



Case Number 1301319/2022
Type V

EMPLOYMENT TRIBUNALS

Claimant
Mr M Mistry

BETWEEN
AND

Respondent
E.ON UK Plc

JUDGMENT OF THE EMPLOYMENT TRIBUNAL (REMEDY JUDGMENT)

HELD AT Birmingham ON 30 January 2025

EMPLOYMENT JUDGE GASKELL MEMBERS: Mr S Woodall
Mr P Simpson

Representation

For the Claimant: In Person
For the Respondent: Mrs A Niaz-Dickinson (Counsel)

JUDGMENT

(Sent to the parties on 30 January 2025 – set out here for ease of reference)

The unanimous judgment of the tribunal is:

- 1 Pursuant to Section 116(1)(c) of the Employment Rights Act 1996, it would not be just to make an order for reinstatement.
- 2 Pursuant to Section 116(3)(c) of the Employment Rights Act 1996, it would not be just to make an order for re-engagement.
- 3 The claimant is awarded compensation for unfair dismissal in the sum of **£20145.20** calculated as follows:

(a)	Basic Award	£ 2176
(b)	Compensatory Award	
	Loss of earnings 6 June 2022 – 13 March 2023	
	40 weeks @ £404.44 =	£16176.60
	Loss of pension contributions	
	6 June 2022 – 13 March 2023 40 weeks @ £31.93 =	£ 1277.20
(c)	Loss of Statutory Rights	£ 500

Total Award £20145.20

REASONS

1 The remedy judgment was given orally on 30 January 2025. These written reasons are provided pursuant to a request made by the respondent dated 7 February 2025.

2 After a hearing lasting 5 days with the parties, and a further day in deliberation, by a reserved judgement issued on 11 July 2024, we found that the claimant in this case had been unfairly dismissed. By the same judgement, we dismissed claims for disability discrimination, disability-related harassment, and victimisation.

3 Our finding of unfair dismissal was on a fairly narrow basis:

- (a) We found that the claimant had been dismissed for a reason relating to his conduct which is a potentially fair reason.
- (b) We found that the respondent genuinely and reasonably believed that the claimant was guilty of culpable misconduct.
- (c) We found that the respondent had ample evidence for its conclusions and that it had conducted an adequate investigation.
- (d) We found that the respondent had followed a fair procedure.
- (e) But, we found that having regard to all of the circumstances of the case the decision to dismiss the claimant was outside the range of reasonable responses.

4 At remedy hearing on 30 January 2025 we awarded cessation of £20,145.20. We declined to order reinstatement.

5 In readiness for the hearing on 30 January 2025, the claimant filed an up-to-date schedule of loss in which she calculated his total losses at £66,612.55. The respondent filed a counter schedule of loss which appeared to contender for a total award of £16,270.75. The claimant provided a witness statement relevant to remedy, he gave oral evidence and was cross examined, and we had the opportunity to ask questions. We listened to helpful closing submissions from Ms Niaz-Dickinson for the respondent and from the claimant.

Reinstatement

6 Neither the claimant's up-to-date schedule of loss nor his witness statement make any reference to the question of reinstatement. However during oral evidence and submissions the claimant made clear that he wished the tribunal to consider an order for reinstatement. Having heard submissions from the parties, we declined to order reinstatement because we are satisfied that the claimant was guilty of culpable misconduct and he had received 2 final written

warnings. This was the basis upon which the respondent decided on dismissal. Whilst we found that in the particular circumstances dismissal was outside the range of reasonable responses, our judgement is that by his conduct, the claimant has fundamentally undermined the trust and confidence which the respondent needs to have in its employees and it would not therefore be appropriate to require the respondent to reinstate the claimant. Accordingly, we determine that the appropriate remedy in this case is in order for compensation.

The Claimant's Schedule of Loss

7 The claimant calculates his basic award for unfair dismissal at £2176. He claims lost earnings at £404.44 per week from 27 December 2021 until 19 June 2023 in the sum of £31,199.66 and loss of pension contributions during that same period at £2463.17. He also claims a lost retention payment of £1000; loss of statutory rights at £500, a 25% increase for failure to follow the ACAS code - £8790.71; and a grossing element of £483.01. This brings a total award of £46,612.55: to which he has purported to add the sum of £20,000 for injury to feelings creating a total loss claimed of £66,612.55.

The Respondent's Counter-Schedule

8 The respondent also calculates the basic award at £2176. The respondent corrects the claimant's schedule such that the loss of earnings operate from the correct date of the claimant's dismissal 6 June 2022 and extending until 19 January 2023 when on the respondent's case the claimant should have obtained fresh employment. The respondent makes a similar adjustment to the loss of pension contributions. The respondent deletes the retention payment; and the 25% increase for alleged failure to comply with the ACAS code. As the respondent's calculation brings the claim below £30,000 in any event the grossing up element has been deleted. The respondent appears to concede the claim for loss of statutory rights and this brings a total of £16,270.75.

9 The respondent schedule does not indicate that there should be a **Polkey** deduction on the basis that the claimant is likely to have been fairly dismissed within a short and determinable timeframe. However Ms Niaz-Dickinson has argued before us that there should be such a deduction on the basis that the claimant had accumulated two final written warnings in a relatively short period of time and it was therefore likely that he would commit further misconduct within the reasonably foreseeable future.

Our Findings

10 We dismissed all of the claimant's discrimination claims and accordingly the claim for injury to feelings of £20,000 is wholly inappropriate no such award can be made.

11 We invited the claimant to address us as to which elements of the ACAS Code are said to have been breached. He was unable to assist. In our judgement the ACAS Code was not breached: indeed the respondent conspicuously complied with the requirements of the Code. Accordingly there can be no 25% markup as claimed.

12 The effective date of termination of the employment in this case was 6 June 2022. In our judgement the claim for loss of earnings in the context of unfair dismissal cannot begin to run at an earlier date. We deal with this point in our liability judgement. It may be that the claimant would have had a viable claim for unlawful deductions from wages for a period prior to 6 June 2022, but no such claim was pursued. Accordingly the start date of the claim for loss of earnings for the purposes of our compensatory award is 6 June 2022.

13 The claimant secured alternative employment in June 2023 almost 12 months after his dismissal. We accept the respondent's submission that on the evidence the claimant did not make sufficient effort to mitigate his loss during that period. He first applied for a job with Morrisons in January 2023. He later applied for another job with SMS. He secured his current employment in June 2023. In calculating its counter schedule of loss the respondent has arbitrarily selected January 2023 as the cut-off date - this being the time of the claimant's first application. To an extent, any cut-off date is arbitrary. Our judgement is that it would have been reasonable in the circumstances to expect the claimant to have secured alternative employment on comparative terms within a period of 40 weeks from the date of his dismissal. Accordingly we calculate the claimant's loss of earnings and lost pension contributions from the date of dismissal until 19 March 2023.

Polkey

14 In our judgement, the respondent's argument for a **Polkey** reduction is misconceived. There is no basis upon which we could find it likely that an employee who had accumulated 2 final written warnings (with a period of some 2 ½ years between the first incident of misconduct until the imposition of the 2nd written warning) would necessarily commit further misconduct justifying dismissal within a short timeframe. Accordingly we make no **Polkey** deduction.

Contribution

15 The respondent has not argued before us that there should be a deduction for contributory conduct. Whilst it is clearly the case that the claimant's conduct contributed to his accumulation of 2 final written warnings, our judgement is that it would be illogical to suggest that his conduct led the respondent to an excessive response. It was the fact that dismissal was outside the range of reasonable responses that led to a finding of unfair dismissal. Accordingly in our judgement a deduction for contributory conduct will not apply in this case.

Conclusion

14 The parties are agreed that the ward should include a basic award of £2176 and compensation for loss of statutory rights at £500.

15 Accordingly our calculation of compensation at £20145.20 is as follows:

(a)	Basic Award	£ 2176
(b)	Loss of Earnings	£16192
(c)	Loss of Pension Contributions	£ 1277.20
(d)	Loss of Statutory Rights	£ 500
Total Award		£20145.20

Employment Judge Gaskell

Approved on 15 April 2025