



EMPLOYMENT TRIBUNALS

Claimant: Mr R J Toghill

Respondent: Lidl Great Britain Ltd

Heard at: By video **On:** 24 February 2025

Before: Employment Judge S Moore

Members: Mrs A Fine
Mrs M Humphries

Representation:
Claimant: Mr O Rhys-James (Counsel)
Respondent: Mr M Williams (Counsel)

JUDGMENT having been sent to the parties on 7 March 2025 and reasons having been requested by the respondent in accordance with Rule 60 of the Rules of Procedure 2013:

REASONS

Background and Introduction

1. The above remedy hearing followed the reserved judgment in favour of the claimant dated 25 October 2024 sent to the parties on 28 October 2024. The claimant's claims for unfair dismissal, wrongful dismissal, discrimination arising from disability (factors related to the dismissal on 21 August 2023) and failure to make reasonable adjustments (in regard to the disciplinary hearing) succeeded.
2. The Tribunal had an agreed remedy bundle of 533 pages. We heard evidence from the Claimant and Mr M Tallis for the Respondent.

3. The issues to be determined were set out in the case management order dated 29 February 2024 under paragraphs 3 and 9.
4. The relevant findings from the liability judgment are as follows.

Unfair dismissal

Paragraph 97

5. There should not be any Polkey reduction as the dismissal fell outside the band of reasonable responses; the respondent cannot show there would be a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed.

Paragraph 98

6. The issue of contributory fault was reserved to the remedy hearing.

S15 discrimination arising from disability

Paragraphs 110-113 and 116-117

7. The Claimant's dismissal was found to be unfavourable treatment under s15 as it arose in consequence of the claimant's disability specifically his difficulties with communication and the reliance on a lack of remorse. However we concluded that the respondent was entitled to decide the claimant should be demoted because the claimant's disability did not cause Mr Bowley to conclude the claimant could not be trusted in a management position. The cause of that was the claimant's decision to use the PPT when he knew that it was against company policy.
8. The claimant's remedy for the s15 claim will be limited to injury to feelings for the dismissal.

Failure to make reasonable adjustments

Paragraphs 127 (v and vi) and 128

9. Seeking advice prior to the hearing on the manner of its conduct for a person suffering from ADHD, to ensure that the hearing was fully cognisant of the nature of the Claimant's disability in terms of explanation and the Claimant's understanding of the proceedings, questions asked of the Claimant and affording him an adequate opportunity to put his case.

10. Implementing breaks in the course of the hearing to ensure that the Claimant had adequate thinking time and time for reflection as required for his disability.
11. The above two steps would have been reasonable steps to have taken and were already identified in their own disciplinary procedure (see paragraphs 14). We consider that these steps would have alleviated the disadvantages as can be evidenced from Mr Bowley's conclusions but they did not take any of those steps until the appeal stage. The claimant had been off sick due to forthcoming disciplinary hearing and the respondent was on notice he found it difficult to express himself in these types of meetings.
12. For these reasons this complaint is well founded in regard to the disciplinary hearing.

Findings of fact

13. The claimant commenced employment on 7 October 2019 as a shift manager at the Usk Way store in Newport. He was promoted to the position of deputy store manager ("DSM") on 1 June 2022. DSM's are responsible for the stores in the absence of store managers and will be the most senior manager present. He started work at the Risca store on 1 March 2023 and then moved to Ystrad Mynach on 1 July 2023.
14. The effective date of termination was 21 August 2023. One of the unusual features of this case is that the Claimant was offered reinstatement on appeal but with demotion which he refused.
15. At the time of the claimant's dismissal his salary was as follows:

Gross annual basic pay	£35,000
Gross weekly basic pay	£673.08
Net weekly basic pay	£518.47
Employer pension contributions	3%
Contractual notice period	4 weeks
Claimant's date of birth	30/12/1992
Claimant's age at EDT	30 years
16. Since his dismissal the Claimant has received Employment Support Allowance ("ESA") in total £4706.00.
17. It was agreed that but for the dismissal the claimant would have received a pay rise of £2000 on 1 March 2024.
18. The amount claimed for unlawful deduction from wages was confirmed in a letter from his representative dated 27 February 2024 as £174.44.

19. The Claimant had been incorrectly paid Company sick pay in respect of sickness absence taken in August 2023. Clause 8.8 of his contract of employment states that “Company Sick Pay will not be paid during any notice period, and/or if you are absent from work by reason of illness or injury during any investigation and/or disciplinary”). The amount of the overpayment was approximately £800.00.
20. The Claimant has worked in various roles since the age of fourteen. Upon leaving school he worked at Costa Coffee in Bristol between 2015 – 2019 working his way up to Store Manager. He moved to Newport in 2019 with his partner and began to look for work. It took three months to secure a role at Lidl which he commenced in October 2019. The Claimant told the Tribunal this had taken him a bit longer than expected having underestimated the job market in Newport compared to Bristol.
21. Since his dismissal the Claimant has applied for 16 jobs in total between August – Christmas 2023 and none thereafter.
22. We accepted the Respondent’s evidence that there were multiple job vacancies in the Newport and Cardiff area for retail store managers and the job market was buoyant. We heard evidence from Mr Tallis who the Respondent’s Regional recruitment manager for South Wales. We accepted his evidence that the Respondent has faced competition for candidates within the local job market facing significant growth from other retailers opening new stores and generally. Indeed data, whilst showing some fluctuations, showed that within a 25 mile radius of Newport there were over 150 advertised vacancies between January 2024 and January 2025 for Deputy manager roles. Between January 2024 – July 2024 there were over 200.
23. Mr Tallis had also collated evidence of over 40 vacancies within the local area of comparable job roles to deputy Store Manager in food retail and retailers such as Aldi and Peacocks as well as the hospitality sector. We accepted that the documents in the bundle were genuine and Mr Tallis had cut and pasted the adverts into a word document for the purpose of these proceedings.

Evidence as to injury to feelings in respect of successful complaints

24. There was some limited evidence as to how the acts of discrimination impacted on the claimant’s feelings but the focus of the claimant’s witness statements was on the consequences of the dismissal on his mental well being.

25. The claimant did not initially, at the point he was dismissed, fully react to the events that had unfolded. Whilst he found the dismissal process incredibly stressful and anxiety-inducing he did not believe he would be dismissed. The claimant told the Tribunal that he continued to bury his feelings whilst preparing for the appeal hearing, as he held the belief that it would be immediately overturned and it was quite a shock when the appeal outcome showed that this was not the case. The claimant equated the shock attributable to Mr Bowley's finding that despite the acknowledgments of Ms Neith's errors and admission of what constituted discrimination, he failed to fully overturn her decision. He remained hopeful that with ACAS early conciliation the decision would be overturned. He began to struggle to process the situation and felt pressured to continue job searching due to financial concerns and not wanting to let his partner down. When he learned that the respondent declined to engage in conciliation he found this incredibly confusing as it was inconsistent with the appeal outcome where elements of discrimination had been acknowledged.
26. We had sight of medical records in the bundle as follows. There were a series of Fit Notes from the Claimant's GP starting from 18 October 2023 running through to 21 January 2025. During this period the Claimant has been certified as unfit to work during that period by his GP. The GP notes gave a number of different reasons, initially it was anxiety, then stress at work in December (this is unexplained as the Claimant was not working at this time) but then a mixture of ADD and anxiety with depression latterly in the summer of 2024.
27. We had also before us a medical report which was dated 6 November 2024. This appears to have been the date of an addendum to that report as it is clear from reading the report itself that it starts sometime before the Tribunal Hearing because it refers to an upcoming Tribunal Hearing. The report is from the ADHD Services of Aneurin Bevan Health Board. Some elements of the report were redacted which was unfortunate in respect of the diagnosis section. The report largely supported the Claimant's evidence about how his mental health had been affected since the dismissal and how that had impacted both on his mental health and his ability to search for alternative employment. The Claimant's witness statement contained a lot of evidence on how his mental health had been during this period.
28. The Claimant was referred for a mental health review on 6 October 2023. During this period he continued to look for work. He was struggling to attend interviews due to anxiety and was starting to spend more time in the house. The notes from 6 October 2023 record that the Claimant was stressed about applying for roles when he was not ready, having poor performance in interviews and damaging work relationships. There was reference to not

wanting to apply for jobs, wanting to “wait it out a little bit” and if he “screwed up interviews” he would lose a future opportunity to work for the company.

29. On 9 February 2024 it is recorded that he had anxiety and was experiencing mental health triggers from going to job interviews and leaving the house to meet his solicitor. It supported the claimant’s evidence that he was spending time at home unless walking the dog. The next entry was 1 March 2024. It recorded he could not get back out in the “big wide world” until the Tribunal case was over and was “not comfortable to apply for jobs right now, does not want to give his mind reasons for stress”.
30. On 26 January 2024 he had been prescribed Citalopram to treat depression and panic attacks but was unable to stay on the medication due to side effects.
31. The Claimant’s witness statement says that by March 2024 his mental health had worsened and he was referred for face to face therapy. The waiting list was to be six months or longer.
32. Since the Claimant’s dismissal he rarely left the house going out only to attend GP appointments, solicitor appointments, DWP appointments or walk the dog or local shop. When outside he wears headphones to try and avoid social contact. Around the beginning of 2024 his depression was severe and he started a period of not leaving one room and neglecting his basic hygiene, also barely speaking to his partner. He has not engaged in normal social activities such as day trips, shopping, visiting cafes or restaurants or seeing friends and family. He has also stopped engaging with his hobby of maintaining his motorbike.
33. The dismissal triggered an exacerbation of the Claimant’s ADHD symptoms. He struggled a lot more at home when completing basic tasks and household chores such as doing laundry, as well as less frequent activities like getting a haircut. His social life was also affected and he has found it difficult to stay in touch with family and friends. He has seen his mum twice, and two friends on separate occasions, each time at his home, as he has been unable to leave for social visits. He has not celebrated his birthdays since the dismissal.
34. The claimant has some minor improvements he is still struggling for days and weeks at a time. He still experiences being triggered by his own thoughts which leads to periods of depression or anxiety attacks which can affect his sleep.

The Law

Unfair Dismissal

35. Section 123 ERA 1996 provides:

S123 Compensatory award

- (1) Subject to the provisions of this section and sections 124[, 124A and 126], 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.

36. S124 (1ZA) (b) provides that the compensatory award shall not exceed 52 week's pay.

37. Losses can only be compensated as part of the compensatory award if they are attributable to the employer's conduct and result from the claimant's dismissal. Approach to causation and loss is based on common law principles. The Tribunal should consider to what extent can it be said that the claimant's continued incapacity to work is attributable to the acts or omissions of the respondent (**Sutherland v Hatton [2002] ICR 612**). In respect of immediate loss, the Tribunal applies a "but for" test. In respect of future loss the Tribunal must assess the prospect of the claimant not being able to work.

38. Whether the Claimant's basic and or compensatory award should be reduced under S122 (2) and S123 (6) ERA 1996. The wording of the two provisions are not identical and differing reductions can be made in principle. S122 (2) provides that where the tribunal considers any conduct of the Claimant before the dismissal 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. S123 (6) provides that 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.

39. In **Steen v ASP Packaging Ltd [2014] ICR 56** (Langstaff P presiding) the EAT stated that the application of those sections to any question of compensation arising from a finding of unfair dismissal requires a Tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault; (2) having identified that it 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; (3) the Tribunal must ask for the purposes of ERA 1996 s 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did cause or contribute to the dismissal to any extent then the Tribunal moves on to the next question; (4) this is to what extent the award should be reduced and to what extent it is just and equitable to reduce it.

40. We were also referred to a number of other authorities in relation to contributory fault in submissions by Mr Williams (**Morrison v Amalgamated Transport and General Workers Union [1989] IRLR 361, University of Sunderland v Drossou UK EAT/0341/16, Parker Foundry v Slack 1992 ICR 302, CA and Polentarutti v Autokraft Ltd [1991] IRLR 457**).

Discrimination

41. S124 EQA 2010 provides:

124 Remedies: general

- (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
- (2) The tribunal may—
 - (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
 - (b) order the respondent to pay compensation to the complainant;
 - (c) make an appropriate recommendation.
- (3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect [on the complainant] of any matter to which the proceedings relate

42. S124(6) provides that the amount of compensation which may be awarded corresponds to the amount which could be awarded by the County Court under S119.
43. The Claimant is under a duty to mitigate his loss and the burden of proof is on the Respondent to show the Claimant has failed to mitigate his loss. **Ministry of Defence v Cannock [1994] ICR 918 and Wilding v British Telecommunications Plc [2002] ICR 1079**. The aim is that ‘as best as money can do it, the applicant must be put into the position she [or he] would have been in but for the unlawful conduct’ (**Cannock**), which is also authority for the principle that the Tribunal should not simply make calculations under different heads and then add them up. A sense of due proportion is required and to look at the individual components of any award and then looking at the total to make sure that the total award seems a sensible and just reflection of the chances which have been assessed (per Morison J at para 132).
44. In **Essa v Laing [2004] IRLR 313**, the Court of Appeal held that it was not necessary to show that the particular type of loss was reasonably foreseeable. If it is reasonably foreseeable that a claimant will suffer injury to feelings then the respondent will be liable for the full loss no matter how extreme (the “eggshell skull” principle).
45. In **Vento v Chief Constable of West Yorkshire Police (No.2) 2003 ICR 318, CA**, the Court of Appeal gave specific guidance on how employment tribunals should approach the issue. There are three broad bands when assessing the compensation for injury to feelings and within which band the compensation should fall.
46. In respect of claims presented on or after 6 April 2023, the Vento bands shall be as follows: a lower band of £1,100 to £11,200 (less serious cases); a middle band of £11,200 to £33,700 (cases that do not merit an award in the upper band); and an upper band of £33,700 to £56,200 (the most serious cases), with the most exceptional cases capable of exceeding £56,200.
47. **Prison Service and Others v Johnson [1997] ICR 725** provided the following guidance when assessing discrimination awards; such awards were compensatory and should be just to both parties, compensating fully without punishing the tortfeasors while not so low as would diminish respect for the policy of the anti-discriminatory legislation; that awards should bear some broad general similarity to the range of awards in personal injury cases and in exercising their discretion tribunals should remind themselves of the value in everyday life of the sum they had in

mind by reference to purchasing power or earnings and should bear in mind the need for public respect for the level of awards made.

Interest

48. The Equality Act 2010 ('the EA (2010)') s.139(1) provides for interest to be awarded on discrimination compensation in regard to past losses and injury to feelings (interest cannot be awarded for unfair dismissal awards). Where the tribunal is concerned with a sum other than injury to feelings, it is required to identify a 'mid-point date'. This date is halfway between the date of which the act of discrimination occurred and the date on which interest is calculated. The interest is then calculated from the mid-point date to the award date.
49. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803 provide the power to award interest on awards made in discrimination cases. Under Reg 2(1) a tribunal is required to consider whether to award interest even if the claimant does not specifically apply for it. The current rate is 8%.

Conclusions

50. We first of all discuss our assessment of the compensation to be awarded for the dismissal. The claimant succeeded with his unfair dismissal claim and there is to be no Polkey reduction (see paragraph 97 (iv) of the liability judgment). We explained that in respect of the s15 dismissal, compensation would be limited to injury to feelings only (see paragraph 117 liability judgment). As such the pecuniary loss for the dismissal falls to be determined under s123 ERA 1996.

Immediate loss

51. This is the period between the date of the dismissal (22 August 2023) and date of the remedy hearing (24 February 2025). Prior to the claimant's dismissal whilst he had been diagnosed with ADHD there was no history of ill health that had led to periods of absence from work either within the respondent's employ or any other employment.
52. Having regard to the mental health records we took into account that some of the language used by the Claimant (see paragraphs 28 and 29) could lead to a conclusion there was an element of reluctance to look for alternative work rather than being unable to due to mental health. We balanced this factor with the Claimant's evidence about how the dismissal impacted on him and his ability to search for alternative work. In particular from January 2024 what the Claimant told the Tribunal about being unable to leave the house. From the Claimant's evidence and supported by the Fit

Notes and medical evidence before us, it is clear that the Claimant was not fit to be applying for jobs and attending job interviews in the immediate period of loss. Prior to the dismissal the Claimant had been in stable employment relationships for many years. Had the claimant not been dismissed there is no evidence before us to suggest he would have developed depression as set out above. For these reasons we consider that the immediate loss is attributable to the actions of the respondent. The claimant was not fit to look for work and as such he has not failed to mitigate his loss. As this period goes beyond the statutory cap of 52 week's pay we do not consider it necessary or proportionate to assess future loss and we cap the compensatory award at 52 week's net pay and pension loss contributions of 3% from the date of dismissal.

Contributory fault

53. We reminded ourselves of the misconduct that gave rise to the possible contributory fault. We found that the claimant knew he was not supposed to use the PPT truck on the shop floor and chose not to adhere to the strict rule. The conduct was therefore blameworthy and contributed to the dismissal. This was the very reason the claimant was called to a disciplinary hearing. The respondent were rightly concerned about the unauthorised use and the claimant was not trained to use it. PPT is a heavy, powerful piece of equipment which if operated incorrectly, could cause serious injury to colleagues or the general public, or serious damage to the fabric of the building.
54. The respondent submitted there should be a 100% reduction to compensation for contributory fault. Turning to the last question under **Steen**; to what extent the award should be reduced and to what extent it is just and equitable to reduce it.
55. The reason we found the dismissal was unfair was because the claimant was dismissed for allegations that had not been put to him (see paragraphs 80 – 82 and 91). Ms Neith concluded that in the absence of her dishonesty finding she would have given the claimant a final written warning for unauthorised use of the PPT. We also found the dismissal was not within the range of reasonable responses as other managers had not been given the same sanction of demotion. We therefore do not think it can be possible to conclude there should be a 100% reduction as this would not be just and equitable. The conduct was not the sole reason for the claimant's dismissal and it therefore should not solely define the contribution. We consider that it is just and equitable to reduce the compensatory award by 30% having regard to the conduct that was blameworthy and the extent of the contribution towards the dismissal given the other factors we have discussed above.

56. We did not consider that the basic award should be reduced for contributory fault by 100% as sought by the respondent. The Tribunal has a wider range of discretion in deciding whether to reduce a basic award in these circumstances depending on whether it is just and equitable rather than the mandatory position in respect of a compensatory award. Whilst we acknowledge that different approaches to deductions are unusual in the circumstances of this claim the conduct was not the sole reason for the claimant's dismissal and as such we do not consider the basic award should be subject to any deduction.

ACAS uplift

57. This has provided to be a problematic matter to consider as the Claimant was dismissed by Ms Neith for an allegation that had not been put to him in the invite to the disciplinary hearing. This might therefore have been deemed quite a serious breach of the ACAS Code of Practice and could perhaps warrant a higher percentage increase of potentially towards the top end of the 25%. The Code of Practice states that the employee should be notified in writing if there is a disciplinary case to answer and the notification should contain sufficient information about the alleged misconduct to enable the employee to prepare in advance of the hearing. We have had to balance that with the fact that this breach was effectively cured on appeal by Mr Bowley's handling of the appeal process. Apart from the consistency of sanction point we concluded the appeal cured the procedural errors that had been made during the disciplinary procedure. In the circumstances we consider that an uplift of 10% was appropriate to recognise an earlier breach of the Code.

Injury to feelings

58. There were three discriminatory acts in which the claimant succeeded. These are set out above in paragraphs 5 to 12:

59. The Claimant's dismissal was found to be unfavourable treatment under s15 as it arose in consequence of the claimant's disability specifically his difficulties with communication and the reliance on a lack of remorse. However as this was overturned on appeal (and the proposed demotion was not found to be discriminatory), the claimant's injury to feelings was limited to these matters. In other words, the claimant's injury to feelings concerning the dismissal could not be considered in the context of how the loss of his job impacted on him. There were two failures to make reasonable adjustments in respect of steps that should have been taken to prevent the substantial disadvantages at the disciplinary hearing.

60. Our relevant findings about the claimant's evidence on injury to feelings in respect of the discriminatory conduct are at paragraphs 24-34. It is

important to remember that the award should only seek to compensate for the claimant for the discriminatory conduct. This has proved somewhat challenging in this case as plainly the claimant's injury to feelings was also bound up with the effect of the dismissal upon him. There were three acts of discriminatory conduct arising from decisions taken at or about the disciplinary hearing on 22 August 2023 that were all overturned on appeal on 11 September 2023. In these circumstances we would normally have regarded this to be a less serious case falling within the lower band. However we consider that the claimant has provided that the discrimination has had a very serious impact on his feelings and whilst in other cases the injury may not have been so severe, in the claimant's case we accepted that it has been and the respondent is fixed with that impact. For these reasons we consider that the injury should be assessed in the middle band and having regard to all of the evidence before us and in recognition of all of the above factors we award the claimant the sum of £20,000.

61. Interest is awarded on past financial losses and injury to feelings.
62. Lastly, in respect of the claim for unauthorised deduction from wages see findings at paragraphs 18-19. Given the Claimant has been overpaid and is required to offset such a payment to the awards that we have made, we declined to make any further award in that regard.
63. Having made these findings the parties agreed the sums and these were reflected in the Judgment.

Approved by Employment Judge S
Moore
Dated: 24 March 2025

REASONS SENT TO THE PARTIES ON
25 March 2025

Kacey O'Brien
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS