# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
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| **Mr Kinkela Makanda** | **v** | **London School of Economics** |

**Heard at**: London Central
**On**: 13 and 14 January 2025

**Before:** EJ G Hodgson
Ms L Moreton
Ms D Keyms

**Representation**

**For the Claimant:** In person
**For the Respondent:** Mr Alexander Bryant, counsel

# JUDGMENT

1. The unanimous judgment of the tribunal is that:
   a. The respondent is ordered to pay to the claimant a basic award of £7,415.60
   b. The respondent is ordered to pay a compensatory award of £5,621.26.
   c. The respondent is ordered to pay damages for wrongful dismissal of £4,449.33.

3 The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply. For the purposes of the regulations:
   (a) The prescribed element is: £3,587.14.
   (b) The prescribed period is: 10 December 2021 to 6 February 2022.
   (c) The grand total of the award is: £17,486.19
   (d) The excess over the prescribed element is: £13,899.05

# REASONS

## Introduction

1. Following a hearing in March 2023, the tribunal upheld the complaints of unfair dismissal and wrongful dismissal. It rejected claims of dismissal and detriment for union related activities.

2. The parties have not been able to agree remedy. The remedy hearing proceeded on 13 January 2025. The decision was reserved.

## The Issues

3. At the hearing, the tribunal, pursuant to section 112(2) Employment Rights Act 1996 explained that it may be possible to order reinstatement or re-engagement. The claimant stated he wanted the tribunal to make such an order.

4. At he hearing, the issues to be determined were clarified.

    a. Should the tribunal order reinstatement or in the alternative re-engagement.
    b. In deciding whether there should be an order for reinstatement or engagement, it will be necessary to consider the following: the wishes of the claimant; whether it is practicable to comply with the order for reinstatement or re-engagement; and if the claimant caused or contributed to some extent to dismissal, whether it would be just to order his reinstatement.
    c. If reinstatement re-engagement is ordered, on what terms should be made.
    d. What is properly payable for any basic award..
    e. What sum is properly payable for the compensatory award.
    f. Should there be any uplift for breach of relevant ACAS code pursuant to section 207A Trade Union and Labour Relations (Consolidation) Act 1992

## Evidence

5. The respondent prepared a bundle of documents which contained any documents relevant to remedy. We received some additional documents.

6. The respondent filed a further statement from Mr Alan Blair, and he gave oral evidence.

7. In addition the respondent provided a bundle of authorities and written submissions on the law.

8. Following direction of the tribunal, the respondent served an updated counter schedule of loss.

9. The claimant did not file an updated schedule of loss, and we were directed to his original schedule together with some additional emails.

10. The claimant did not file any additional witness statement. He gave oral evidence he was cross examined by the respondent.

## The facts

11. We have regard to all the facts found at the original liability hearing.

12. The claimant was employed as a cleaner. He initially worked for contractors and became employed by the London School of Economics and Political Science, the respondent, following a TUPE transfer on 5 March 2018. He was employed from 11 October 2011 until 7 October 2021, when he was dismissed summarily.

13. For some time prior to his dismissal by the respondent, he was working at his church approximately one day a week. He has continued with that employment. However, he has not provided full details, and he failed to mention the employment when initially asked whether he undertaken any work since his dismissal.

14. Since his dismissal, he has secured no other employment.

15. The claimant has received universal credit. The universal credit statements record the claimant's continuing earnings.

16. On the balance of probability, we find that those earnings relate to his employment with the church, and represent money he would have earned in addition to any potential earnings with the respondent during the same period.

17. The claimant has some evidence of applications through the job centre plus website for vacancies, largely concerned with cleaning. We have not seen the content of his applications or any replies. The claimant has given limited details of when he began to apply for jobs, and we find he failed to apply for jobs for two years following his dismissal.

18. There is no evidence the claimant has made any applications through any commercial agencies, commercial websites, or directly to employers.

19. The respondent has provided evidence that during the relevant period, there were numerous appropriate cleaning jobs, whether as agency work or full time, for which the claimant could have applied. We accept the respondent's evidence that the market for cleaners was, and remains, buoyant.

20. The claimant has not addressed in evidence his earnings, and he has not sought to dispute the figures put forward by the respondent.

21. The respondent's counter schedule of loss records the relevant earning totals.

22. The claimant was employed from 11 October 2011 to summary dismissal on 7 October 2021. The respondent acknowledges the effective date of termination, must be extended pursuant to section 97(2) Employment Rights Act 1996 for limited purposes. It follows his number of years' service is 10, but this is only for the purposes of section 119(1) (the basic award).

23. We note that in the counter schedule, the notice period has been recorded as 10 weeks for the purpose of wrongful dismissal. However, the effective date of termination is not extended for the purpose of the contractual claim, we find the notice to be given for the purposes of section 86 Employment Rights Act 1996 was 9 weeks, as he had 9 years' employment at the date of dismissal.

24. The claimant's gross monthly pay was £2,148.17 (being £1,998.86 gross plus the respondent's pension contribution of £149.31).

25. His gross weekly wage for the purposes of calculating the basic award was £494.37.

26. The claimant's net monthly pay was £1,859.83, giving a net weekly pay of £428.02.

27. The claimant was a member of the SAUL pension scheme. He contributed £119.93 per month. The respondent contributed £149.31. For these purposes, the claimant's contribution is not deducted from the net pay, as set out above.

## The law

28. Section 116 Employment Rights Act 1996 provides.

> **(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.**

29. An order for reinstatement or re-engagement cannot be refused merely because it is inexpedient (see **Qualcast (Wolverhampton) Ltd v Ross** [1979] IRLR 98, [1979] ICR 386, EAT.

30. The availability of possible jobs is to be assessed as at the date that any order would take effect: **Great Ormond Street Hospital v Patel** UKEAT/0085/07.

31. The Court of Appeal in **Port of London Authority v Payne** [1994] IRLR 9 held that the tribunal must make a determination on the evidence in relation to practicability at the first stage. This is provisional. It is at the second stage that the final determination has to be made, with the burden of proof then clearly on the employer. The 'provisional' nature of practicability in the initial order was accepted and emphasised by the Supreme Court in **McBride v Scottish Police Authority** [2016] UKSC 27.

32. An order may not be practicable if there remains a continuing breakdown of trust and confidence between the parties: **Wood Group Heavy Industrial Turbines Ltd v Crossan** [1998] IRLR 680, EAT. In in this case the employers remained convinced of the substantive allegations of misconduct. In such a case, what the tribunal must do is to determine whether this employer has genuinely and reasonably lost confidence. The

tribunal should not substitute its own view as to that misconduct **United Lincolnshire Hospitals NHS Foundation Trust v Farren** UKEAT/0198/16. In that case the employment tribunal had accepted that the employee had administered drugs in breach of the trust's policy but considered that the employee had long service, and in the view of the tribunal, the employee could be trusted to act properly in an environment other than an accident and emergency unit, given her experience, record and professional commitment. The tribunal was not permitted to substitute its own view about the trust to be placed in the employee. The correct approach was to ask whether this employer genuinely believed that the claimant had been dishonest, and whether that belief had a rational basis.

33. In **Kelly v PGA European Tour** [2021] EWCA Civ 559 the Court of Appeal confirmed the **Farren** approach. Underhill, LJ referred to need for a "reasonable basis" for any lack of confidence.

34. The mere fact that the initial dismissal was for misconduct does not make reinstatement impracticable even if some managers still believe in guilt (especially in a large organisation) see **London Borough of Hammersmith & Fulham v Keable** [2022] IRLR 4, EAT.

35. Section 207A Trade Union and Labour Relations (Consolidation) Act 1992 deals with the effect of failure to comply with a relevant code of practice

> **(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.**
> **(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that--**
>
> > **(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,**
> > **(b) the employer has failed to comply with that Code in relation to that matter, and**
> > **(c) that failure was unreasonable,**
>
> **the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.**
> **…**
> **(4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice is-sued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes.**
> **…**

36. **Allma Construction Ltd v Laing** UKEATS/0041/11 (25 January 2012, unreported) Lady Smith suggested that a tribunal should approach an uplift under this section in the following way: 'Does a relevant Code of Practice apply? Has the employer failed to comply with that Code in any respect? If so, in what respect? Do we consider that that failure was unreasonable? If so, why? Do we consider it just and equitable, in all the circumstances, to increase the claimant's award? Why is it just and equitable to do so? If we consider that the award ought to be increased,

by how much ought it to be increased? Why do we consider that that increase is appropriate?

**Discussion and conclusions**

37. The first matter we must consider is whether the claimant should be reinstated or re-engaged.

38. For the reasons we will come to, we find that the question of reinstatement or re-engagement, both turn on whether it is practicable for the employer to comply with the order.

39. We first consider the question of reinstatement. There is no suggestion the role occupied by the claimant does not exist and therefore there is a potential for his being reinstated into that original role.

40. We are required by section 116(1) to consider a number of factors.

41. First, does the claimant wish to be reinstated. It is clear that he does.

42. Second, did the claimant cause or contribute to his dismissal, and if so would it be just and equitable to reinstate him. We have already considered whether he contributed to, or caused his dismissal. We have found that he did not contribute to the dismissal. It follows that we do not need to consider whether it would be just and equitable to reinstate him, having regard to his conduct.

43. Third, we must consider whether it is practicable for the employer to comply with the order for reinstatement.

44. It is the respondent's case that it is not practicable to reinstate the claimant. The respondent's overarching submission is that the mutual trust and confidence between the parties is so damaged that neither reinstatement nor re-engagement is practicable. In support of this it relies on a number of assertions. The claimant refused to mediate with Mr Odouye, demonstrating the claimant's continuing hostility. The claimant's evidence that he did not have a problem with either Mr Odouye, or the respondents managers, should be rejected. The claimant's conduct of the proceedings to be taken into account. In particular it should be found that he has sought to mislead the tribunal both in relation to his undertaking work at the church, and his assertion that he does not believe there is a breakdown of trust. The respondent would have to monitor the claimant, and he may find it unacceptable. The claimant may feel untouchable, and this would inhibit management of him. If the claimant did intimidate anyone it may lead to heightened criticism of the respondent. The length of time makes it impracticable. The belief that he committed misconduct was held by the senior management of the Department and he had rational grounds for his belief. Mr Odouye would find it difficult to work with the claimant and he could not be reasonably expected to do so as it

would heighten his anxieties. The claimant had been critical of Mr Blair and other managers and had unreasonably raised allegations of bias.

45. It is the claimant's case that he is able to work with all employees and that he does not have any particular resentment towards any individual. He had not engaged in misconduct and it was unreasonable and irrational for the respondent to believe he had. His contact with individuals such as Mr Odouye is likely to be limited. He was prepared to accept reasonable instruction and he asserted the mutual trust and confidence had not broken down.

46. We heard from Mr Blair. We have no doubt that Mr Blair maintains his view that the claimant is guilty of misconduct. In our liability decision we noted that he considered the claimant blameworthy for a number of incidents, including historical incidents had not been reinvestigated. He maintains that the claimant's couduct during the final incident was blameworthy, despite the clear difficulties with the evidence as previously found. We do not need to consider those matters again. It is clear that Mr Blair does not accept the reasoning of the tribunal and remains convinced that the decision to dismiss was both reasonable and supported by appropriate evidence. Mr Blair continues to have a very low opinion of the claimant to the point that he is hostile to any re-employment.

47. Mr Blair is the senior manager in the department. We do not accept that it is practicable, whether by way of reinstatement or re-engagement, to appoint the claimant to a position whereby Mr Blair is not, ultimately, responsible for his management. Whilst we accept that Mr Blair has a genuine belief that mutual trust and confidence has been destroyed, the basis for that belief is open to question. As we noted in our liability decision, there had been a number of historical investigations, but they had not resulted in findings against the claimant, or disciplinary action. For the reasons previously stated, the final incident could not support a finding of gross misconduct. The claimant was neither in fundamental breach for the purposes of wrongful dismissal, nor was the finding one open to a reasonable employer. We have no doubt the position adopted by Mr Blair is unreasonable. Further, given the lack of supporting evidence, the position adopted is irrational, at least when considering the alleged misconduct advance before us. For a decision to be rational, there should be some rational basis and that should be based on the evidence. When the evidence is unsupportive, no matter how strongly or genuinely the belief is held, it may not be a rational belief.

48. In this case, the claimant asserts mutual trust and confidence has not broken down. We do not accept that assertion. We do not accept the claimant's evidence that he is not hostile towards Mr Odouye . Had he truly maintained neutrality, as he sought to persuade us, it is likely he would have engaged in mediation. He chose not. We find he continues to view Mr Blair as biased. He has no confidence in the respondent's reasonableness, or its ability to act reasonably, as illustrated by his allegations in relation to his trade union activity, which ultimately were not

supported by evidence. All of this indicates that the claimant is hostile to the respondent and does not genuinely intend to return in a manner which is consistent with the mutual trust and confidence required to ensure the continuation of employment relationship.

49. Had we found that the claimant was capable of submitting to the reasonable managerial direction the respondent, it is likely we would have reinstated the claimant. However, given our findings of a breakdown of mutual trust and confidence on both sides, we find that this is not a relationship that can be salvaged or expected to work. In those circumstances we refuse both reinstatement and re-engagement. As for re-engagement, in this case there is not prospect of re-engagement into a position for which Mr Blair would not have overall responsibility.

50. It follows we must now consider compensation.

51. As for the basic award, we accept the respondent calculation. The gross weekly pay is £494.37. The correct multiplier is 1.5, as the claimant was over the age of 41 for all years of employment. There were 10 years' service (allowing for the adjustment to the effective date of termination). The basic award is £7,415.60. There is no contributory fault, and it is not subject to deduction.

52. As for the compensatory award, it is respondent's position the claimant has failed to mitigate his loss. We find the respondent has proved that the claimant has failed to mitigate his loss.

53. The claimant suggests that he was unable to seek employment earlier because of the effect of the dismissal and the depression caused. We have no doubt the dismissal caused anxiety and distress. However, the claimant was able to continue in in his employment with the church. He has failed to produce any medical evidence in support. The evidence he gave us suggested he did not initially take antidepressants, albeit he has now begun to.

54. We find that while he may have been distressed, that did not prevent him from applying for employment. There were numerous jobs available. He could have accessed those jobs in numerous ways, including by registering with agencies and making individual applications. He failed to take any of those steps.

55. The claimant has put no evidence before us as to what sort of position he could have obtained, and what the pay would have been. We are conscious that the claimant may not have obtained a position at the same seniority, at least not initially. He has not sought to argue that he would have been able to obtain employment at the same seniority. In the circumstances the evidence we have is limited.

56. We have a broad discretion we find that the just and equitable approaches is to make an award for a period by which the claimant should

have obtained employment. We find he should have obtained equivalent full-time employment by no later than four months following the initial dismissal. We will deal the calculation below.

57. We find claimant should be awarded £500 for loss of statutory rights.

58. We need to consider the relevant uplift. Pursuant to section 207A Trade Union and Labour Relations (Consolidation) Act 1992 (see above).

59. We have regard to the guidance given. We have considered whether there is a breach of the ACAS code 2015. We have concluded that there are a number of clear breaches.

60. We accept there was an investigation of the final incident. However, the previous incidents were also relied on by Mr Blair, and there was no further investigation of those. The basic facts of the final incident were established. We find that the investigation was concerned with the final incident, and there is no clear breach of paragraph 5.

61. We find there is a breach of paragraph 9. The employee should be notified in writing of the alleged misconduct. As noted in our liability decision there were real difficulties. He was accused of assault, but the detail of the assault was never set out. Moreover, Mr Blair considered allegations of misconduct which went beyond those set out in any letter. Effectively he revisited previous incidents which had not been further investigated and reached different conclusions, but without appropriate evidence. The purpose of paragraph 9 is to ensure that the employee knows the case to answer. The allegation should be clear, precise, and focused. We find that the respondent failed in this respect and that is a breach.

62. Fundamentally, the decision to dismiss incorporated findings of misconduct which were never put to the claimant. Those findings related to previous allegations which Mr Blair unilaterally reopened. The claimant was not allowed a reasonable opportunity to set out his case in the light of the full allegations. That is a clear breach of paragraph 12.

63. The purpose of the code is to ensure fairness and transparency in the procedure. In our view the respondent fell far short of that requirement and the breaches were, cumulatively, serious.

64. We have a broad discretion as to what percentage to apply. The seriousness of the breach is one factor that we may take into account. Also, we should have regard to the overall value of the award. In this case the award is relatively low. In those circumstances, we considered that the uplift should be 20%. We should note, had the potential compensation been significantly higher, it is likely that we would have reduced the percentage.

65. The respondent accepts that an award for wrongful dismissal should be made on a gross basis. As noted, the respondent has calculated that on 10 years' continuous service. That approach is incorrect. It should be nine years continuous service because the effective date of termination under section 97 is only extended for limited purposes, including calculation the basic award, and not generally. It is not extended for the purpose of wrongful dismissal.

66. The award for wrongful dismissal should be 9 x £494.37 = £4,449.33.

67. We award four months' net loss of earnings (£7,439.32). From this we must deduct nine weeks net pay (£3,852.18). This gives a subtotal for loss of earnings of £3,587.14.

68. Given the length of time involved, we award loss of pension on a simple basis being four months' worth of respondent's contributions (4 × £149.31). The award will be £597.24.

69. In addition we add £500 for loss of statutory rights.

70. The subtotal for the compensatory award is £4,684.38.

71. The ACAS uplift of 20% is £936.87.

72. The total of the compensatory award is £5,621.26

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Employment Judge Hodgson

Dated: 29 January 2025

Sent to the parties on:

5 February 2025

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For the Tribunal Office