



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss C Mills

**Respondent:** First Greater Western Limited

**Heard at:** Bristol Employment Tribunal  
**On:** 19 July 2024

**Before:** Employment Judge Youngs  
Mrs D England  
Ms S Maidment

## Representation

**Claimant:** Mr H Menon, counsel  
**Respondent:** Ms I Egan, counsel

**JUDGMENT ON REMEDY** having been sent to the parties on 6 September 2024 (reasons having been delivered orally on 19 July 2024) and written reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS - REMEDY

1. The Claimant's claim for unfair dismissal having succeeded, the issue of remedy was determined by the Tribunal at a separate remedy hearing on 19 July 2023. Oral reasons were provided the same day. The Claimant subsequently requested written reasons, indicating that she was concerned that she had not yet received payment from the Respondent.
2. The Claimant was represented at the hearing by Mr Menon, counsel. She provided a statement and gave oral evidence. The Respondent was represented by Ms Egan, counsel. Both counsel made submissions.

## Issues

3. At the start of the hearing, the issues to be determined were discussed and agreed as follows:

4. The parties had agreed that a basic award was payable, and that the amount of the basic award was £5,139.
5. In terms of the compensatory award, the Tribunal had to consider:
  - a. What financial loss did the dismissal cause the Claimant?
  - b. Did she take reasonable steps to mitigate her loss?
  - c. What period of loss should the Claimant be compensated for?
6. As part of this we also needed to consider how to calculate a week's net pay from net annual salary, and whether the Claimant should benefit from an uplift to her calculation of a week's pay on the basis that a pay award was made by the Respondent and applied to those in employment as at 30 November 2023. It was agreed that where a pay award was made, it was back-dated to a date prior to the Claimant's dismissal.
7. No issue was raised by either party in respect of any reduction or increase based on any alleged failure to follow the ACAS code of practice.

### **The law**

8. Section 118 of the Employment Rights Act 1996 ("ERA") states as follows:
  - (1) 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 ... and
    - (b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126).
9. Sections 123, 124, 124A and 126 of the ERA set out the principles to be applied in calculating the compensatory award. Without repeating the entirety of those sections here, we reminded ourselves of the the key principle in section 123 is 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."
10. The objective of a compensatory award is "to compensate, and compensate fully, but not to award a bonus" (Norton Tool v Tewson [1972] ICR 501).

### **Findings of fact and conclusions**

11. We took into account the evidence to which we were taken, the Claimant's statement and oral evidence, and the submissions of both parties.

### The backpay

12. The general principle when calculating loss of earnings is that loss is based on what the Claimant would have earned had she remained in the employment of the Respondent.

13. The Claimant asserted that the Respondent had agreed a pay increase for staff, to be backdated prior to the date that she left the employment of the Respondent, and that therefore she should have the benefit of the pay award in calculating loss from the date of dismissal onwards. The Claimant was not claiming that any period prior to dismissal should be taken into account in considering the back pay issue. The Respondent noted that the Claimant had disclosed evidence of the uplift and back pay issue late, and the Respondent had not therefore had time to fully consider the issue.
14. We were taken to an email from a trade union representative to the Claimant, setting out that a pay award of the greater of 5% or £1,750, backdated to 2022, had been agreed by the Respondent. The Claimant's evidence was that the backdating would have applied to the time of her dismissal. The Claimant agreed that pursuant to the terms of the agreement between the Respondent and the trade unions, she would have had to have remained employed as at 30 November 2023 to receive the pay award. She claimed that had she not been unfairly dismissed, she would have received the pay award. For the Claimant, £1,750 per annum was more than a 5% increase, and therefore she claimed that her annual salary for the purposes of calculating loss should be increased by £1,750 per annum.
15. There was tentative general agreement by the Respondent that the email from the trade union representative to the Claimant was correct. The Tribunal noted that even where this disclosure was made late, this is something that the Respondent would have been able to check prior to the remedy hearing, or even during the course of the remedy hearing. We noted that if the Respondent discovers after the hearing that the pay award for the Claimant would have been different, reconsideration can be sought, subject to the provisions of the Employment Tribunals Rules.
16. We had already made a finding (at the liability hearing) that the Claimant may have been fairly dismissed, and found that a Polkey reduction of 50% should be applied.
17. We concluded that it would be just and equitable to calculate loss to include the pay award, but on a net basis and taking into account that such net loss will also be subject to the 50% Polkey deduction. £1,750 equates to 5.5% of the Claimant's gross salary, so we decided to uplift the Claimant's net weekly pay by 5.5% to reflect this award.

A week's pay:

18. Section 229(2) of the ERA provides that the tribunal must apportion the payment in the manner that it considers just.
19. We took into account that it is generally accepted that that full time employees work 260 days a year and that in most cases a day's pay will be 1/260 of a year's

pay. We applied that principle, and then multiplied a day's pay by 5 to give a week's pay.

20. The Claimant's net pay as at date of dismissal was £25,313. Increasing this by 5.5% to account for a £1,750 gross pay award gives a net revised annual salary of £26,705.215. Dividing that net salary by 260 and multiplying by 5 gives a net week's pay of £513.56.
21. We were satisfied that this is a just way of calculating a week's pay in this case.

#### Period of loss

22. The Claimant obtained a number of different roles to mitigate her loss.
23. She commenced a role with Specsavers on 8 August 2022, had a cleaning role for a short period, and then took up employment with Thames Water from 28 November 2022. There was an issue as to whether the pay slip in the Bundle represented the totality of the Claimant's earnings in the cleaning role. There was no evidence to the contrary and we accepted the Claimant's evidence that the totality of her earnings in this regard had been disclosed.
24. As at the date of the remedy hearing, the Claimant remained employed by Thames Water and had obtained a fixed period secondment into a higher-paid role with Thames Water from February 2024 to August 2024. There is no suggestion that her employment with Thames Water will terminate after this, although the Claimant believes she will revert back to the original Thames Water role. We are satisfied that the Claimant has taken reasonable steps to mitigate her loss.
25. We in any event considered what loss the dismissal caused to the Claimant and what compensation is just and equitable to award.
26. After November 2022, the Claimant did not apply for another alternative role until 10 September 2023, approximately 6 weeks prior to the liability hearing of her Claim, and over 9 months after commencing work with Thames Water.
27. We are mindful that s.123 of the ERA requires that compensation will be such amount as the Tribunal considers just and equitable having regard to the loss sustained by the Claimant in so far as is attributable to the Respondent. We are required to make an assessment based on findings of fact, and then 'to assess the loss flowing from the dismissal, using [our] common sense, experience and sense of justice' (see *Software 2000 Ltd v Andrews* [2007] IRLR 568, per Elias P).
28. The tribunal carefully debated the point to which loss should be calculated. Taking into account the timeline of events, we conclude that the Claimant had settled into her employment with Thames Water. The Claimant was not challenged as to whether or at what point she may have made a decision to stay at Thames Water, notwithstanding any potential ongoing loss, and after much

consideration we were satisfied that loss to the date of this hearing is just and equitable. However, we find as fact that the Claimant has chosen to remain with Thames Water, and in any event she is now earning more and it cannot be said with certainty that her secondment has to end or that she will revert back to a previous level of pay with no pay rise. It has been two years since the Claimant's dismissal. She has held a role with Thames Water for 20 months. We concluded it would not be just and equitable to compensate the Claimant beyond the date of this hearing.

29. We therefore conclude that insofar as there was a difference in pay from that which the Claimant would have earned with the Respondent from today's date onwards, any such loss should not be attributed to the Respondent.
30. Accordingly, we find that the period of loss from the date of dismissal was from 27 July 2022 to 19 July 2024 (the date of the remedy hearing) inclusive, which is 103 weeks and three days.
31. The Respondent submitted that the Claimant's loss should be limited on the basis that the Claimant would have remained on sick leave for the period after her dismissal, and therefore she would have been paid statutory sick pay only. We carefully considered this, but we were not satisfied that the Claimant would have remained off sick. She did in fact go to work for a new employer from August 2022, and was doing additional work for a cleaning company. We consider that it is too speculative to limit loss on the basis of the Claimant potentially remaining off sick. We note that the Claimant's compensation will be reduced by 50% in any event to account for the potential of a fair dismissal, whether on grounds of ill health, some other substantial reason or another potentially fair reason.

Calculation of the Claimant's loss

32. A day's pay being 1/5 of a week's pay, the Claimant's total loss, prior to reductions for mitigation or by way of *Polkey* deduction, for the period set out above is

$£513.56 \times 103 \text{ weeks} = £52,896.68,$   
plus  
 $(£513.56 / 5 \text{ days}) \times 3 \text{ days} = £308.14$   
Total = £53,204.82

33. The Claimant's net mitigation in the period to 31 May 2023 was as follows:
  - a. The Claimant received notice pay from the Respondent: We calculated the net notice pay based on a net week's pay of 486.79 (i.e. without the pay award) (calculated in the same way as we calculated a week's pay previously):  $£486.79 \times 9 \text{ weeks} = £4,381.11;$
  - b. The Claimant received £4,803.87 from working at Specsavers;
  - c. The Claimant received £240 from her cleaning job.

34. The Claimant's pay during her employment with Thames Water for the period up to 31 May 2024 was £33,009.21 net.
35. There was nothing in the Bundle to confirm the Claimant's pay from Thames Water for June or July 2024, although the Claimant confirmed that she was still employed by Thames Water.
36. We therefore based June's net pay on the Claimant's previous month's pay, i.e. £2,068.10. There were exactly three working weeks in July up to the date of today's hearing, so we calculated net pay for the three weeks in July 2024 by using the month's pay of £2,068.10, multiplying by 12 to get a year's pay, dividing by 260 to get a day's pay and multiplying that figure by 5 to give us a week's net pay. A week's net pay on this basis was £477.254, with three week's net pay therefore being £1,431.76.
37. In total, therefore, the Claimant's net mitigation to the date of this hearing was £45,934.05.
38. This gives a total net loss of £53,204.82 – £45,934.05 = £7,270.77 (prior to the *Polkey* deduction).

Loss of Statutory rights

39. The Claimant claimed £600 by way of loss of statutory rights. We considered this to be just and reasonable. We noted that it is less than two weeks' gross pay, which has been found to be reasonable in other cases.

**Total loss and application of *Polkey* reduction**

40. The Claimant's total loss, prior to *Polkey* reduction is: £7,870.77.
41. Applying a 50% *Polkey* reduction gives a figure of £3,935.39, which is the total compensatory award payable to the Claimant.
42. This is payable by the Respondent, in addition to the agreed basic award of £5,139.

Employment Judge Youngs  
20 October 2024

JUDGMENT SENT TO THE PARTIES ON  
11 November 2024

FOR THE TRIBUNAL OFFICE

**Public access to employment tribunal decisions**

Judgments (apart from judgments under rule 52) and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.