 2022 to 2 August 2022 (excluding wrongful dismissal damages for notice) (£272.27 x 14 weeks)	£3,811.78
Acas Uplift – 12.5%	£476.47
Total Prescribed Element	£4,288.25
Non-Prescribed Element	
Expenses incurred in seeking employment	£538.52
Loss of Statutory Rights	£500.00
Pension losses	£199.68
Staff discount card	£105.00

ACAS uplift – 12.5%	£167.90
Total Non-Prescribed Element	£1,511.10
Wrongful Dismissal	
Loss of wages from 3 February 2022 until 28 April 2022 (twelve weeks) (£272.27 x 12)	£3,267.24
ACAS uplift – 12.5%	£408.41
Total wrongful dismissal	£3,675.65
TOTAL AWARD	£11,471.80

EJ Coen

Dated: 29 October 2023.....

Judgment and Reasons sent to the parties on:

30/10/2023