



EMPLOYMENT TRIBUNALS

Claimant: Mr P Western

Respondent: Cheshire Curtainsiders Ltd

Heard at: Birmingham

On: 25 & 26 September 2025

Before: Employment Judge McGough

REPRESENTATION:

Claimant: Mr Austen (Counsel)

Respondent: Ms Neal (Consultant)

JUDGMENT having been sent to the parties on 2 October 2025 and written reasons having been requested in accordance with Rule 60(4) of the Employment Tribunals Rules of Procedure 2024, the following reasons are provided:

REASONS

THE COMPLAINTS AND PRELIMINARY ISSUES

- 1 The Claimant was employed by the Respondent as a Mobile Trailer Technician from 11 March 2019 until 26 April 2024. By a claim form presented on 17 August 2024 the Claimant brought complaints of unfair dismissal, age discrimination, disability discrimination and the Claimant sought unpaid notice pay.
- 2 Early conciliation started on 23 June 2024 and ended on 19 July 2024.
- 3 At a preliminary hearing on 17 April 2025 there was discussion about the issues in dispute between the parties. The Claimant withdrew his complaints of age discrimination and disability discrimination and those complaints were dismissed. The Respondent conceded that the Claimant's dismissal was procedurally unfair. The Respondent also conceded that the Claimant should have been given five weeks' notice rather than the four days he was given, therefore the Respondent was ordered to pay the Claimant for the remaining 4.5 weeks' notice. The parties confirmed in the hearing that this had been paid by the Respondent to the Claimant.

THE HEARING

- 4 The Claimant was represented by Mr Austen of Counsel and the Respondent was represented by Ms Neal, a consultant. The Respondent had prepared a 440 page bundle. The page numbers referred to in these Reasons are pages in the bundle.

- 5 The Claimant has tinnitus and therefore has difficulty hearing. At the start of the hearing adjustments were agreed whereby breaks would be taken at various points in the hearing so that Mr Austen and the Claimant's friend who had accompanied him to the hearing (Ms Worrall) could explain matters to the Claimant as required and give him the opportunity to ask any questions.
- 6 When discussing the documents for the hearing with the parties, it became apparent that the Respondent had not provided a witness statement for Ms Griffiths. Ms Griffiths was the director of the Respondent who had made the decision to dismiss the Claimant. The Respondent had not realised that Ms Griffiths was required to provide a written witness statement. The Tribunal decided, with the agreement of Mr Austen and Ms Neal, that Ms Griffiths would be cross examined by Mr Austen, that the Tribunal Judge would ask any additional questions so that the Tribunal could make findings of fact, and that Ms Neal would then have the opportunity to re-examine Ms Griffiths on any points coming out of cross examination and the Tribunal's questions.
- 7 One of the Respondent's witnesses, Mr Murrell, was planning to attend on the second day of the hearing, despite it having been made clear in the Case Management Orders dated 17 April 2025 that the parties were to seek to complete evidence and submissions at the end of the first day so that the following day the Tribunal could deal with oral judgment and remedy or future case management as needed. To enable the hearing to keep to that timetable, the Tribunal decided that Mr Murrell would need to attend the hearing on the first day, 25 September, if he was to give evidence in person. The Tribunal explained that less or no weight was likely to be given to Mr Murrell's (short) statement if he was not able to attend in person. Regrettably, after being contacted by the Respondent, Mr Murrell was not able to attend in person on the first day of the hearing.
- 8 The Tribunal heard evidence from Ms Griffiths, Mr Creer (one of the Respondent's employees), and the Claimant. The Tribunal also heard submissions from Mr Austen and Ms Neal.
- 9 The issues that were in dispute between the parties are set out below.
- 10 At the start of the second day of the hearing the Tribunal gave oral judgment on liability, *Polkey*, and contributory conduct. The Claimant was successful in his complaint of unfair dismissal. The Tribunal then heard submissions on remedy after which it gave oral judgment on remedy whereby the Respondent was ordered to pay the Claimant a basic award in the sum of £3,937.50 and a compensatory award in the sum of £38,467.52 (calculated in accordance with the attached Schedule).
- 11 The Respondent made a request for written reasons in writing on 2 October 2025. The Tribunal's reasons are set out in this document.

THE ISSUES

- 12 The issues which needed to be determined were:

Unfair dismissal

- 1 It is not disputed that the Claimant was dismissed or entitled to treat him/herself as dismissed. The Tribunal will need to decide what was the reason or principal reason for dismissal?
- 2 The Respondent says the reason was (mis)conduct.
- 3 It will initially be for the Respondent to show what the reason for the Claimant's dismissal was.

- 4 The Tribunal will need to decide whether the Respondent genuinely believed the reason was (mis)conduct.
- 5 If the reason was (mis)conduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually need to decide, in particular, whether:
 - there were reasonable grounds for that belief;
 - at the time the belief was formed the Respondent had carried out a reasonable investigation;
 - the dismissal was within the range of reasonable responses.

Remedy

- 6 If the Claimant was unfairly dismissed reinstatement, re-engagement, and compensation will need to be considered.
- 7 Does the Claimant wish to be reinstated to their previous employment/re-engaged to comparable employment or other suitable employment? The Claimant confirmed at the start of the hearing that he did not wish to be re-instated.
- 8 Should the Tribunal order reinstatement or re-engagement? The Tribunal will consider in particular whether either is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just. The Claimant confirmed at the start of the hearing that he did not wish to be re-engaged.
- 9 What basic award is payable to the Claimant, if any?
- 10 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?
- 11 If there is a compensatory award, how much should it be? The Tribunal will decide:
 - What financial losses has the dismissal caused the Claimant?
 - Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - If not, for what period of loss should the Claimant be compensated?
 - Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
 - If so, should the Claimant's compensation be reduced? By how much?
 - Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
 - Did the Respondent or the claimant unreasonably fail to comply with it?
 - If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?
 - If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
 - If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?
 - Does the statutory cap of fifty-two weeks' gross pay or £115,115 apply?

- 12 The Case Management Orders of 17 April 2025 set out that the Tribunal would also need to consider if the Respondent has breached any of the Claimant's rights to which the claim relates, in which case it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.

FINDINGS OF FACT

- 13 The Respondent operates a business which carries out maintenance and repair of haulage vehicles. The Claimant had worked for the Respondent for just over five years as a Mobile Trailer Technician. This involved him travelling to customers' premises or their trailers in a van provided by the Respondent to maintain and service haulage trailers.
- 14 The Claimant's employment contract contained the following relevant provisions in respect of the Respondent's disciplinary procedure:

"7. Disciplinary Procedure

[...]

In the event of disciplinary action being taken against the Employee, the following procedure will be followed:

7.1 In the case of gross misconduct, the Employer will terminate the contract of employment immediately, without notice or payment in lieu of notice. The Employee will be given 5 days to appeal in writing to the Employer in order to seek address;

7.2 In cases of inadequate work or misconduct which is not considered gross, the following procedure will apply:

7.2.1 An oral warning will be administered by a partner or manager, a note of which will stay on the Employee's record for a period of 6 months, and a copy will be given to the Employee;

7.2.2 For more serious offences or where there has been a failure to comply with the oral warning, this will result in a written warning, which will stay on the Employee's record for a period of 12 months, and a copy will be given to the Employee;

7.2.3 Failure to comply with the above will result in a final written warning, which will have no time limitation;

7.2.4 If there is no further improvement, or the Employee commits a further offence, no matter how minor, a notice will be given to the Employee by way of a complaint form, which will provide written details of the offences and will be given to the Employee at least 24 working hours prior to a hearing;

7.2.5 Notification of a hearing will be detailed within the complaint form and will detail the procedure of the hearing.

[...]

7.4 The Employee will have the following general rights:

7.4.1 To receive adequate notice of a hearing; and

7.4.2 To be accompanied by a colleague at all disciplinary meetings or interviews; and

7.4.3 To be heard courteously and at a reasonable length on matters directly relevant to the subject matter; and

7.4.4 To appeal against a sanction or severity of sanction, or in the belief that a disciplinary hearing was in some way flawed.”

- 15 On the morning of 19 April 2024, the Respondent was contacted by a customer who had been trying to get hold of the Claimant. He had been due to arrive at the customer's site at 8am. Ms Griffiths looked on the tracker for the Claimant's van. The tracker shows (remotely) the status of the van, including warning lights on the dashboard. The tracker showed that a number of warning lights were on on the van – the engine management light and the brake warning light. At 10am the customer contacted Ms Griffiths to say she may as well stand the Claimant down. Ms Griffiths then contacted the Claimant to tell him not to attend the customer's site and to go home instead.
- 16 The Respondent sent two employees to the Claimant's home address collect the van, given the warning lights showing on the tracker. Edward Newsom, Ms Griffiths' son who worked for the Respondent at the time, told the Claimant he needed the van and picked up the van to return it to the Respondent's site without allowing the Claimant to remove his belongings from the van.
- 17 Ms Griffiths was very concerned about the state of the van when it was returned to site and took photographs of the van (pages 88 – 100 and page 105). There were a number of issues which Ms Griffiths considered to be very serious and meant that she considered the van not roadworthy. The key issues were:
 - The brake lights and engine management light meant the brakes and/or engine might fail;
 - The compressor, ladders and tool boxes were not bolted down;
 - There was a petrol can in the van next to an exhaust and a compressor, which get hot when used – this was considered a fire hazard;
 - Cigarette stubs and a cigarette lighter indicated that the Claimant had been smoking in the van, which is a fire hazard and a criminal offence given it is a commercial vehicle; and
 - The scrutineer (a piece of equipment required to test lights and brakes on trailers before they could be signed off by a technician) was not working.
- 18 In addition to those key issues, the photographs showed that the van was very untidy and dirty, with oily rags, wires, and other items cluttering the floor in the van itself. In the cab there were clothes and oily rags on the passenger side and cups, valves and other items in the footwell of the driver's side of the van.
- 19 The Claimant admitted in evidence that he had been smoking in the van, stating that other employees also did this. He accepted that the brake warning lights were on, but did not agree that he had not reported this to Ms Griffiths. He explained that his van got untidy as the week went on but he would clean it out and fix any issues on a Sunday, at home. This was his normal practice.
- 20 In answer to questions in the hearing about the photograph of the compressor in his van (page 91) the Claimant stated in oral evidence that the photographs had been fabricated. The Claimant had not previously raised any issues about the authenticity of the

photographs and the Tribunal does not accept the Claimant's assertion that the photographs were fabricated.

- 21 Mr Creer, another of the Respondent's Mobile Trailer Technicians, explained in his evidence, which the Tribunal accepts, that it was normal practice for a Technician to tidy their van at the end of each day. That way it was easier to keep on top of things. In her evidence, which the Tribunal accepts, Ms Griffiths explained that it was not the Claimant's job to be fixing his Company van at home on a Sunday.
- 22 Having seen and photographed the van, Ms Griffiths decided to terminate the Claimant's employment. She wrote a letter of termination and sent it to the Claimant on 22 April 2024 by Whatsapp, accompanied by numerous photographs of the van (pages 83 – 85). Ms Griffiths explained in oral evidence, which the Tribunal accepts, that she sent the letter by Whatsapp because she had concerns that the Claimant would not see it straight away if it was sent by post; explaining that the Claimant had a tendency not to open his post right away.
- 23 The letter did not just refer to the issues with the Claimant's van (page 118). It stated that:
- "Your health issues and attitude to following company processes along with the general condition of company equipment you are responsible for is such that the company can no longer tolerate this situation as it is affecting customer long standing relationships"*
- 24 It went on to list key concerns about the van and equipment, including the scrutineer. It also stated:
- "We have talked to you about this to you and still you ignore our requests".*
- 25 Towards the end of the letter stated that:
- "The workload tasks that you are required to perform are not being carried [sic] due to your general physical condition and the company as a result of this issue has taken the decision stated above."*
- 26 In oral evidence, Ms Griffiths accepted that she had not followed any procedure before dismissing the Claimant. She had not spoken to him to ask him about what she had found or her concerns, including the van, so he was unable to put his side of the story before any decision was made.
- 27 Ms Griffiths explained in evidence that the reason she decided to dismiss the Claimant was misconduct and that the issues she considered to constitute that misconduct were the key issues outlined earlier regarding the van. Ms Griffiths considered the van to be dangerous and was concerned that she or the Respondent would be liable if there were any issues with the trailers that had been checked and signed off by the Claimant, given his equipment was not working properly.
- 28 She accepted that there is a disciplinary process set out in the Claimant's employment contract (paragraph 14 above) which she had failed to follow, despite having it followed it previously, in April 2023, when the Claimant was issued with a first written warning about working outside normal working hours (page 74). That warning had expired by the time of the dismissal.
- 29 She explained in oral evidence, which the Tribunal accepts, that she had spoken to the Claimant about issues with his van numerous times in the past, and at times helped him clean it out; and that she had spoken to him numerous times, including sending a Whatsapp message (page 80), about not working until very late (sometimes midnight and beyond). However, despite the condition of the Claimant's van only intermittently improving before the issues became prevalent again, and despite Ms Griffiths explaining that the

Claimant continued to work outside working hours notwithstanding her discussions with him about not working late and alone, Ms Griffiths did not issue the Claimant with any formal warnings about any of these issues. Ms Griffiths explained that she considered that the Claimant's actions discovered on 19 April 2024 in respect of the van amounted to gross misconduct and that she understood this to mean that the Respondent could dismiss the Claimant immediately, without any process or procedure. She accepted in oral evidence that she should have followed the disciplinary procedure. As a consequence of the Respondent's approach, the Claimant was not aware that continued or more serious issues with his van could result in his dismissal.

- 30 After a number of prompts via Whatsapp messages from Ms Griffiths, the Claimant attended the Respondent's premises in February 2025 to collect his belongings from the van. His belongings consisted of some personal items and various tools. There was (and continues to be) a dispute between the Claimant and the Respondent about the ownership of some specialist tools that were in the van. The Claimant asserted that they belong to him, which has been refuted by the Respondent. The Claimant has also asserted that without these tools he has been unable to obtain new employment as all employers would require him to have his own specialist tools. The Respondent submitted that this is not the case but did not provide any evidence about technician (or any other) roles that the Claimant could have applied for, or any evidence as to whether employers expect employees in this type role to provide their own tools.
- 31 The Claimant has not found employment since his dismissal and in oral evidence, which the Tribunal accepts, he explained that he had no current plans to retire.

THE RELEVANT LAW

- 32 An employee has the right not to be unfairly dismissed by their employer. Sections 94 and 98 of the Employment Rights Act 1996 (ERA) provide:

94 The right

An employee has the right not to be unfairly dismissed by his/her employer.

98 General

- (1) *In determining [...] whether the dismissal of an employee is fair or unfair it is for the employer to show-*

(a) the reason (or if more than one, the principal reason) for the dismissal; and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

- (2) *A reason falls within this subsection if it—*

[...]

(b) relates to the conduct of the employee

[...]

- (4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-*

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and*
- (b) shall be determined in accordance with equity and the substantial merits of the case.*

33 Where the reason for the dismissal is misconduct the Tribunal must consider (as set out in *British Home Stores Ltd v Burchell* [1978] IRLR 379 and *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439):

- Whether the employer genuinely believed the employee to be guilty of misconduct;
- Whether the employer had reasonable grounds for that belief;
- Whether the belief was based on a reasonable investigation; and
- Whether the dismissal was within the range of reasonable responses open to a reasonable employer.

34 The “range of reasonable responses” test applies not only to the actual decision to dismiss, but also to the investigation carried out by the employer - *Sainsburys Supermarkets Ltd v Hitt* [2003] IRLR 23.

35 Where there is dismissal for misconduct reasons, the employer will normally not act reasonably unless it investigates the allegation of misconduct fully and fairly and hears whatever the employee wishes to say in their defence or mitigation – *Polkey v AE Dayton Services Ltd* [1988] ICR142, HL.

36 Section 122(2) of the ERA provides:

Where the tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice before the notice was given), was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

37 The relevant parts of Section 123 of the ERA provide:

(1) [...] 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.

[...]

(4) In ascertaining the loss [sustained by the Claimant] 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.

[...]

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

38 When considering contributory fault, the conduct must be “culpable or blameworthy” - *Bell v The Governing Body of Grampian Primary School* [2007] All ER (D) 148. The Tribunal may take a very broad view of the relevant circumstances when determining the extent of contributory fault - *Gibson v British Transport Docks Board* [1982] IRLR 228.

- 39 The chances of whether or not the employee would have been retained must be taken into account when calculating any compensation to be paid to the employee (Polkey, as above). Tribunals are required to take a common-sense approach when assessing whether a Polkey reduction is appropriate - Software 2000 Limited v Andrews [2007] IRLR 568. The assessment is of what the actual employer would have done had matters been dealt with fairly not how a hypothetical fair employer would have acted - Hill v Governing Body of Great Tey Primary School [2013] IRLR 274.
- 40 The burden of proving that an employee would have been dismissed even if a fair procedure had been followed is on the employer, once the employee has put forward an arguable case that they would have been retained were it not for the unfair procedure – Britool Ltd v Mr T Roberts & Ors [1993] IRLR 481. It is therefore for the employer to put forward any arguments in respect of the Polkey test and to support them with evidence – Compass Group plc v Ayodele [2011] IRLR 802.
- 41 In respect of mitigation of loss, the EAT set out in Gardiner-Hill v Roland Berger Technics Ltd 1982 IRLR 498 that where there is a substantial issue as to failure to mitigate the Tribunal should ask itself:
- what steps were reasonable for the claimant to have to take to mitigate their loss;
 - whether the claimant took reasonable steps to mitigate their loss; and
 - to what extent would the claimant have mitigated their loss had they taken those steps.
- 42 The burden of proving that there has been failure to mitigate is on the employer - Cooper Contracting Ltd v Lindsey [2016] ICR D3:
- “What had to be proved was that the claimant had acted unreasonably; he did not have to show that what he did was reasonable. There was a difference between acting reasonably and not acting unreasonably, and what was reasonable or unreasonable was a matter of fact. It was to be determined taking into account the views and wishes of the claimant as one of the circumstances, though it was the tribunal’s assessment of reasonableness and not the claimant’s that counted. The tribunal was not to apply too demanding a standard to the victim. He was not to be put on trial as if the losses were his fault, when the central cause was the act of the wrongdoer.”*
- 43 Section 207A Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A) 1992 provides that in unfair dismissal cases where an Employment Tribunal concludes that an employer has unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures, it may increase any award which it makes to the employee by up to 25%, if it is just and equitable in all the circumstances.
- 44 Section 124(1ZA) of the ERA sets out the maximum compensatory award, which is the lower of:
- A fixed statutory amount (£115,115 at the time of the Claimant’s dismissal); and
 - 52 weeks’ pay calculated in accordance with sections 220-229 of ERA 1996.
- 45 Employer pension contributions come within the meaning of "remuneration" for the purposes of calculating a week's pay - University of Sunderland v Drossou UKEAT/0341/16.

CONCLUSIONS

- 46 The Tribunal heard submissions from Mr Austen and Ms Neal.

- 47 In summary Mr Austen submitted that misconduct was not the real reason for the dismissal, and even if it was, the dismissal must be unfair because there was a complete failure to follow any process or procedure at all.
- 48 Mr Austen argued that the word misconduct is not mentioned in the termination letter or the Respondent's response. Both the termination letter and the response refer to matters other than misconduct, including the Claimant's physical condition and working outside contracted hours.
- 49 On Polkey and contributory conduct, Mr Austen submitted that:
- It was not appropriate to apply the Polkey test here because it would be entirely speculative; and
 - There should be no reduction for contributory conduct because the Claimant had an answer to all of the Respondent's questions in the hearing about the state of the van and the accompanying photographs.
- 50 Turning to Ms Neal's submissions. Ms Neal accepted that the Respondent had failed to follow any process, including the disciplinary procedure set out in the Claimant's employment contract.
- 51 She explained that the Respondent is a small, traditional business that cares about its staff but has made mistakes with its processes. Nevertheless, she submitted that it is not (as Mr Austen implied in his submissions) simply about an unclean van. The issues with the Claimant's van were serious and made the van unsafe. Furthermore, the Respondent was concerned that the Claimant was not safely signing off vehicles he was working on, given the scrutineer was not working. The Respondent therefore considered the issues to be so severe and that they amounted to gross misconduct.
- 52 The Tribunal will take each of the issues in the issues list in turn.

What was the reason or principal reason for dismissal?

- 53 The Respondent submitted the reason was misconduct and the Tribunal must decide whether the Respondent genuinely believed the reason was misconduct. The Tribunal concludes that the Respondent genuinely believed the reason for the dismissal was misconduct. Whilst the termination letter did not use the word "misconduct" it set out in some detail the serious issues it discovered with the Claimant's van. When the letter was sent to the Claimant, it was sent with copies of the photographs of the van. In her oral evidence, which the Tribunal accepts, Ms Griffiths explained that she considered the issues with the van to constitute misconduct. Indeed, she considered them to be very serious for the reasons outlined above. The Tribunal therefore concludes that the principal reason for the dismissal was the Claimant's conduct.

Did the Respondent act reasonably in all the circumstances treating that as a sufficient reason to dismiss the Claimant?

- 54 In summary, the Tribunal concludes that the Respondent did not act reasonably in treating this as a sufficient reason to dismiss the Claimant. The ET has considered the points set out below.

Were there reasonable grounds for that belief?

- 55 The Respondent had serious concerns about the safety and roadworthiness of the van and that the Claimant had been smoking in the van. The Claimant was responsible for the van and it was in his control – it had been collected from him during the working day. However, the Respondent failed to ask the Claimant about the condition of the van and the equipment within it.

At the time the belief was formed, had the Respondent carried out a reasonable investigation?

- 56 The Respondent had not carried out any investigation into the condition of the van, other than to take photographs of what was found. It did not ask the Claimant anything about it or give him the opportunity to explain.

Was the dismissal within the range of reasonable responses?

- 57 The dismissal was not within the band of reasonable responses, given that no investigation or disciplinary process was carried out. The Respondent failed to carry out any of the steps set out in the ACAS Code of Practice or its own process, which is set out in the Claimant's employment contract. It did not offer the Claimant any right of appeal. The Respondent did not consider any lesser sanction than dismissal, for example formal warnings and an opportunity for the Claimant to improve, in which case he would have been fully aware that that there could be serious consequences if things did not improve. In effect, the Claimant jumped from having informal discussions with the Claimant to dismissing him with immediate effect without any opportunity for him to explain or appeal. The fact that the Respondent is a small employer does not preclude it from being able to follow its own disciplinary process and it is clear that the Respondent knew how to do so, having previously issued the Claimant with a disciplinary warning (paragraph 28 above). The Tribunal therefore concludes that the dismissal fell outside the band of reasonable responses.
- 58 The Tribunal's decision was therefore that the complaint of unfair dismissal is well founded.
- 59 The Claimant was not seeking re-instatement or re-engagement, so the Tribunal proceeded straight to consideration of the award to be payable to the Claimant as set out in the list of issues above.

Polkey

- 60 Firstly, the Tribunal considered whether any adjustment should be made to any compensation that may be awarded to Claimant on the grounds that there is a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed. The Tribunal was satisfied that the Claimant has put forward an arguable case that he may have been retained in employment were it not for the unfair procedure, for example by a lesser sanction such as a written warning or final written warning being applied. The burden is on the Respondent to show that the dismissal might have occurred even if a correct procedure had been followed (Britool Ltd v Roberts and Compass Group plc v Ayodele, paragraph 40 above).
- 61 Regrettably, the Respondent did not provide any evidence or make any submissions on this point. There was a complete absence of any prior disciplinary process or sanction (for example a prior written warning or formal written warning) or any other evidence from which the Tribunal might have been able to deduce what would or might have happened had the Respondent carried out an investigation and held a disciplinary meeting when it discovered problems with the Claimant's van. For these reasons, the Tribunal concluded that no reduction to the compensatory award could be made on *Polkey* grounds.

Contributory conduct

- 62 The Tribunal then considered whether a deduction should be made to the basic and/or compensatory award on the basis of the Claimant's conduct.
- 63 Firstly, it is necessary to identify the conduct which gives rise to the possible contributory fault. Secondly, the Tribunal must decide whether that conduct is blameworthy. Thirdly, the Tribunal should consider whether the blameworthy conduct caused or contributed to the dismissal to any extent and finally it must determine to what extent it is just and equitable for the award to be reduced.

- 64 The Claimant admitted in evidence that he had been smoking in his Company vehicle, which is a health and safety issue and a criminal offence. It is particularly serious given that there are flammable liquids kept in the van. Furthermore, there were other serious issues identified with the Claimant's van, as outlined above.
- 65 The Claimant did not argue that this was caused by anyone or anything else. In terms of the smoking, he argued that other employees do it too. On the petrol can, he stated that the photographs were fabricated, which (as already explained) the Tribunal does not accept. On the compressor and ladders he asserted that they were bolted down, when the photographs show that they were not. The Tribunal therefore concludes that these matters are conduct by the Claimant which give rise to possible contributory fault.
- 66 For the reasons set out in paragraphs 64 and 65 above, the Tribunal considers that that conduct was blameworthy.
- 67 On the third point, these matters were specifically called out in the termination letter and the photographs which accompanied it. The Tribunal therefore finds that this blameworthy conduct did contribute towards the dismissal.
- 68 In the circumstances, the Tribunal concludes it is just and equitable to reduce the Claimant's basic and compensatory awards by 25%.

REMEDY

- 69 The Tribunal awarded the Claimant £400 for loss of statutory rights.
- 70 The Claimant's period of financial loss was 79 weeks from the date of dismissal until 1 November 2025, the time by which the Claimant estimated in his Schedule of Loss he would be able to find new work (page 51).
- 71 The Respondent's payment to the Claimant of £3,252.92 for notice pay, ordered on 17 April 2025 and which the parties have confirmed has been paid, was deducted from the compensatory award.
- 72 The burden of proving that there has been failure to mitigate is on the employer (Cooper Contracting Ltd v Lindsey above). However, the Respondent did not provide any evidence to show what steps it was unreasonable for the Claimant not to have taken or how long it would reasonably have taken him to find new employment, therefore there was no deduction for mitigation.
- 73 The ACAS Code of Practice on Disciplinary and Grievance Procedures applied. The Respondent did not follow any part of the Code and therefore the Tribunal concluded there should be a 25% increase in the compensatory award.
- 74 A 25% reduction was applied to the basic award and compensatory award for contributory conduct, as set out above.
- 75 The total sum was then grossed up for tax. That sum was above the statutory cap of 52 weeks' gross pay, and therefore the statutory cap was applied.
- 76 The Tribunal therefore made the basic and compensatory awards to the Claimant as set out at paragraph 10 above, calculated in accordance with the information set out in the attached Schedule.
- 77 The Tribunal concluded that, whilst the dismissal fell outside the band on reasonable responses and the Claimant had been unfairly dismissed, there were no aggravating features to the Respondent's breach of the Claimant's rights and therefore no financial penalty was payable under s12A of the Employment Tribunals Act 1996.

Approved by:
Employment Judge McGough
20 October 2025

Notes

Judgments (apart from judgments under rule 51) and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found at www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

SCHEDULE**Calculation of compensation for unfair dismissal****Basic Award**

At dismissal on 26 April 2004, the Claimant was aged 66 with five complete years of service. His (agreed) gross weekly basic pay was £722.87.

The calculation of the basic award: $7.5 \times £700$ (capped weekly pay in place at relevant time) = £5,250

Deduction for contributory conduct @ 25%: $£5,250 \times 0.75 = £3,937.50$

Total Basic Award**£3,937.50****Compensatory Award**

Financial loss

(1) Loss of statutory rights £400

(2) Lost earnings

- Agreed net weekly basic pay (agreed): £578.31
- Monthly employer pension contributions (agreed): £73.21

Total net weekly earnings figure¹ (agreed): £595.20

- Period of past financial loss = 74 weeks from date of dismissal until 26.09.2025 (date of hearing)
- Period of future financial loss = 4 weeks from date of hearing until 1 November 2025

Total period of loss = 79 weeks

Total lost earnings: $79 \times £595.20 =$ £47,020.80

Total compensatory award (before adjustments and grossing up) **£47,420.80**

ADJUSTMENTS

1. Deduction of notice payment already made by employer

$£47,420.80 - £3,252.92 =$ £44,167.88

2. Deduction of sums to reflect failure to take reasonable steps to mitigate
Nil

3. Polkey deduction Nil

¹ Including employer pension contributions of £16.89 per week

4. ACAS Code uplift of 25%

$$£44,167.88 \times 1.25 = £55,209.85$$

5. Percentage reduction for contributory conduct by employee (25%)

$$£55,209.85 \times 0.75 = £41,407.39$$

6. Gross up

Amount of compensatory award included within the remaining amount of the £30,000 tax free element once basic award considered:

$$£30,000 - £3,937.50 \text{ (basic award)} = £26,062.50 \text{ (tax free sum)}$$

Amount of compensatory award that should be taxed:

$$£41,407.39 - £26,062.50 \text{ (tax free sum)} = £15,344.89$$

$$\text{Deduct unused personal allowance:} \quad - \underline{£12,570}$$

$$\text{Sum to be grossed up:} \quad £2,774.89$$

Grossed up at 20% (within applicable lower rate tax band limit of £37,700)

$$£2,774.89 / 80 \times 100 = £3,468.61$$

Add back tax free sums included in total award:

• Grossed up sum	£3,468.61
• Balance of £30,000 (after basic award)	£26,062.50
• Personal allowance	<u>£12,570</u>

$$\text{Total compensatory award (after grossing up)} \quad \underline{\underline{£42,101.11}}$$

7. Apply statutory cap

$$52 \times £739.76 \text{ weeks' gross pay}^2 = £38,467.52$$

Total Compensatory Award after adjustments and grossing up

£38,467.52

² Including employer pension contributions of £16.89 per week (£73.21 per calendar month)