



EMPLOYMENT TRIBUNALS

Claimant: 'M'

Respondent: 'N'

Heard at: Bristol by video, in public

On: 20 March 2025

Before: Employment Judge Cuthbert

Representation:

Claimant: Represented himself

Respondent: Mrs Singh (consultant)

REASONS (REMEDY)

1. These written reasons are provided following a request on behalf of the respondent, after oral judgment and reasons were given at the remedy hearing in this matter.

Outcome of the hearing

2. The respondent was ordered to pay the claimant compensation for unfair dismissal in the sum of **£11,418.72**, comprising as follows:

2.1. **£755.48** by way of a basic award for unfair dismissal.

2.2. **£10,663.24** by way of a compensatory award for unfair dismissal, comprising:

2.2.1. £500.00 for loss of the claimant's statutory rights; plus

2.2.2. £8,772.38 in respect of the claimant's loss of earnings and pension;
and

2.2.3. £1,390.86 by way of an uplift (15%) for failure to comply with the Acas Code.

Procedure at the hearing and issues to be decided

3. I was provided with an agreed bundle of documents, including a Schedule of Loss from the claimant, and also a witness statement from the claimant relevant to remedy (unfair dismissal only).
4. I explained to the parties the issues that I would need to decide at the hearing. The amount of the basic award was agreed, and so the remaining question was the level of any compensatory award for unfair dismissal.
5. I explained that, pursuant to section 123 Employment Rights Act 1996, the question was what compensation would be just and equitable to award with regard to the losses sustained by the claimant in consequence of the dismissal, insofar as that loss was attributable to the respondent. It was for the claimant to establish the losses which he claimed.
6. I pointed out to the respondent that the question of any housing benefit received by the claimant was irrelevant to the compensatory award. There was correspondence from the respondent on the Tribunal file about this issue. I referred the parties to the cases of *Savage v Saxena* [1998] UKEAT/605/97 and *Olayemi v Athena Medical Centre & Anor* UKEAT/0140/15). I said that I therefore did not expect to hear any evidence about housing benefit.
7. The claimant asserted that there had been a breach of the Acas Code of Guidance on Disciplinary and Grievance Procedures and so I would need to consider the question of whether there had been a breach and the question of any uplift if so.
8. The respondent made a brief specific disclosure application for copies of the claimant's bank records, on the basis of an apparent rumour that the claimant had been working and receiving cash payments, contrary to his witness statement on remedy. The application was late (made for the first time at the hearing), it was unsupported by any evidence whatsoever and was in part based on a mere rumour. I concluded that it was a fishing expedition, such disclosure was not necessary and explained that it was refused, following the approach in *Canadian Imperial Bank v Beck* [2009] EWCA Civ 619 and *Santander v Bharaj* UKEAT/0075/20. I also had regard to the overriding objective, in particular the likely delay which any order for disclosure of such material would cause. The respondent could cross examine the claimant about such alleged matters and if I took the view that any disclosure was necessary as a result of the claimant's answers, I would be prepared to reconsider the position on disclosure (this did not arise).
9. The claimant indicated that he wished to make an application for a preparation time order against the respondent, in respect of some issues relating to the preparation of the case (alleged delays in the main). I explained to the claimant, who was not legally represented, that costs were still very much the exception and not the norm in the Tribunal. I said that my initial view was that any application on the basis being brought would face a real uphill struggle and was not in that exceptional category. I explained that lateness in compliance and chasing was unfortunately fairly routine, from one side or the other in many

Tribunal cases, and does not result in costs orders. I suggested that he would be better to focus, in the time we had (a three-hour hearing) on key issues of remedy rather than taking up Tribunal time with other matters such as costs. I explained that if the claimant wished to make the application, despite the indication I had given, I would hear it as part of his closing submissions (it was not pursued).

10. The claimant was then cross-examined on behalf of the respondent. Each party then made oral submissions, the respondent and then the claimant. I then adjourned the hearing to deliberate and resumed, giving oral reasons and judgment.

Findings of fact

11. The claimant was unfairly dismissed by the respondent for the reasons set out in my earlier liability judgment. I declined to make any finding of contributory fault or any *Polkey* reduction in that decision.
12. Following his summary dismissal on 14 December 2023, the claimant's earnings ceased with immediate effect.
13. I accepted the claimant's evidence that his dismissal had a significant negative effect on his mental health. He had previously had episodes of depression, including following the breakdown of his marriage in early 2023, but no significant periods of absence during his employment with the respondent. He was not able to work or look for work after his dismissal, as his depression flared up. The loss of his job (as a sales assistant in a fishing equipment shop) also adversely affected various friendships and his pursuit of his main fishing hobby.
14. After pressure from his family, given his lack of income and low mood and motivation, the claimant subsequently claimed and was awarded contribution-based Employment and Support Allowance (ESA) with effect from 1 February 2024, at the rate of £138.20 per week.
15. The claimant was provided with several medical certificates by his GP, which ran until August 2024. By that time, he had been assessed by the DWP via a work capability assessment as being in the "support" group category for ESA, which meant that he was regarded as unfit for work and no longer needed to provide medical certificates.
16. The claimant had not provided the Tribunal with copies of his GP records for the period in issue (late 2023, 2024 and 2025) and there was no medical evidence running beyond the final GP medical certificate (page 30 of the bundle) which simply stated that the claimant would be unfit for work until 4 August 2024 due to "*depression*". The only other evidence of a medical nature were referral letters for mental health assessments (dated 17 and 28 June 2024) and for an ADHD assessment (dated 27 February 2024) but not the outcomes of the assessments themselves.
17. The claimant remained unfit for work and in receipt of contribution-based ESA at the date of the present hearing.

18. The claimant's most recent normal monthly payslip with the respondent (November 2023) was at page 56 of the bundle and the following figures were obtained from it:

Gross pay	£1,636.87
Tax	£96.80
NICs	£70.66
Pension (employer)	£33.51
Net pay:	£1435.90 per month
	£331.36 weekly

19. Employer pension contributions were at 2.05% or £7.74 per week

20. This amounted at a £339.10 net weekly loss of earnings for the claimant.

Relevant Law

21. Section 123 of the Employment Rights Act 1996 states:

123 Compensatory award

(1) Subject to the provisions of this section and sections 124, 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

(2) The loss referred to in subsection (1) shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

...

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

22. 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).

23. In the case of *Dignity Funerals Ltd v Bruce* [2005] IRLR 189 it was held that the question in cases where a claimant was too unwell to work was as follows: *"whether the depression in the period after the dismissal was caused to any material extent by the dismissal itself; whether, if so, it had continued to be so caused for all or part of the period up to the hearing; and, if it was still so caused at the date of the hearing, for how long it would continue to be so caused"* (paragraph 13)..

24. In accordance with *Morgans v Alpha Plus Security Ltd* [2005] ICR 525, the amount of contribution-based ESA received by a claimant must be set off against the loss claimed from the respondent.
25. Where an employer (or employee) has failed to follow the Acas Code of Practice on Disciplinary and Grievance Procedures, and a Tribunal considers that the failure was unreasonable, it may increase (or reduce) the amount of compensation that would otherwise have been payable by no more than 25% if it considers it just and equitable to do so (section 207A, Trade Union & Labour Relations (Consolidation) Act 1992). In an unfair dismissal case, that means no more than 25% of the compensatory award not the basic award (section 124A, ERA 1996).

Closing Submissions

26. The respondent submitted as follows:

- 26.1. The basic award was agreed at £755.48.
- 26.2. The compensatory award was compensate the claimant for loss suffered and not to penalise the respondent.
- 26.3. Where loss was taxable, it should be awarded net of tax and NICs – the *Gourley* principle.
- 26.4. The question was whether losses were occasioned or caused by the respondent, attributable to its conduct and whether it would be just and equitable to award compensation.
- 26.5. A figure of £500 was appropriate for loss of statutory rights.
- 26.6. In terms of mitigation, the test was *not* all possible steps – the burden of establishing a failure to mitigate was on the respondent.
- 26.7. Under section 124 ERA 1996, the cap on the compensatory award in this was 52 weeks' pay.
- 26.8. It was for the claimant to prove the losses he claimed. In many cases, this would be obvious or easy to achieve – the question was whether he had taken reasonable steps to mitigate his losses.
- 26.9. The claimant had a long history of poor mental health and had suffered a marriage breakdown. The effects of that were likely to be far reaching. He sought a full year's pay but had pre-existing health issues and causation was lacking in terms of the respondent's conduct.
- 26.10. The claimant had failed to mitigate his losses by seeking alternative employment. He should have claimed benefits and been signed off before February 2024.
- 26.11. His loss of earnings should therefore be limited to three months' pay.
- 26.12. In terms of the Acas Code, it was submitted that the respondent did "broadly adhere" to the Acas code but it was accepted that the

investigation was found to be lacking. An uplift should be limited to 5% - the claimant was seeking a 25% uplift.

26.13. Pension losses should also be limited to the same three-month period.

27. The claimant made brief closing remarks as follows:

27.1. It was unfortunate that his employment ended as it did, as he loved working for the respondent. He found it very upsetting how he had been dealt with.

27.2. The only other point he wished to make was that the decision to dismiss him contributed “massively” to his inability to work. He did continue to work after his marital breakdown. He should be awarded the full 12 months’ pay he claimed. He would hopefully return to work in the future.

Decision

28. After considering the evidence and the relevant law, I concluded as follows.

29. I awarded the claimant the agreed basic award of **£755.48**.

30. In terms of the compensatory award, the claimant had not found any alternative work since his dismissal. The question with reference to s123 ERA was what would it be just and equitable to award with regard to the losses sustained by the claimant in consequence of the dismissal, insofar as that loss was attributable to the respondent. I had regard to *Dignity Funerals v Bruce* (above).

31. On the one hand:

31.1. It was clear from GP medical certificates that the claimant was considered by his GP to be unfit for work from February 2024 until August 2024, due to depression. This was the period shortly after the dismissal.

31.2. The claimant was vulnerable to mental health issues – he had some absences from work before he was dismissed due to depression, but no long-term absences in the two-and-a-half years of employment with the respondent. This suggested that it was likely that he would be, and indeed was, badly affected by the loss of a job which meant a great deal to him.

31.3. In July 2024 he was assessed by DWP as being in the Support Group category for ESA – this indicated that he had limited or no capability for work (and so no need to continue to provide medical certificates).

31.4. The claimant remained unable to work at the date of the present hearing, now 15 months after the dismissal.

32. On the other hand:

32.1. There were no medical records before the Tribunal for the relevant period after the dismissal other than the GP medical certificates, save for letters confirming that during 2024 the claimant was being assessed for ADHD (February 2024) and was having a mental health assessment (June 2024). There were some earlier GP records but these related to early 2023

and had been obtained before the liability hearing. There were no GP records for 2023, 2024 or 2025 dealing with the effects of the dismissal.

32.2. There were other potentially stressful and difficult matters in the claimant's life than the dismissal itself - including his family situation, the indirect effects of his loss of employment (as opposed to the dismissal itself) on his friendships and his fishing hobby. There was also the effect of the litigation itself which was invariably stressful (evidenced by the PTO application).

32.3. The respondent said that losses should be limited to just three months.

33. In the circumstances, I was satisfied that the dismissal itself *did* have a significant negative effect upon the claimant in the period following his dismissal and was likely to have caused the flare-up of his mental health issue, depression, such that he was unfit to work as recognised by his GP and then the DWP assessor at page 43 of the bundle. I was satisfied that the unfitness for work was materially caused by the dismissal itself.

34. There was, however, no medical evidence beyond August 2024 as to the extent to which the effect of the dismissal itself, as opposed to other possible factors, had maintained the claimant's inability to work.

35. I concluded in the circumstances that it would be just and equitable to award losses to the claimant for a period of nine months following the dismissal, namely until 14 September 2024. Beyond that, on the available evidence and the absence of any further medical evidence, I could not be satisfied that the effects of the dismissal itself had continued to materially affect the claimant's inability to work.

36. I then considered the amount of the loss:

36.1. The claimant had no income at all between 15 December 2023 and 31 January 2024. I accepted the claimant's evidence that he was not fit to either seek work or claim benefits during that time. He had his final payment from the respondent at the end of December 2023 and that his family urged him to seek help by the start of February 2024.

36.2. From 1 February 2024 he was paid £138.20 per week in contribution-based ESA. There was no evidence of any other income. In accordance with *Morgans v Alpha Plus Security Ltd* [2005] ICR 525, the amount ESA needed to be set off against the loss claimed from the respondent.

36.3. In the circumstances, I concluded that the claimant's attempts to mitigate his losses by way of claiming benefits when he did, in view of his health, were reasonable.

36.4. It was also just and equitable to award the claimant for loss of employer pension contributions, which were at the rate of 2.05% in this case.

36.5. I awarded £500 for loss of the claimant's statutory rights (a sum not in dispute).

37. The claimant had asserted breaches of the Acas Code by way of:

37.1. Only receiving two days' notice of disciplinary hearing (albeit that the hearing was postponed from 28 November 2023 until 6 December 2023).

37.2. A failure to investigate his grievance raised about same issue

38. I was not satisfied that there was a breach of the Acas Code for those reasons but I **did** find that there was a significant breach of the Acas code – specifically paragraph 4 and the obligation to act fairly, which included carrying out all necessary investigations (also part of paragraph 5), for the reasons given in the original decision. That failure did materially impact on the fairness of the overall process and it was unreasonable. In the circumstances, I considered that a 15% uplift would be just and equitable.

39. For the period between 15 December 2023 and 31 January 2024, there was no ESA to set off. 48 days' loss, or 6.657 weeks @ £339.10 = £2,257.39.

40. From 1 February 2024 until 14 September 2024, the claimant received ESA. 227 days' loss or 32.429 weeks @ (£339.10 – £138.20) = £6514.99.

41. The subtotal of the loss was £8,772.38, plus £500 for loss of statutory rights, giving £9,272.38.

42. A 15% uplift for breach of the Acas code added on **£1,390.86**,

43. This totalled **£10,663.24** by way of the compensatory award for unfair dismissal. This was within the statutory cap in this case of 52 weeks' pay.

44. The total sum payable was **£11,418.72**. Recoupment did not apply as the claimant received contribution-based ESA and credit was given to the respondent for the sums received in the calculations above.

Employment Judge Cuthbert

Dated: 16 April 2025

WRITTEN REASONS SENT TO THE PARTIES ON

07 May 2025 By Mr J McCormick

FOR EMPLOYMENT TRIBUNALS