EMPLOYMENT TRIBUNALS

BETWEEN

Claimant:	**Ms Tatiana Stockman**	
Respondent:	**Phoenix House Limited**	
Held at:	London South	On: 12 & 13 June 2017
Before:	Employment Judge Freer	
Members:	Ms R Bailey Mr G Shaw	

Representation:
Claimant: In person
Respondent: Mr C Milsom, Counsel

RESERVED JUDGMENT ON REMEDY

It is the unanimous judgment of the Tribunal that:

1) There shall be no order for reinstatement or re-engagement;

2) The Basic Award shall be reduced by 30% for contributory fault;

3) The Compensatory Award shall be reduced by 10% when applying the *Polkey* principle;

4) The Compensatory Award shall be reduced by 20% for contributory fault;

5) The Respondent shall pay to the Claimant the sum of £15,764.88 comprising a Basic Award of £947; a Compensatory Award of £9,709.09 and injury to feeling with interest of £5,110.79.

REASONS

1. This is a decision on remedy arising from judgments of the Tribunal promulgated on 24 April 2015 and 24 May 2017.

2. The Tribunal received evidence from the Claimant and Mr George Lambis, Director of Finance and Mr Tony Pearson, Director of Human Resources and Learning Development for the Respondent, together with a bundle of documents comprising 367 pages.

3. The Tribunal was also cross-referred to the witness statements and bundles from the liability hearing.

4. The Claimant confirmed that she is applying for reinstatement as the primary remedy.

5. Dealing with that matter first, the law relating to reinstatement and re-engagement is contained in sections 113 to 116 of the Employment Rights Act 1996.

6. Section 113 provides:

> 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.

7. Section 116 addresses the 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.

8. The Claimant has relied principally upon the authority of **McBride -v- Scottish Police Authority** [2016] UKSC 27 and the Respondent relied upon a series of authorities set out in paragraphs 3 to 7 of its written submissions, all of which the Tribunal has taken into consideration.

9. The Claimant's effective date of termination was 28 November 2013 and at that time was employed as a full-time Payroll Officer.

10. In February 2014 at the time of a re-organisation the Respondent employed one full-time and one part-time Payroll Officer (see page 193). As a result of the reorganisation the Respondent created a new post of Senior Payroll Officer, which was at a higher grade, Grade H+. The new role was more complex than the previous Payroll Officer position, but the job duties were mapped through from the old role (see page 319). The Tribunal concludes that this is a position the Claimant could have undertaken and having regard to the evidence of Mr Lambis, she was likely to have been successful in securing that role.

11. That Senior Payroll Officer role remained in place over two further re-organisations in 2015/2016 (see pages 303 for June 2015 and page 315 for 2016).

12. It is this position into which the Claimant wishes to be reinstated.

13. The Claimant's claim against the Respondent was not a stand-alone unfair dismissal complaint, it was a complaint that was made with significant various claims of discrimination and protected interest disclosure in respect of which the majority of those complaints were not well founded and not made out on the evidence.

14. The Tribunal accepts that Respondent's evidence, as set out in the witness statement of Mr Lambis, Director of Finance, at paragraphs 31 and 32

regarding the effects of those complaints. The complaints have clearly had a significant impact and the relationship between the Claimant and Respondent has significantly soured. In this respect the Tribunal refers to the Court of Appeal authority of **Coleman and Stephenson -v- Magnet Joinery Ltd** [1974] IRLR 343.

15. Having considered all the circumstances and the relevant authorities, the Tribunal concludes that it is not practicable to reinstate the Claimant into the Senior Payroll Officer post generally, made even less practicable given that the position reports into Mr Lambis as Director of Finance.

16. In addition, as set out below, the Tribunal has made a finding that the Claimant contributed to her dismissal and taking account of that matter and the surrounding circumstances the Tribunal also concludes that it would not be just and equitable to reinstate the Claimant as argued.

17. By way of completeness, although not expressly argued by the Claimant in submissions, for the same reasons expressed above the Tribunal also concludes not to exercise its discretion to make a re-engagement order. No suggestion has been made of the alternative position into which the Claimant is seeking to be re-engaged and it is almost inevitable that it would entail a financial element and report to Mr Lambis.

18. The statutory provisions relating to compensation for unfair dismissal are set out in sections 112 to 127 of the Employment Rights Act 1996.

19. Section 119 addresses the calculation of the Basic Award. By virtue of section 122(2), a Tribunal may reduce the basic award where the conduct of the employee before the dismissal was such that it would be just and equitable to do so.

20. The main provisions relating to the assessment of the Compensatory Award are contained in section 123:

> (1) Subject to the provisions of this section and sections 124 [F1, 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.
> (3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of—
> (a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or

(b) any expectation of such a payment,
only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same 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.

21. So far as possible, the Tribunal should use the facts at its disposal in order to reach an accurate assessment of compensation, but it is also recognised that a Tribunal will often be compelled to adopt a 'broad brush' approach (see **Norton Tool Company Ltd –v- Tewson** [1972] ICR 501, NIRC).

22. It is well-established law that the principle contained in **Polkey –v- A E Dayton Services Ltd** [1987] IRLR 503, HL, applies to the consideration of the just and equitable element of the Compensatory Award. A Tribunal may reduce the Compensatory Award where an unfairly dismissed employee may have been dismissed fairly at a later date or if a proper procedure had been followed.

23. There is no need for an 'all or nothing' decision. If the Tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment.

24. In **Software 2000 Ltd -v- Andrews** [2007] IRLR 568, the EAT reviewed the authorities and set out some guidance, such as:

> "If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself".

25. By virtue of section 123(6), the Tribunal may reduce the compensatory award by such proportion as it considers just and equitable where the dismissal was to any extent caused or contributed to by any action of the employee.

26. By combination of Section 207A and Schedule A2 of the Trade Union and Labour Relations (Consolidation) Act 1992 and section 124A of the Employment Rights Act 1996, where a claim by an employee is made under any of the jurisdictions listed in Schedule A2 of the 1992 Act and is also one to which the ACAS Code of Practice on Disciplinary and Grievance Procedures applies, where a party has failed to comply with that Code in relation to that matter, and that failure was unreasonable, the Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase or decrease any

compensatory award by no more than 25%.

27. Such an adjustment shall be applied immediately before any reduction for contributory fault and any adjustment under section 38 of the Employment Act 2002 for a failure to provide employment particulars.

28. With regard to contributory fault, the Tribunal in particular refers to: paragraph 20 of its reasons on remission regarding the Claimant's pursuit of an argument that there was a lack of genuine reason for the restructure of the finance department; paragraphs 123 to 128 of the original reasons relating to the office incident with Mr Lambis; and the circumstances relating to the Claimant stating that she would pursue a grievance as set out in paragraphs 138 and 139 of the original reasons. The Tribunal concludes that these factors, in respect of which the Claimant was culpable and blameworthy, contributed to the Respondent considering that the employment relationship had broken down and ultimately her dismissal.

29. Having regard to all the factual circumstances and also the findings on why the Tribunal concluded that the dismissal was unfair (but disregarding matters relating to adherence to the ACAS Code) the Tribunal concludes that the Claimant contributed to her dismissal to an extent where it is just and equitable to reduce the Basic and Compensatory Awards by 20%.

30. With regard to the amount of any award that it is just and equitable to make, the Respondent relies significantly upon the Claimant's covert recording of discussions with Ms Logan.

31. In this respect the Respondent relies upon the well-established case of **Devis -v- Atkins** as support for the proposition that the Tribunal can take into account misconduct matters discovered after dismissal.

32. The judgment in **Devis** states: "In assessing compensation the tribunal is entitled to have regard to subsequently discovered misconduct and, if they think fit, to award nominal or nil compensation".

33. The Respondent's submissions refer to this matter also forming part of contributory fault. The Tribunal concludes that this may be possible with regard to the Basic Award as there is no stipulation that such conduct caused the dismissal, the statutory provisions simply refer to conduct occurring before dismissal in respect of which it would be just and equitable to reduce the amount of the Basic Award. The provisions relating to the Compensatory Award prescribe the circumstances to have contributed to the dismissal. Clearly conduct discovered after the date of dismissal, as the recordings were, cannot have contributed to it.

34. The Tribunal concludes that the matter of the recordings more properly goes to the just and equitable nature of any Compensatory Award as identified in **Devis** per Viscount Dilthorne at p955 H and 956 A-B. It is also clear that the ratio of the case relates to paragraph 19(1) of the Industrial Relations Act 1971 which is in very similar form to section 123 of the Employment Rights Act 1996.

35. The Respondent argues that had the Respondent known about the recording it would have dismissed the Claimant for gross misconduct. For the purposes of the Compensatory Award it is in essence a **Polkey** point.

36. The transcripts of the conversations are in the original Tribunal bundle. The Claimant recorded the conversations and did not disclose that fact to Ms Logan.

37. The Tribunal accepts the Claimant's evidence that she created the transcript of the recordings because of the legal obligations under the Tribunal's disclosure process. No transcript of, or reference to, the recordings were used by the Claimant as part of the internal proceedings with the Respondent generally, or to the detriment of the Respondent. In fact, the recording transpired to be detrimental to the Claimant, as set out in paragraph 143 of the original reasons.

38. The Tribunal also considers that there is no suggestion of entrapment or attempted entrapment. For example, there were no questions asked by the Claimant that give the impression of being made in order to obtain a favourable position. The Tribunal accepts that the Claimant was flustered at the time and was even uncertain whether or not the device would record.

39. The Respondent's oral evidence was had it known of these actions at the time the Claimant would not have been dismissed automatically and the matter would have depended on all the circumstances. A disciplinary hearing is likely to have been undertaken. Although Mr Lambis stated in evidence that he would have found it difficult to think of circumstances where he would not have found the matter to be gross misconduct, he was not dealing with the Claimant's disciplinary matters at the time and was unlikely to have done subsequently given the Claimant's allegations about him. Mr Pearson was not employed by the Respondent at the time.

40. The making of covert recordings is not set out specifically in the Respondent's disciplinary policy as amounting to gross misconduct and the Policy has not been amended in light of these proceedings.

41. **Devis** confirms that in assessing compensation the Tribunal "*might take into account* evidence of misconduct that came to light after the dismissal and reduce the compensation it might otherwise have awarded" – the Tribunal's emphasis. That view is consistent, of course, with the award of compensation being just and equitable.

42. The judgment also confirms that Parliament when drafting the statutory provisions: "cannot have intended that a dishonest employee who has cheated his employers and has successfully concealed his defalcations up to the time of dismissal, should in addition to the proceeds of his dishonestly, obtain "compensation" from his employers". The Tribunal concludes that the Claimant's conduct does not fall to be described in the same manner. For example, there are no "proceeds of dishonesty" in this case.

43. The Tribunal concludes that this matter, whether more properly addressed under **Devis**, **Polkey**, or pure statutory 'just and equitable' principles, is one of assessing the chance of the Claimant being dismissed fairly had the Respondent known about the Claimant's conduct at any time before her actual dismissal and then adjusting any amount of the Compensatory Award in line with that conclusion as is just and equitable.

44. The Tribunal has also been referred to comments made in the case of **Nandhra -v- Royal Borough of Grenwich** which, unusually, is reference to a first instance decision of a Tribunal that was also conducted by the same Employment Judge as the instant case. The case of **Nandhra**, of course, was a case determined on entirely different facts to the instant case and before a differently constituted Tribunal. For example, as stated above, the Tribunal in this case considers that the Claimant's recording was not done with the purpose of securing an unguarded remark, was not in defiance of an express instruction by Ms Logan and was not contrary to any express term in the Respondent's Disciplinary Policy.

45. The Tribunal concludes that when weighing all the circumstances and assessing whether or not the Respondent would have fairly dismissed the Claimant had it known of the recordings, it is just and equitable to reduce the Compensatory award by 10% to fully reflect the circumstances relating to the covert recordings. It is possible that once the reasonably available facts were known, the Respondent may objectively and reasonably have considered this to be a misconduct matter which then fairly led to dismissal. The Tribunal considers in the circumstances that this is a low percentage chance.

46. The Tribunal further concludes that given the terms of the statutory Basic Award contribution provisions it is just and equitable to further increase the Basic Award reduction by the same amount to a total of 30%.

47. The Tribunal has referred itself to the conclusions on why the dismissal was unfair both at the disciplinary stage and the final position after appeal. The Tribunal concludes that the Claimant confirmed throughout the process that she was able to move on and despite repeated questioning on the matter, perhaps so as to elicit a different answer at some point, the Claimant did not deviate from her view. The Claimant is an intelligent woman and the Tribunal concludes that once she realised her dismissal was a real likelihood that she would have remained of the view that she was able to move on constructively and acted upon it, whether or not there was any trial period as indicated by the Employment Appeal Tribunal.

48. In all the circumstances having regard to all the findings of unfairness that were still live issues at the conclusion of the appeal process, the Tribunal concludes that it is not just and equitable to apply any further reduction to the Compensatory Award when applying the **Polkey** principle and in particular whether the Claimant would have been dismissed fairly had the elements of unfairness not existed and also whether she would have been dismissed fairly at a later date.

49. With regard to mitigation, the burden of proof is on the Respondent to show that the Claimant has failed to mitigate loss.

50. The Tribunal concludes that the Claimant did mitigate her loss. The Tribunal concludes that it was reasonable in the circumstances for the Claimant to concentrate on the employment tribunal proceedings as she did and accepts that it was reasonably time consuming. It was reasonable for her to consider that the fact of her dismissal would be a material hindrance to securing alternative employment and any job search. That was the reality and the Tribunal accepts the Claimant's evidence as set out in paragraph 7 of her witness statement that she made a number of applications and when she gave details of the reason for leaving her employment she did not hear again from the prospective employers.

51. The Claimant actively and reasonably applied for several positions, but was unsuccessful. However, the Claimant did secure temporary employment with a major organisation from 12/05/14, in respect of which she managed to negotiate an extension to 10/12/14. After the initial Tribunal hearing completed in December 2014 the Claimant secured a permanent job at a higher wage than the position she held with the Respondent. That job interview took place on 08 January 2015 and the employment commenced on 13 January 2015.

52. The Claimant resigned from that company on 19 January 2017 when an issue arose over a reference from the Respondent. From that time the Claimant has been undertaking temporary work.

53. The Claimant's schedule of loss claims only for the period from dismissal up to the time she secured permanent work.

54. The Respondent provided evidence, principally through Mr Pearson, which the Tribunal concludes was not consistent. Mr Pearson's oral evidence was that the job market generally is usually very active in January and February. Whereas the Hays 'Recruitment Trends' article Mr Pearson relied upon indicated that accelerating recruitment took place from Spring 2014 onwards and suggested that many employers were keen to recruit individuals with specific sector experience rather than look for those with transferable skills.

55. Having regard to all the mitigation material the Tribunal concludes that the Claimant did mitigate her loss up to the time she secured new employment on 12/01/15 for which she was paid more than the salary she received from the Respondent. The Tribunal concludes that it is just and equitable to award the Claimant her loss of earnings for the period from the effective date of termination on 28/11/13 up to starting her new job on 12/01/15, a period of 59 weeks. The Tribunal concludes that the loss to the Claimant arising as a consequence of her dismissal ends at this point. It is an intervening event that ends any future compensation. The issue over the reference and whether the Claimant disclosed to her new employer the reason for leaving the Respondent is not relevant for the purposes of calculating compensation.

56. The EAT in the decision to remit this matter back to the employment tribunal held that the ACAS Code does not apply to 'some other substantial reason' dismissals. The grievance procedure had been exhausted. Accordingly, there is no ACAS Code compliance adjustment to be made.

57. Having regard to the actual amount of compensation, the Claimant is entitled to a Basic Award of £1,350 to which a 30% contributory fault reduction is made giving a total of £945.

58. With regard to the compensatory award, as set out above the Claimant mitigated her loss and the Tribunal concludes that it is just and equitable to award loss of earnings from the effective date of termination on 28/11/13 up to starting her new job on 13/01/15. The Tribunal accepts the figures and calculations set out in the Claimant's schedule of loss which details the increase in pay and gives credit for the sums earned by the Claimant and gives a total loss figure of £13,134.85. Those figures in themselves were not challenged by the Respondent.

59. The Tribunal accepts the evidence of Mr Lambis, as set out a paragraph 14 of his statement for this remedy hearing, that the Claimant is not entitled to a bonus payment.

60. The Claimant has received annual leave pay as part of the loss of earnings calculation and therefore it would amount to double recovery to make any further award.

61. There is no contractual right for the Claimant to claim ACCA subscription fees.

62. Therefore, the Tribunal concludes that it is just and equitable to make an award in respect of loss of earnings of £13,134.85 together with £350 for loss of statutory rights.

63. The Tribunal makes no award in respect of Tribunal fees given the outcome in the recent Unison case at the Supreme Court. That is a sum the Claimant can apply to recover direct from HMCTS. In **R (on the application of UNISON) -v- Lord Chancellor** [2017] UKSC 51 the Supreme Court decided that it was unlawful for Her Majesty's Courts and Tribunals Service (HMCTS) to charge fees of this nature. HMCTS has undertaken to repay such fees.

64. Applying to the total compensatory award of £13,484.85 a 10% 'just and equitable' reduction gives a total of £12,136.37 and then a further 20% reduction reflecting contributory fault gives a final figure for the Compensatory Award of £9,709.09.

65. The Tribunal also makes an award for injury to feelings in respect of the successful protected disclosure and victimisation claims.

66. The statutory provisions are contained in section 124 of the Equality Act 1996. The assessment of injury to feelings is given helpful guidance by the decision in **Vento –v- Chief Constable of West Yorkshire Police (No 2)** [2002] EWCA

Civ 1871, as updated by a combination of **Da'Bell –v- NSPCC** [2010] IRLR 19 and **De Souza –v- Vinci Construction (UK) Ltd** [2017] EWCA Civ 879 regarding the earlier decision in **Simmons -v- Castle**). An award for injury to feelings in respect of a detriment in employment by reason of having made a protected disclosure may be made and follows the same principles (see **Virgo Fidelis Senior School –v- Boyle** [2004] IRLR 268, EAT).

67. The EAT in **Ministry of Defence –v- Cannock** [1994] IRLR 509 confirmed that awards for injury to feelings should be purely compensatory and it would be wrong for such awards to be used as a means of punishing or deterring employers from particular courses of conduct. On the other hand, discriminators must take their victims as they find them and once liability has been established, compensation should not be reduced because, for example, the victim was particularly sensitive. The issue is whether the discriminatory conduct caused the injury, not whether the injury was necessarily a foreseeable result of that conduct:

68. The Tribunal accepts that the Claimant suffered distress as a consequence of those matters. The Claimant was informed that she may be dismissed, the Claimant was placed under great pressure by the meeting being called at short notice and by the absence of advance written notice of the basis for the cause for concern of the Respondent until the actual dismissal meeting itself. These events caused upset to the Claimant. The Tribunal accepts the Claimant's evidence that she suffered general stress and anxiety, lack of sleep, fast heartbeat and discomfort as a consequence.

69. The Tribunal concludes that the injury to feelings is in the lower **Vento** band and considering all matters concludes it is just and equitable to award a sum of £4,000 (which includes adjustments reflected in **Da Bell** and **Simmons -v- Castle**).

70. The Tribunal awards interest on that sum at 8% from 25 November 2013 to the calculation date, which gives a sum of £1,110.79.

71. The Tribunal has received no medical evidence from the Claimant to substantiate any other symptoms with regard to the claim for personal injury. No award is made in that respect in addition to the general injury to feelings factors covered under that heading.

72. The Tribunal concludes that it is not appropriate to make any award of aggravated damages. The conduct of the Respondent does not approach the level required to make such an award. The sending of costs warning letters, offers of settlement that an individual may consider to be on the low side and the possibility of being 'outnumbered' at the Tribunal hearing is part of general litigation.

73. Accordingly, the Tribunal makes judgment that the Respondent shall pay to the Claimant the sum of £15,764.88.

Employment Judge Freer
Date: 22September 2017