EMPLOYMENT TRIBUNALS

Claimant: Mr C Roche

Respondent: Royal Mail Group Limited

Heard at: London Central (by cvp) **On:** 5 January & 11 March 2025

Before: Employment Judge Emery

REPRESENTATION:

Claimant: Mr C Banham (counsel)
Respondent: Mr S Peacock (Solicitor)

REMEDY JUDGMENT

The judgment of the tribunal is as follows:

1. It is practicable and just to Order that the claimant be reinstated to his original role as an Operational Postal Grade (OPG) postperson at Earls Court and West Brompton Delivery Office on the same terms as increased since his dismissal.

2. The claimant shall be reinstated on or before 7 April 2025 (the reinstatement date).

3. The claimant acknowledges that the Delivery Duty / Walk may not be the same as the pre-dismissal Delivery Duty.

4. The claimant is awarded the following:

   Arrears of pay, benefits and overtime:
   From 27 April 2023 to 7 April 2025: £58,188.28

LESS Carers Allowance	(£ 5,404.90)
PLUS 10% ACAS Uplift	£ 5,278.34
LESS 10% for contributory fault:	(£5,806.17)
GROSSING UP:	
£52,255.55 - £30,000	
At 20% basic rate:	£4,451.11

TOTAL	**£56,706.66**
Non-taxable pension contributions	
payable into pension fund (approx 5.65% net pay)	**£9,248.77**

REASONS

1. Reasons were given at the 11 March 2025 hearing. Final calculations were provided after the hearing. Written reasons were requested.

The Issues:

2. Should the Tribunal make an order for reinstatement? In considering this issue:

   a. Does the claimant wish to be reinstated

   b. Is it practicable for the respondent to comply with such an order

   c. Where the claimant contributed to his dismissal, would it be just to order reinstatement?

3. Did the claimant contribute to his dismissal?

4. Did the respondent fail to follow a proper process and if so would be just and equitable to increase the award by up to 25%?

5. If reinstatement is ordered, what payments are due to the claimant?

6. If reinstatement is not ordered, is the claimant entitled to a basic award and/or compensation for loss of earnings?

Witnesses and tribunal procedure

7. I heard evidence from the claimant and from Mr Tipler, at the time the Operations Performance Leader SW London and the dismissing manager, who gave evidence on the practicability of reinstating the claimant.

Relevant facts

8. In his evidence the claimant maintained, as he had done during the liability hearing, that he behaved irrationally rather than aggressively during the dismissal incident. He accepts that his actions may have come across as aggressive, but "I did not go out to be aggressive or act like this." He accepts that a Core Standard, the '1st Principle' – a critical business standard – of the respondent is to treat colleagues with "curtesy, dignity and respect"; and he accepts that his conduct was "diametrically opposed" to this standard. His case was that looked at "humanely" and considering his 44 years of good performance, this was "a few seconds" of poor conduct.

9. The claimant apologised for his conduct during the disciplinary process and during these proceedings. I find that during these proceedings he has shown genuine regret. He says, and I accept that he means, he wants to apologise to Mr A. He clearly holds no ill will towards this colleague.

10. The claimant still maintains that a motivation behind his dismissal was his engagement in industrial action which led to worsening relations between management and staff.

11. The claimant does not accept that he contributed towards his dismissal

12. Mr Tipler's evidence was that the respondent accepts the judgment of the tribunal. On reinstatement, he argues that the claimant's breach of 1st Principle was at the "higher level". In his statement he argues that the claimant was responsible for unacceptable physical contact with a colleague; that the judgment of the Tribunal "does not detract" from the respondent's view that this conduct was unacceptable.

13. Mr Tipler argued that he still believes this was an "attack" on Mr A, and that he still believes there were other factors which led to this incident, not just the health of his brother; he said he believed this in part because the claimant failed to take other steps to leave the depot "… it was not necessarily all to get away to see his brother, and he could have dealt with it differently". He still believes that the claimant demonstrated a "lack of honesty" to Mr Haughton when he was suspended, he believes that the claimant threatened a walk out.

14. Mr Tipler's evidence was that as a consequence trust and confidence is irreparably broken and it is not practicable to reinstate the claimant. He also says that Mr A continues to be employed at the Fulham office, again a significant issue of

practicability, as delivery offices have people working together in close confines, "… so working together, respect, getting along are key for smooth running of office."

15. On questions about the claimant's stated mitigation during the dismissal process and in his case - his brother's illness and his belief he needed to give urgent assistance causing him significant stress, his counselling since, his length of good service - Mr Tipler argued that this was not sufficient mitigation to mean it was practicable to reinstate. Mr A was "grabbed hold of, attacked, a member of staff was trying to restrain; it would have been prolonged if no colleague present. I have a duty of care to that colleague. … there was not enough mitigation to warrant no dismissal. So, trust was lost at this point. … this is my view now, even with the findings of the tribunal."

16. Mr Tipler argued that the claimant's mitigation evidence "does not explain" his actions towards Mr A, that the claimant could have resolved his need to get to his brother in other ways. He accepted that the failure to assist the claimant when he was trying to leave the depot was 'unhelpful' but this did not detract from the claimant's actions.

17. The respondent's case is that there are surplus employees in the SW postcode, the number of employees in the region is 1,132 against a requirement of 1,060 (230).

18. The respondent also argues that at the Fulham office there is a surplus of 27 staff. West Brompton is understaffed by 2, but the Fulham excess would need to be transferred; to reemploy the claimant would add to the surplus.

19. The claimant and Mr Charles argue that several offices have significant issues with poor delivery patterns; that the respondent has been obliged to put more staff into these offices to get the post delivered, that there is an operational reason for any deemed surplus, as these numbers of staff are required at that depot.

20. Mr Charles also says that the 1,060 figure is not agreed, in any event attrition rates are "huge", between 50 – 70 per quarter, that the respondent is not making staff reductions across SW London; that the company and unions "are trying to establish how many [staff] are needed … 1060 is a red herring, as there is additional requirement for bodies to do the work we have". He says that while reform has been proposed to reduce headcount, "no reform has been agreed…" that this needs to go to parliament. There have been trials of different ways of working, but how the workplace will look like as a result of any reform "we do not know" as it has yet to be agreed with the union or confirmed by parliament.

21. Mr Charles also argues that there is no recruitment stop "we have people being changed from agency to Royal Mail and we have new employees walking through the door, including West Brompton and Earls Court."

22. On the claimant's case that Mr Blair was not disciplined for similar conduct, but was instead transferred, Mr Tipler has no knowledge of this case, he accepts that no investigation has been undertaken into Mr Blair since the liability hearing.

23. The respondent's position is that the claimant has failed to mitigate his loss as he has not applied for, say, driving jobs. The claimant's position is that he had to stop driving for the respondent as he has sclerotic arthritis for which he takes medication. He accepts that he has not applied for work, he was dismissed for aggressive conduct, and he has no other experience of work. He has no computer skills and no qualifications. He believes his age and medical conditions count against him.

The Law

24. Employment Rights Act 1996

s.113 - The orders.

An order under this section may be—

(a) an order for reinstatement (in accordance with section 114), or
(b) an order for re-engagement (in accordance with section 115),

as the tribunal may decide.

s. 114 Order for reinstatement.

(1) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed.

(2) On making an order for reinstatement the tribunal shall specify—

(a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement,
(b) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and
(c) the date by which the order must be complied with.

(3) If the complainant would have benefited from an improvement in his terms and conditions of employment had he not been dismissed, an order for reinstatement shall require him to be treated as if he had benefited from that improvement from the date on which he would have done so but for being dismissed.

(4) In calculating for the purposes of subsection (2)(a) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of reinstatement by way of—

(a) wages in lieu of notice or ex gratia payments paid by the employer, or
(b) remuneration paid in respect of employment with another employer, and such other benefits as the tribunal thinks appropriate in the circumstances.

s.115 - Order for re-engagement.

(1) An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment.

(2) On making an order for re-engagement the tribunal shall specify the terms on which re-engagement is to take place, including—

(a) the identity of the employer,
(b) the nature of the employment,
(c) the remuneration for the employment,
(d) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of re-engagement,
(e) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and
(f) the date by which the order must be complied with.

(3) In calculating for the purposes of subsection (2)(d) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of re-engagement by way of—

(a) wages in lieu of notice or ex gratia payments paid by the employer, or
(b) remuneration paid in respect of employment with another employer, and such other benefits as the tribunal thinks appropriate in the circumstances.

s. 116 - Choice of order and its terms.

(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.

s.123 - Compensatory award

...

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

25. Case law - practicability of reinstatement

a. Timex Corpn v Thomson [1981] IRLR 522: A tribunal can make an order for reinstatement or re-engagement even if it was not convinced that the order was necessarily practicable, provided it thought that it might succeed. The tribunal may make an order to test whether the employer's claims of impracticality are justified; s.116 only requires the tribunal "to 'have regard' to matters of practicability. In our judgment there is no need for a tribunal to reach a final conclusion that re-engagement is practicable before making any such order … At the stage when the order to re-engage is being made, it is not in our judgment necessary for the tribunal, looking at future possible events, to make a definite finding that the order for re-engagement was practicable. They must have regard to the question of practicability and if they are satisfied that it is unlikely to be effective, they will no doubt not make an order. The only strict requirement is that they should have regard to practicability"

b. *Rao v Civil Aviation Authority [1992] IRLR 203:* the relevant principles are:
   i. Orders for reinstatement or re-engagement are "primary remedies" for unfair dismissal

   ii. Such orders are discretionary

   iii. The only fetter on that wide discretion is that a tribunal must "take into account" the considerations set out in section 116(1) and (3)

   iv. In both subsections the word "practicable", is used. It is not "possible"; it is not "capable"."

c. Port of London Authority v Payne [1994] IRLR 9 CA: The issue of practicability is a question of fact, not an issue of reasonableness. In reaching its conclusion the tribunal should "give due weight to the commercial judgment" of the employer. Also, while the determination at the first stage was of necessity provisional, it is important that there is a finding at stage 1:

   "… 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…".

d. *Coleman and Stephenson v Magnet Joinery Ltd[1974] IRLR343:* what was practicable should not be equated with what was possible; it is necessary for a tribunal to consider the industrial relations realities of the

situation. If there would be serious industriual strife as a consequence it would not be practicable to re-engage an employee. The question is whethere reinstatement was “capable of being carried into effect with success.”

e. *Central and North West London NHS Foundation Trust v Abimbola [2009] All ET (D) 188:* a breakdown in mutual trust and confidence is material to the practicability of a re-employment order: were their factors which undermined the respondent's trust and confidence in the claimant such as to make it impracticable for them to reinstate him?

f. *Kelly v PGA European Tour [2021] EWCA Civ 550:* a genuine belief that the employee has committed an act of misconduct is a material consideration. It is particularly important that the tribunal does not substitute its own assessment for that of the employer.

> “In particular, I am wary of tribunals becoming too focused on the language of “trust and confidence”, which may carry unhelpful echoes from its use in other contexts. In this context it simply connotes the common sense observation that it may not be practicable for a dismissed employee to return to work for an employer which does not have confidence in him or her, whether because of their previous conduct or because of the view that it has formed about their ability to do the job to the required standard. Of course any such lack of confidence must have a reasonable basis. The important point made by the EAT in *United Lincolnshire NHS Foundation Trust v Farren* is that while that is an objective question it must be judged from the perspective of the particular employer: that reflects a proper recognition that an employment relationship has got to work in human terms. However, each situation must be judged on its particular facts.

g. *Kelly v PGA European Tour [2020] IRLR 927, EAT*, the tribunal must consider whether the whether the employer had genuinely and rationally concluded that it lacked trust and confidence in the employee. The ultimate question is whether it is practicable for this employer to re-employ this employee and whether the employer's objection to doing so is held upon a genuine and rational basis.

> ''Accordingly, the Tribunal must consider whether the employer genuinely and rationally believes that trust and confidence has been broken, so that re-employment is not practicable: that is, not capable of being carried into effect with success. An employer cannot merely assert that this is the case in a self-serving way, in order to successfully resist the Order sought. The Tribunal should test and evaluate against the evidence before it, whether the

> employer's stated belief is both genuinely and rationally held. But it must keep in mind that the ultimate question is about whether it is practicable for *this employer* to re-employ this employee.'
>
> ''The requirement for the asserted belief to be both genuinely held, and have a rational foundation, is not a reasonableness test, or to be equated with that which would be applied under section 98(4) of the 1996 Act. A belief may have a rational foundation in evidence or information known to the person who forms it, though it has not been reasonably reached. This explains why, as authorities such as *Crossan* show, it is possible for an employer to rely upon a genuine and rational belief in misconduct as having a bearing on practicability, even though the dismissal for that same conduct was unfair.

h. *United Lincolnshire Hospitals NHS Foundations Trust v Farren* UK EAT/0198/16: it is the employer's view of trust and confidence – appropriately tested by the tribunal as to whether it was genuine and founded on a rational basis – that matters, not that of the tribunal which should not substitute its view for that of the employer.

i. *London Borough of Hammersmith & Fulham v Keable EAT [2022] IRLR4:* the fact that an employer still genuinely believes in the guilt of an employee after a Tribunal judgment of unfairness can amount to a breakdown in trust and confidence such as to make reinstatement not practicable, but not always. Notwithstanding that this was a belief, a tribunal may conclude that trust and confidence has not been lost.

> ''In our view, it does not automatically follow, particularly in an organisation as large as the Council, that because the dismissing officer … genuinely believed that the Claimant had been guilty of misconduct, that the Council, as an employer, had lost trust and confidence in him. Similarly, and self-evidently, it does not automatically follow that because an employer decides to dismiss an employee for conduct, that decision later being found to be an unfair one, that reinstatement is impracticable. If that were the case, the primary remedy of reinstatement would very rarely be able to be made. …
>
> “It is the employer's view of trust and confidence – appropriately tested by the tribunal as to whether it was genuine and founded on a rational basis – that matters, not the tribunal's”.

26. Case law - Contributory fault

a. Jagex Ltd v McCambridge [2020] IRLR 187, EAT: The test is whether the conduct is culpable, blameworthy, foolish, or similar. This includes conduct that falls short of gross misconduct and need not necessarily amount to a breach of contract.

b. Steen v ASP Packaging Ltd UKEAT/23/13: A Tribu
   i. must identify the conduct which is said to give rise to possible contributory fault;

   ii. must ask whether that conduct is blameworthy—the answer depends on what the employee actually did or failed to do, which is a matter of fact for the Tribunal to establish and which, once established, it is for the Tribunal to evaluate;

   iii. the Tribunal must ask for the purposes of ERA 1996 s 123(6) if the blameworthy conduct it has identified caused or contributed to the dismissal.

   iv. If it did cause or contribute to the dismissal, is it just and equitable to reduce the award, if so to what extent.

c. N Notaro Homes v Keirle [2024] EAT 122: If the tribunal finds that the employee's conduct was culpable, it is bound to consider making a reduction by such amount as it considers to be just and equitable. However, it is not mandatory to make a reduction. The tribunal may consider it just and equitable for there to be no reduction event though blameworthy conduct occurred.

d. Frew v Springboig St John's School UKEATS/0052/10: A tribunal must consider all the relevant circumstances, including mitigating factors, when determining whether to make a reduction for contributory fault.

e. Parsons v Airplus International Limited UKEAT/0023/16: It is difficult to envisage circumstances that would justify a conclusion that it would not be just and equitable to reduce an award at all when there has been a finding that the claimant's blameworthy conduct caused or contributed to the dismissal.

f. Gibson v British Transport Docks Board [1982] IRLR 228:

   "What has to be shown is that the conduct of the [claimant] contributed to the dismissal. If the applicant has been guilty of improper conduct which gave rise to a situation in which he was dismissed and that conduct was blameworthy, then it is open to the tribunal to find that the conduct contributed to the dismissal. That is how the section has been uniformly applied'.'

g. Wilkinson v Driver and Vehicle Standards Agency [2022] EAT 23: When considering contributory fault, while the focus is on the employee's conduct, the employer's conduct in causing the dismissal to be unfair is a factor to be considered:

> "I do not, however, accept [the employer's] submission that fault on the part of the employer is wholly irrelevant to the exercise of the Tribunal's discretion under section 123(6). Once section 123(6) is engaged, the task of determining the appropriate level of contributory reduction frequently becomes, in practical terms, an exercise in apportionment of culpability between the employee and the employer. It follows that, once section 123(6) is engaged, conduct of the employer which caused the dismissal to be unfair frequently becomes relevant in assessing the appropriate percentage reduction. It is clear from the way in which the percentage bands of culpability were defined in Hollier v. Plysu Limited [1983] IRLR 230 … that this involves an apportionment of fault between employee and the employer in relation to the matters which contributed to the dismissal."

Conclusions on the evidence and law

27. On contributory conduct, the claimant's position is that his irrationality during the disciplinary incident, his brother's ill health and urgent need to leave the office means there was no contributory conduct by him. The respondent argues there is a "high level" of contribution given the claimant instigated an act of aggression and shouted at a colleague, a serious breach of its 1st Principal.

28. I accept that the claimant was guilty of improper conduct which gave rise to the disciplinary process. It was blameworthy conduct in that, as the claimant accepts, he grabbed a colleague's fleece and shouted at him.

29. The employer's conduct is also a factor to be considered in assessing the extent of the claimant's contribution to his dismissal. The respondent's reason for dismissal contained findings on issues and allegations which were not disciplinary allegations known to the claimant. The respondent failed to properly consider the claimant's mitigation evidence because of its view on the seriousness of the incident.

30. I accept that it is not mandatory to make a deduction for contributory fault, that the tribunal may consider it is just and equitable for there to be no deduction.

31. However, this was a serious incident in which the claimant engaged in aggressive behaviour, he grabbed a colleague's fleece though the van window and shouted at him. Even through there is significant mitigation evidence, and significant failures by the respondent in the process, I conclude that it is just and equitable to make a

reduction in the compensatory award to the claimant. Given his mitigation evidence, his loss of control in a very stressful situation involving an urgent need to visit his brother, together with an assessment of the respondent's conduct, I assess his contribution at 10%.

32. I accept that the respondent genuinely believes that it has lost confidence in the claimant by way of his conduct, such that it believes it is unable to reinstate him.

33. Trust and confidence must necessarily be connected to something – there must be 'factors' which fatally undermine the relationship such that it is impracticable to reinstate. To summarise the respondent's evidence, it is not willing to reinstate the claimant because:

    a. his conduct was so serious ("grabbed hold of and attacked...") that the claimant's mitigation evidence is insufficient;
    b. it has lost trust and confidence in the claimant not to act in a similar way in the future;
    c. in any event the claimant's mitigation evidence does not explain his conduct, and it does not accept the whole reason the claimant wanted to leave was to see his brother. If it was, he could have left by other means
    d. the claimant had an animus towards his management regarding industrial action and was untruthful when being suspended

34. The claimant's position, put by Mr Banham in closing arguments, is that reinstatement is practicable because his conduct would not have led to his dismissal had a fair process been adopted. Instead, the respondent continues to rely, as at liability, on issues in the disciplinary process which "did not occur or were not disciplinary allegations". A fair process looking at the actual events of that day would have found that the claimant engaged in aggressive behaviour when under extreme stress causing him to act irrationally, and because of this he shouted and grabbed Mr A's clothing. With 44 years' service and an excellent record, "under a fair process he would not have been dismissed."

35. The claimant argues that Mr Tipler has not properly addressed the issues on reinstatement, that the respondent uses the same arguments it used at liability, that the respondent continues to believe the claimant was untruthful during the disciplinary process, these views were unfair at the disciplinary process; so Mr Tipler's evidence "is weak or worthless".

36. I accept that Mr Tipler's evidence reflects his genuine belief that the claimant was untruthful, and that he genuinely believes the claimant threatened a walk-out and other misconduct.

37. On reinstatement, the issue is whether these views are rationally held. I do not accept they are. It is not rational to assess the claimant's conduct as an attack, or violent conduct. He grabbed an employee's fleece while in a state of extreme

stress. In any ordinary meaning of the words, this act was not an attack and was not violent conduct, and it is irrational to continue to say that it was, particularly given the findings at liability which have not been challenged.

38. Additionally, as the liability judgment sets out, many of Mr Tipler's views in his evidence were never part of the disciplinary case. It was not an allegation or a disciplinary finding that the claimant's reasons for leaving were untruthful, and some of the reasons for dismissing him had never been disciplinary allegations.

39. I conclude that many of the reasons given by the respondent for considering there is a loss of trust and confidence are based on mere suspicions. They are not rational views for the following reasons. No evidence has been provided to support the respondent's view that the claimant may have had another motive for wanting to leave; his consistent explanation is supported by contemporary evidence that he told his manager his reasons for leaving urgently; his manager's knowledge of his brother's condition and being sole carer; his irrational conduct was witnessed by his manager; he has asserted throughout that this was a very difficult and stressful situation for him.

40. This was information in the respondent's hands which clearly supports the claimant's reasoning, which "explains his conduct" – i.e. why this incident occurred. But it is because the respondent refuses to accept that the claimant has explained his conduct, that it continues to believe there was another motive, it considers it cannot have trust and confidence in the claimant. Again, this is a circular argument which lacks rationality.

41. I also find that the respondent has discounted both his exemplary 44 years of prior service, and evidence of counselling post the incident. This is relevant evidence in support of the claimant's arguments on reinstatement, that he can safely be reinstated in post. While the respondent is entitled to argue that this was a serious incident, in doing so it has determined that his length of service and good record cannot be supportive evidence for his reinstatement. Effectively it is arguing that there cannot be trust and confidence because of the seriousness of the incident.

42. In so arguing, the respondent fails to consider that his long service is further evidence that this conduct was so out of character that it is highly unlikely to reoccur. Again, I do not consider that the respondent's conclusion is rational. Service is a factor which the respondent should have considered because of the nature and context of this incident. Its failure to do so because it viewed this incident so seriously is not, in the context of the incident itself, a rational one.

43. Given the high staff turnover at the claimant's usual place of work and the high number of temporary staff, I do not accept the respondent's contention that there will be no vacancies in the near future, meaning it is impracticable or unjust to the respondent to reinstate the claimant. In discussion, it was agreed that a feasible

date of return was 7 April 2025, suggesting that there was the likelihood of an available vacancy by that date.

44. The claimant has asserted that a motivation to dismiss him was to do with his involvement in industrial action. I do not accept this was the case, as I find the respondent had a genuine view his was a serious incident. But I also do not accept that the claimant's view means reinstatement is not practicable. He did engage in industrial action, and there was clearly poor morale and poor staff/management relations for a while afterwards. The claimant is entitled to a view, but this does not detract from his eagerness to return to work and his clear willingness to start afresh.

45. I do not accept that the claimant has failed to mitigate his loss. He believed that after a working lifetime working for the respondent and being dismissed for gross misconduct, coupled with his age and lack of other expertise including computer skills, his inability to do driving jobs and other health issues, he was unlikely to find another job. I find that all these factors mean he was probably right, and he was certainly justified in holding this belief. The respondent has not provided details of any roles he could have obtained.

46. I agree that it was reasonable for the claimant to take on the role of caring for his brother, for which he has received Carers Allowance. In the claimant's specific circumstances, undertaking this role and receiving benefits he was entitled to receive amounts to adequate mitigation. The parties agree that his Carers Allowance is not a recoupable benefit, but the amount he received should be deducted from any awards of back-pay or compensation.

47. I accept that where a claimant has contributed towards his dismissal, it is only in exceptional circumstances that a tribunal will order reinstatement.

48. I conclude that this is one of those circumstances - the exceptional length of the claimant's employment of 44 years, his excellent work record, the significant mitigation evidence surrounding the incident, the claimant's genuine belief that reinstatement will succeed and his willingness to apologise to Mr A, and the lack of cogent evidence or reasons from the respondent at this hearing as to why reinstatement is not practicable.

49. While it cannot be guaranteed that reinstatement will work, all these factors justify discounting the claimant's contribution to his dismissal. There is a real prospect that reinstatement will be successful.

50. I accept that the claimant has contributed towards his dismissal by 10% and conclude that this should be reflected in a reduction in the award of back-pay of 10%.

51. I conclude that the respondent has failed to comply with the ACAS Code on disciplinaries. It used allegations which were not part of the disciplinary and about which the claimant was never told or asked questions about, it did not provide him with a relevant statement. The respondent argues that the issues of non-compliance were minor, it argues that there should be no increase in the award, the claimant says it should be substantial.

52. I concluded that I would make an award for the following reasons: the breaches of process by the respondent were serious, part of its reasons for dismissal was never part of the disciplinary allegations. But the respondent sought to have a fair process, it had a genuine belief in the claimant's misconduct; the process was not a sham.

53. I informed the parties I would calculate the percentage award once we had arrived at the back pay figure for compensation, to give a sense check on the overall level of the award and the value of a percentage uplift.

54. I determined that the reasons above merited an award in the mid-range of the ACAS uplift. Given the level of the award and taking account proportionality, I determined to award a 10% increase. While the breaches were serious, the respondent did seek to have a fair process, it had a genuine belief in the claimant's conduct; the process was not a sham. Against this is that allegations and material evidence used to dismiss the claimant was not provided to him, a significant error. Given the level of the award for back pay, I determined that a 10% contribution was equitable in the circumstances.

The calculation:

55. Lost earnings from 27 April 2023 to 7 April 2025:

a.	Loss of salary 27/04/23 to 31/03/24 (49 weeks) x £450.58 (net weekly pay)	£22,078.42
b.	Loss of salary 01/04/24 to 07/04/25 (53 weeks) x £493.98	£26,180.94
c.	Overtime – 27/04/23 to 07/04/25	£ 4,929.88
d.	Lost DS Allowance	£ 2,902.14
e.	PSB Allowance	£ 254.15
f.	Misc payments	£ 1,842.75
	TOTAL:	£58,188.28

LESS

Carers allowance:	(£5,404.90)	
TOTAL		£52,783.38
ACAS Uplift at 10% = £5,278.34 =		£58,061.72
LESS 10% contribution	(£ 5,806.17)	
TOTAL		£52,255,55

GROSSING UP:

£52,255.55 LESS £30,000

at 20% basic rate: £4,451.11

TOTAL PAYABLE TO CLAIMANT **£56,706.66**

Non-taxable pension contributions

payable into pension fund (approx. 5.65% net pay) **£9,248.77**

Approved by:
Employment Judge Emery
2 May 2025

Judgment sent to the parties on:

15 May 2025
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For the Tribunal:

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