EMPLOYMENT TRIBUNALS

Claimant: Ms Haile

Respondent: Co-operative Group Limited

Heard at: London South (by video)

On: 9 January 2025

Before: Employment Judge Evans
Ms Cook
Ms Oldfield

Representation
Claimant: in person
Respondent: Ms Nickles, counsel

JUDGMENT

1. The Tribunal makes no order for reinstatement.

2. The respondent shall pay the claimant the following sums in respect of her complaint of unfair dismissal which was found to be well-founded by a judgment sent to the parties on 15 February 2024:

   (a) A basic award of **£2686.90**.

   (b) A compensatory award of **£5969.13.**

   Note that these are the actual sums payable to the claimant after any deductions or uplifts have been applied.

REASONS

Preamble

1. These are the Tribunal's written reasons for its decision given orally at the end of the remedy hearing on 9 January 2025. The claimant made a request for written reasons immediately after we had given our oral reasons.

2. The judgment on liability had been sent to the parties on 15 February 2024 and written reasons were subsequently sent after a request had been made on 2 April 2024 (together, "the Judgment on Liability"). The claimant's complaints were dismissed, apart from her complaint of unfair dismissal. The purpose of the hearing today was therefore to decide remedy in relation to that complaint.

3. The hearing today was a hybrid hearing. The three members of the Tribunal attended by video (cloud video platform). The claimant, Ms Nickles and Mr Ullah attended in person. The arrangements worked well except that part-way through the morning Ms Cook's internet connection ceased working. Thereafter she attended the hearing by phone. When asked, neither party had any objection to this.

4. The Tribunal had before it a bundle running to 296 pages and witness statements from the claimant and Mr Ullah. All page references in these written reasons are to the page numbers of the bundle. Although the claimant had sent additional documents to the Tribunal the day before the hearing, after a discussion of the scope of the hearing today, and in particular emphasis by the Tribunal on the facts that we would not (1) consider her criticisms of her previous legal advisers or (2) re-open issues decided by the Judgment on Liability, it was agreed that all relevant documents were contained in the 296 page bundle.

5. It should be noted, however, that the claimant did not accept that the scope of the remedy hearing today was limited in the way that we had explained to her. Throughout the remedy hearing she sought to give evidence, ask questions and make submissions on the basis that the Judgment on Liability was wrong, and that she had been the victim of a plot by senior managers. We repeatedly explained that these were not matters which we could consider and reminded her that she has an appeal to the Employment Appeal Tribunal in respect of the Judgment on Liability. However, the claimant found it impossible to limit her evidence, questions and submissions to relevant matters. Indeed, she again revisited matters which were irrelevant to the issues to be decided in the remedy hearing when making her request for written reasons immediately after we had given our judgment and the reasons for it.

6. The claimant gave oral evidence and was cross-examined by the respondent's representative. Mr Ullah also gave oral evidence and was cross-examined by the claimant.

7. An unusual feature of this remedy hearing has been that Employment Judge Evans was not the Employment Judge who had presided over the liability hearing

last year. That was Employment Judge Dyal, who no longer sits as an Employment Judge. The panel today was constituted specifically to deal with the separate matter of remedy.

Liability judgment as relevant to remedy

8. The Judgment on Liability did, however, contain conclusions relevant to the question of remedy. Specifically, that:

   8.1. The basic award should be reduced by 50% on account of contributory conduct;

   8.2. Any compensatory award should be reduced by 75% in respect of the period between 29 December 2021 and 18 January 2022 on account of contributory conduct and in relation to any subsequent period on account of Polkey.

The issues to be decided on 9 January 2025

9. It was agreed at the beginning of the hearing today that the issues for us to decide, taking account of course of the reductions to be made to which we have just referred, were as follows, given that the claimant wished to be reinstated (but not re-engaged):

10. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

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

    11.1.1. What financial losses has the dismissal caused the claimant?

    11.1.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

    11.1.3. If not, for what period of loss should the claimant be compensated?

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

    11.1.5. Did the respondent fail to comply with it by failing to carry out a reasonable investigation?

    11.1.6. Does the statutory cap of fifty-two weeks' pay apply?

12. What basic award is payable to the claimant?

The Law

The remedies: orders and compensation

13. Having found a claim of unfair dismissal well-founded, section 112(2) of the Employment Rights Act1996 ("the 1996 Act") requires the Tribunal to explain what orders may be made under section 113, and the circumstances in which they may be made, and ask the claimant whether they wish the Tribunal to make such an order. If the claimant expresses such a wish, the Tribunal may make such an order. If no order is made, the Tribunal shall make an award of compensation calculated in accordance with section 118 to 126 and which may therefore include both a basic award and a compensatory award.

Orders for reinstatement or re-engagement

14. Section 113 of the 1996 Act provides for an order for reinstatement (in accordance with section 114) or an order for re-engagement (in accordance with section 115).

15. An order for reinstatement under section 114 is an order that the respondent will treat the claimant in all respects as though they had not been dismissed. It must specify various matters including any arrears of pay due to the claimant and the date by which the order must be complied with.

16. The process to be followed if the claimant wishes to be reinstated is set out in section 116 of the 1996 Act as follows:

> *(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.*

Practicability

17. Turning to the question of practicability, the Tribunal's determination of that issue when it considers whether to make an order of reinstatement or re-engagement is provisional. In Port of London Authority v Payne [1994] IRLR 9 the Court of Appeal held that the determination at the first stage is of necessity provisional. Neil LJ stated:

> *… some determination has to be made at stage 1. But the determination or assessment is of necessity provisional. The final conclusion as to practicability is made when the employer finds whether he can comply with the order within the period provided for reinstatement or re-engagement. At this second stage the burden of proof rests firmly on the employer.*

18. Practicability is to be assessed as at the date when the reinstatement or re-engagement would take effect.

19. The meaning of practicability was considered in Port of London Authority v Payne. Neil LJ said:

> *The standard must not be set too high. The employer cannot be expected to explore every possible avenue which ingenuity might suggest. The employer does not have to show that reinstatement or re-engagement was impossible. It is a matter of what is practicable in the circumstances of the employer's business at the relevant time*

20. Matters relevant to the question of practicability may include amongst other matters:

    20.1. The fact that the atmosphere in the workplace is poisoned;

    20.2. The fact that the employee has shown that they distrust or lack confidence in their employer and would not be a satisfactory employee if reinstated;

    20.3. That there has been a breakdown of trust and confidence;

    20.4. That the employee has made allegations against the person with whom they would be working if reinstated;

    20.5. The employee's conduct in the internal dispute or litigation.

Basic award

21. An employee who is unfairly dismissed is entitled to a basic award. The basic award is calculated in accordance with section 119 of the 1966 Act.

Compensatory award

22. An employee who is unfairly dismissed is in principle also entitled to receive a compensatory award. This should be calculated in accordance with section 123 of the 1996 Act.

23. Section 123(4) requires the employee to mitigate their loss. This duty can be summarised as follows:

> *… it is the duty of an employee who has been dismissed to act reasonably and to act as a reasonable man would do if he had no hope of seeking compensation from his previous employer.*(Archbold Freightage Ltd v Wilson [1974] IRLR 10)*.*

24. The operation of the principle of the duty to mitigate was clearly expressed as follows in AG Bracey Ltd v Iles [1973] IRLR 210:

The law is that it is the duty of a dismissed employee to act reasonably in order to mitigate his loss. It may not be reasonable to take the first job that comes along. It may be much more reasonable, in the interests of the employee and of the employer who has to pay compensation, that he should wait a little time. He must, of course, use the time well and seek a better paid job which will reduce his overall loss and the amount of compensation which the previous employer ultimately has to pay … [A] man who is dismissed from a £40 a week job may act unreasonably if he does not accept a job bringing in, say, £35 a week. If he does not do so, a tribunal is fully entitled to say, "We are going to take no account of any loss which he could have avoided by taking the £35 a week job". But that still leaves him with a loss of £5 a week, the difference between £40 and £35. A tribunal is fully entitled to take account of that loss, which could not have been avoided by taking the job which they think he should have taken.

25. However, the duty to mitigate does not arise until the employee has been dismissed and if the respondent seeks to argue that the employee has not mitigated their loss then the burden of proof is upon the respondent making that allegation.

26. If a Tribunal concludes that a claimant has failed to mitigate his loss, the approach to be taken is as set out in Savage v Saxena [1998] ICR 357. It should:

    26.1. Identify what steps should have been taken by the claimant to mitigate his loss;

    26.2. Find the date upon which such steps would have produced an alternative income;

    100.1. Reduce the amount of compensation by the amount of income which would have been earned.

Uplift under section 207 A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act")

27. Section 207A of the 1992 Act provides for awards made in claims under any of the jurisdictions listed in Schedule A2 to the 1992 Act (which include a claim of unfair dismissal) to be increased or decreased if it appears to the Tribunal that an employer or employee has unreasonably failed to comply with a relevant code of practice. In summary, in the event of such a failure compensation may be increased or decreased by up to 25% if the Tribunal concludes that it is just and equitable in all the circumstances to do so.

28. The relevant code of practice in this case is "the ACAS Code of Practice 1: Code of Practice on Disciplinary and Grievance Procedures 2015" ("The ACAS Code").

Order of reductions or increases to the compensatory award

29. Various reductions or increases may be made to the compensatory award. The order of these is as follows once amounts received from the employer and post-

dismissal earnings (or any amount in respect of a failure to mitigate losses) have been deducted from the employee's losses:

29.1. Any Polkey reduction;

29.2. Any increase or reduction due under section 124A of the 1996 Act as a result of the application of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act");

29.3. Any reduction under section 123(6) or (7) (contributory fault).

30. The statutory cap is applied after these increases and/or reductions have been made.

Agreed findings of fact

Figures that are agreed between the parties

31. The parties were able to agree the following facts in relation to the claimant's employment and remuneration:

Period of service	13 years
Gross weekly pay (inc London weighting)	£413.37
Net weekly pay (inc London weighting)	£342.50
Pension contributions	Respondent required to make employee pension contributions of 5%

Findings and Conclusions

Reinstatement

32. We have concluded that we should not exercise our discretion under section 113 to make an order of reinstatement for the following reasons.

33. First, we have concluded that it would not be practicable for the respondent to comply with an order for reinstatement. This is because:

33.1. We accept the evidence of Mr Ullah that the manner in which the claimant behaved prior to her dismissal (i.e. refusing to work the shifts she was required to work and so turning up to work twice at the wrong time and refusing to go home) would present significant difficulties in relation to her relationships with her Team Leader colleagues.

33.2. It is clear from her schedule of loss and, indeed, her evidence today that she does not accept the decision of the Tribunal in relation to liability and continues to believe that she was treated in a variety of ways which are not reflected in the Tribunal's findings in the Judgment on Liability. This would in our view be likely to affect both how she behaved on her return to work and her relations with Team Leader colleagues. We refer in this respect in particular to what the claimant says in her schedule of loss under the heading "injury to feelings" (page 100).

33.3. She has made it clear today that does not believe that she did anything wrong at all, despite the Tribunal finding in the Judgment on Liability that the conduct for which she was dismissed was "egregious" (paragraph 162 of the written reasons at page 73). Her attitude in this respect would, we conclude, undoubtedly cause difficulties if we reinstated her.

33.4. Further, and separately, we accept the evidence of Mr Ullah that, in light of the matters for which she was dismissed, the respondent has lost trust and confidence in the claimant. This is completely unsurprising in light of the findings of fact contained in the Judgment on Liability in relation to the claimant's misconduct.

34. Further and separately, we have concluded that it would not be just to order reinstatement in light of the fact that the Tribunal concluded at paragraph [180] of its written reasons that it would be just and equitable to reduce her compensatory award by 75% because:

180.1 The Claimant's nature and character of the misconduct was very serious and in short, she is primarily to blame for the dismissal.

180.2 The misconduct was repeated on a second day.

180.3 The conduct was the reason for the dismissal.

35. In summary, given the extent of the misconduct that resulted in her dismissal, and her ongoing refusal to accept that she did anything wrong at all, it would self-evidently not be just to order her reinstatement and so require the respondent to treat her as though she had not been dismissed at all.

36. We have decided not to order re-engagement because the claimant did not wish us to make such an order. However, if she had sought such an order, we would have refused to make one for similar reasons to those for our refusal of an order for reinstatement.

Mitigation

37. We find that the claimant has failed to take reasonable steps to mitigate her losses: it is some three years now since she was dismissed and she has still not

found employment. We find that she would have done if she had taken reasonable steps to mitigate her losses.

38. We find that the claimant was very upset by her dismissal but was nonetheless able to work in a second job and, indeed, she was able to find some additional work with her second employer between January and August 2022 which, in light of her oral evidence (regrettably she has failed to produce any documentation), we find produced additional net income of £2400.

39. The claimant did not, however, begin to seek another job until November 2022. We find that, taking full account of the upset caused by the unfair dismissal, she could and should have begun to seek other work by no later than September 2022. We note in this respect that the letter from the GP of 30 September 2024 (page 175) does not say that she could not as a result of medical conditions work in the relevant period. We find that whilst it would have been reasonable at this point to have focused her search for jobs on a new sector – the NHS and local authorities, perhaps in light of her experience with her second employer – she should by the end of 2022, that is to say 12 months after the date of her dismissal, have begun to search for jobs in the retail sector where she had many years of relevant experience.

40. We reject her suggestion that it was reasonable of her to decide to not seek any employment at all in the retail sector because of the way she believed she had been treated by the respondent.

41. In light of the evidence of Mr Ullah we find she would have found equivalent employment in the retail sector by 28 March 2023 if she had started to look for such work, as we have found she should have done, by the end of 2022. Accordingly, we find that by 28 March 2023 (65 weeks after dismissal) she would have suffered no further financial losses and so our calculation of her losses should be limited to this date.

Uplift

42. The claimant sought to argue in her schedule of loss that the respondent had failed to comply with the Acas Code in relation to grievances, although she did not explain exactly how. However, the complaint which has succeeded is one of unfair dismissal. The Acas Code in relation to grievances had no relevance to a dismissal when the claimant has been found to have been dismissed for misconduct in which the respondent has been found to have had an honest belief. The fact that the factual background included an unsuccessful grievance by the claimant is insufficient for us to reach a different conclusion. Further and separately, the claimant has not in any event identified in her schedule of loss or witness statement exactly *how* the respondent is said to have failed to comply with the Acas Code.

43. However, in the Judgment on Liability the Tribunal found that there were various procedural failures which contributed to the dismissal being unfair and which included:

43.1. There was not a reasonable investigation because the witness statements of Mr Jayabalasingam and Ms Esplugas-Mateu were not sent to the claimant and they should have been (paragraph [165] of the Judgment on Liability);

43.2. The failure to grant the claimant's request for a postponement of the disciplinary hearing so that she could get legal advice (paragraph [166])

44. The ACAS Code provides at its [4] that two of the elements of a fair disciplinary procedure are that:

- *Employers should carry out any necessary investigations to establish the fact of the case.*

- *Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.*

45. Paragraph [9] of the Code provides:

> *9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.*

46. The Code does not contain any provision requiring the employer to consider adjourning or to adjourn in order for an employee to take legal advice.

47. We conclude, in light of the contents of paragraphs [4] and [9] of the Code, that the respondent failed to comply with the code by failing to provide the claimant with the witness statements relied on by the respondent.

48. The question for the Tribunal, therefore, is whether the failure was unreasonable. We find that it was unreasonable in light of the conclusions in relation to this very point in the context of the fairness of the dismissal.

49. The question therefore becomes whether it would be just and equitable in all the circumstances to make an adjustment in relation to the compensatory award. We find that it would be just and equitable, because there was no good excuse for the respondent failing to send the claimant the witness statements (and we refer to the Tribunal's conclusions at [165] in relation to liability) in this respect, and the failure to send the claimant the witness statements resulted in the process being unfair. However, we limit the uplift to 10%: it is just and equitable to do this in

particular in light of the claimant's very limited participation in the investigation process. She chose not to participate to the extent that she could have done even without the witness statements being sent to her.

The final calculation

50. Our findings and conclusions above result in the claimant's basic and compensatory awards being calculated as set out in this table:

Basic award	13 weeks' pay at £413.37 = £5373.81 Reduced by 50% for pre-dismissal conduct gives:	**£2686.90**
Compensatory award		
Losses – wages 29 December 2021 to 18 January 2022 (3 weeks)	£342.50 x 3 weeks	£1027.50
Losses – pension contributions – 29 December 2021 to 18 January 2022 – 5% of gross weekly pay of £413.37 (3 weeks)		£62.00
TOTAL LOSSES TO 18 JANUARY 2022		£1089.50
Increased by 10% pursuant to s.207 TULR(C)A (Acas Code)	Increase of £108.95	£1198.45
75% reduction for contributory fault	Reduction of	-£898.84
ADJUSTED AMOUNT due to 18 January 2022		**£299.61**
Losses - wages from 19 January 2022 to 28	£342.50 x 62 weeks	£21235

March 2023 (62 weeks)		
Losses – pension contributions – 29 December 2021 to 18 January 2022 – 5% on gross weekly pay of £413.37 (62 weeks)	62 x £413.37 x 5%	£1281.45
Less extra wages earned in period January to August 2022		-£2400
Loss of statutory rights	Add	£500
Sub-total before Polkey reduction		£20616.45
75% Polkey reduction	Reduction of 75%	-£15462.34
Total due after Polkey reduction in respect of period 19 January 2022 to 28 March 2023		£5154.11
Increased by 10% pursuant to s.207 TULR(C)A (Acas Code)		£515.41
Adjusted amount due in respect of period 19 January 2022 to 28 March 2023		**£5669.52**
TOTAL COMPENSATORY AWARD		**£5969.13**

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Employment Judge Evans

Approved on: 12 January 2025

JUDGMENT SENT TO THE PARTIES ON
12 February 2025

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