EMPLOYMENT TRIBUNALS

Claimant: Mr S Mohmed

Respondent: Network Rail Infrastructure Limited

HELD AT: Manchester **ON:** 16 October 2017
8 January 2018 (In Chambers)

BEFORE: Employment Judge Holmes
Mrs L Atkinson
Mr A Gill

REPRESENTATION:

Claimant: In person
Respondent: Mr S Lewinski, Counsel

RESERVED JUDGMENT ON RECONSIDERATION

It is the judgment of the Tribunal that :

1. The claimant's application for reconsideration is dismissed.

2. The respondent's application for reconsideration is granted, and the tribunal varies its judgment sent to the parties on 5 January 2017 to provide at para. 4 in place of the current finding the following:

   "4. The claimant's conduct prior to the dismissal in harassing Lisa Riley, and contacting her former employer Birse and the University of Warwick was such that it would be just and equitable to reduce the amount of any basic award by 100%., pursuant to s.122(2) of the Employment Rights Act 1996.

REASONS

1. By a judgment sent to the parties on 5 January 2017, the tribunal found that the claimant had been unfairly dismissed, but awarded him a nil compensatory award, on the basis that, applying ***Polkey*** , there was a 100% chance that he would have been dismissed in any event . The claimant's claims of detriment by reason of having made a protected disclosure were dismissed.

<u>The procedural history of the applications, and documents received.</u>

2. Following promulgation of the judgment, on 5 January 2017 the claimant wrote to the tribunal , on 19 January 2017, seeking reconsideration of its judgment. This document runs to some 16 pages, 94 paragraphs , and sets out the grounds that the claimant was relying upon.

3. The respondent, by letter of 19 January 2017 also sought reconsideration, of one aspect only of the tribunal's judgment, namely the proposal to make a basic award to the claimant in respect of the finding of unfair dismissal. The claimant, as invited by the tribunal to, responded to the respondent's application by e-mail of 10 February 2017, attaching "Comments" upon it, and the respondent similarly responded to the claimant's application by e-mail of 13 February 2017, attaching its Response document.

4. In the meantime the claimant appealed to the EAT on 16 February 2017. That appeal was further considered by the EAT on 31 May 2017, and it was dismissed under Rule 3(7) on that date.

5. The tribunal sought to list the applications for a hearing, but this was not possible until 16 October 2017. By this time the tribunal had received the following documents:

E-mail of 25 May 2017 from the claimant asking to amend his ET1 by submitting additional claims.

E-mail of 28 May 2017 from the claimant asking if he needed to use a prescribed form to submit his application to amend his claims. The additional claims he sought to make were :

"1. The respondent not being on guard against signs of bullying on the workplace.

2. Protection from Harassment Act 1977."

6. By letter of 31 May 2017 the tribunal wrote to the claimant informing him that the tribunal would not consider his application to amend his claims until the application to re-consider its judgment . If the judgment was reconsidered, and re-opened, the tribunal would then consider the application to amend.

7. The respondent responded to that application by e-mail to the tribunal on 31 May 2017, objecting to it.

8. On 2 October 2017 the claimant sent to the tribunal an updated reconsideration document. This is an (undated) 70 page document, comprising of 367 paragraphs.

9. By e-mail of 13 October 2017 the respondent commented upon the claimant's further submission. It contended that the claimant was seeking to re-litigate his case,

and noted that his latest representations now ran to 44,559 words, a fourfold increase on the original submission.

10. The claimant replied to the respondent by two e-mails of 13 October 2017 , copied to the tribunal. In the first (21.12 hours) he said :

"My understanding is the whole purpose of a reconsideration hearing is for the re-litigation of the case and a hearing that is provided at the discretion of employment tribunals."

11. Earlier the same day , at 09.23 hours, the claimant sent the tribunal "Supplementary Pages" a further three page document that he wanted to expand upon some of the points he had made in his previous submission, one of which he said was a new matter , although it is hard to identify which matter that is .

The reconsideration hearing and subsequent events.

12. The tribunal sat on 16 October 2017 to hear the applications. The claimant again appeared in person, and Mr Lewinski of counsel represented the respondent. The tribunal took the first part of the hearing to read the claimant's updated , 70 page, application, and his further three page document of 13 October 2017. It was discussed, and agreed with the parties, that the tribunal should consider the claimant's written application first, so that the claimant did not need to read it out, or repeat it, hear the respondent's objections, and its own application, and then have the claimant respond in support of his own application, and in opposition to the respondent's application.

13. The tribunal conducted the reconsideration this way, but was unable to conclude the matter, as the hearing went on to 4.30p.m. The tribunal accordingly reserved it judgment.

14. Following the hearing, however, the following further documents were received by the tribunal:

E – mail at 22.48 on 16 October 2017 , from the claimant , following the hearing, in which he sought to draw the tribunal's attention to his "statement of issues" which had been submitted ahead of the hearing in July 2016. He said that he did not have that document to hand in the hearing earlier in the day. He went on to say that he did " have the significant bullying, victimisation and discrimination matters" in his statement of issues, when he was in a position to start "running with" the case later. He said these were "in sync" with the matters he highlighted on those topics in his witness statement. He went on to refer to the fact he was representing himself, and had no familiarity with the rules and regulations, and did not know what else to do.

E-mail in response from the respondent's solicitor, at 11.49 on 17 October 2017, in which it is pointed out that the claimant list of issues was expressly considered by the tribunal in paragraphs 5 and 12 of its judgment.

E-mail from the claimant at 08.46 on 28 October 2017. This e-mail continues to make reference to the claimant's list of issues, and how it had not been agreed. he

went on to talk abut the bundles, and alleged that the respondent's counsel had attempted "underhand tactics" in relation the bundles, and alleging that he had been warned not to raise anything with the Judge again. His e-mail then goes on to make reference to an application to amend his claims to include a section 103A automatically unfair dismissal claim, and his s.47B detriment whilstleblowing claims, which he says "should never have been rejected". He says that this (presumably that his dismissal was by reason of his having made a protected disclosure) was always part of the claim from its inception, and he went on to refer to the evidence of David Hunter and Penny Hunt, suggesting that she (and probably David Huner_) had lied. . He then goes on to make reference to this being a travesty of ustice based on a technicality (of pleading, in effect), and his solicitor "incorrectly" referring to s.47B rather than s.103A, which he could not have realised at the time, due to significant health issues at the time. He goes on to refer to the loss of his "very lucrative career on the railways"., and the losses , including pension loss that he wished also to claim.

E-mail from the respondent , received at 14.22 on 6 November 2017, replying to the claimant's previous e-mail above. The point is made that the claimant continued to make representations after the hearing had concluded, that the respondent sent the claimant its List of Issues on 14 July 2016, and contesting his allegations of any underhand tactics, or that the respondent's witnesses had lied.

E-mail from the claimant , in effect to the respondent's solicitor, but copied to the tribunal , at 22.45 on 7 November 2017. In this e-mail the claimant says he has to defend his position , and provided his comments to provide the "full picture". He does on to make 8 bullet points, largely alleging that the respondent's conduct of the proceedings was "absolutely suspect" , and maintaining his previous assertions.

15. In accordance with the tribunal's directions, the parties did subsequently agree that , subject to any reduction, the basic award to which the claimant would be entitled was £4,176.00. The tribunal was unable to re-convene in Chambers until 8 January 2018, when the panel deliberated upon the applications, accordingly now gives its judgment upon them..

Discussion and findings.

1.The claimant's application for reconsideration.

16. The claimant's written application is long, unstructured, and highly narrative document, which does not identify specific findings of the tribunal which are challenged on specific grounds. It is a hard document to summarise, and the tribunal will not attempt to do so, but will attempt to extract from it what it discerns to be the grounds upon which the claimant seeks reconsideration.

17. The implication of the claimant's application (for he has not said in terms what he is challenging) is that the tribunal should not, despite finding that he was unfairly dismissed, have made the reduction to the compensatory award of 100%, on the basis of ***Polkey***, and/or the alternative basis (at para. 69 of the judgment) , for contribution. The thrust of his arguments and submissions, therefore, are directed at the tribunal's findings on contribution and ***Polkey*** .

18. To the extent that the claimant seeks to summarise the grounds of his application, on page 1 of his submissions (the 70 page version) he says this:

"The relevant considerations have not been deliberated upon in the Judgment formed and reasoning provided. There has been comparable conduct whilst in office during when I was made subject to relentless bullying after my big promotion leading to false statements being made about me and what followed during the grievance process. A number of individuals in Mr Evans' team were not happy with my promotion. A number of key issues have not been addressed. The finding of fact is perverse due to the weight that may have been attached to the account of Lisa Riley and other employees who provided statements to the Respondent and to Greater Manchester police. Also the finding of fact is perverse on the detriment claims I had alleged against the Respondent due to the documentation that may not have been relied upon in deliberations. Finally, whether a fair hearing was provided to put the Claimant's case across against the time provided to the Respondent's counsel."

19 What then ensues in this document is 367 paragraphs , which at times resemble a further witness statement from the claimant , in that the claimant makes numerous factual assertions, exhibits extracts of documents, , and comments upon the evidence that the tribunal heard. .

20. The main thrust of the respondent's submissions was that this is no more than an attempt by the claimant to re- litigate a claim which he has (in effect) lost. He is seeking a second "bite at the cherry", and in some aspects seeks to raise new claims which were not before the tribunal. His application offends principle of finality of litigation, as set out in ***Flint v Eastern Electricity Board [1975] 395*** .

21.. The tribunal does not propose to go through each of the 367 paragraphs advanced by the claimant , but as the claimant has in his opening general paragraph identified (what appear to be) four general grounds upon which he seeks reconsideration of the judgment, the tribunal will address these in turn.

Ground 1. : others were guilty of "comparable conduct".

The claimant links this to his assertions, made in the course of the grievance and the disciplinary process, that he was the victim of false allegations made by colleagues, jealous of his promotion. His argument appears to be twofold. Firstly, that this somehow excuses or mitigates any behaviour on his own part, and secondly, that in dismissing him for this conduct , when others were guilty of similar , or worse, conduct, in essence a consistency point.

22. In relation to the former, these points were made by the claimant and considered by David Hunter. He did not consider them relevant, and did not accept the premise of the claimant's arguments that the allegations were "false". He did so largely on the basis of the claimant's own evidence, and the incontrovertible documents which revealed the nature and extent of the claimant's communications with Lisa Riley , particularly in early 2013. The tribunal too formed its view of the claimant's conduct , largely on the basis of that documentation , as set out in paras. 36 and 37 of its judgment (there being a typo in para. 36(f) as to the date of 2014,

which clearly should be 2013). There is, in short, the tribunal found, and nothing in the claimant's submissions which leads to tribunal to consider that this finding is unsafe.

23. Turning to the second aspect, the consistency argument, this issue was considered in para.62 of the tribunal's judgment, where the relevance of arguments as to consistency was considered. The respondent did not consider, and was entitled to do so, that the alleged (for the respondent did not accept that the other employees referred to had acted improperly, whatever the claimant may contend) misconduct of the other employees, effectively the claimant's accusers, was such as would amount to misconduct. Whilst the claimant alleged that they were motivated by malice, the respondent did not so find, and in any event, concentrated on the claimant's own conduct. As the authorities cited in that paragraph make clear, it will be only rarely that a tribunal would be entitled to hold that a dismissal was unfair by reason of some alleged inconsistency in treatment, particularly where the alleged conduct on the part of others is not accepted or established, and there are good grounds for differentiating between the conduct of the claimant and that of others.

Ground 2: The finding of fact is perverse.

24. Turning to the next ground, by this it is presumed that the claimant is referring to the finding of fact that he did indeed harass Lisa Riley, as he goes on to refer to the weight that may have been attached to her account , and those of other employees who supported that allegation. The tribunal , however, did not hear from Lisa Riley, or indeed, the other witnesses directly involved. As previously stated, the tribunal's primary finding was that David Hunter believed, and was entitled to believe, on all the evidence, particularly the claimant's own evidence and the documents, that the claimant had, certainly since early 2013, harassed Lisa Riley. That would have been the result regardless of the procedural unfairness that then ensued in relation to the appeal. It is also the tribunal's own finding on all the evidence. The tribunal does not have to be sure beyond reasonable doubt, merely it has to be satisfied , on a balance of probabilities , that the claimant was guilty of the conduct alleged, in this instance harassment. The claimant may disagree, but there was ample material upon which firstly David Hunter, and secondly, the tribunal itself, could come to that conclusion. It cannot be categorised as perverse.

Ground 3: The finding of fact on the detriment claims is perverse.

25. The next ground relates to the protected disclosure detriment claims. The finding of fact referred to presumably is the conclusion expressed in paras 77 to 87 of the tribunal's judgment. that the claimant was not subjected to any detriment by reason of having made any protected disclosure.

26. The tribunal did, of course, find that the claimant had made a qualifying protected disclosure when he complained about the "leaking" of his defence statement to the Police. He therefore satisfied the first limb of the detriment provisions. The sole issue then , therefore, was whether there was a causal link between the detriments complained of, and the making of the disclosure. This ultimately was a matter of credibility of the persons involved, namely Penny Hunt, and David Hunter. The tribunal was faced with a choice as to whether or not to

accept their evidence as to the absence of any motive in their treatment of the claimant relating to his having made a protected disclosure. That was a matter upon which the claimant could give no direct evidence, the tribunal had to assess the evidence of those witnesses, and decide whether to accept it. In the final analysis, for the reasons set out in paragraphs 78 to 87 of its judgment, the tribunal did accept that evidence. The claimant may disagree with this finding, but nothing in his submissions persuades the tribunal that its findings are wrong, or perverse.

Ground 4: whether a fair hearing in terms of duration was provided to put the claimant's case across against the time provided to the respondent's counsel.

28. Finally, this ground raises issues with the fairness of the hearing process. The claimant elaborates upon it in paras. 1 to 11 of his written submissions. In relation to time, the claimant as an unrepresented party, was afforded breaks, and time for preparation , whenever he asked for it, and was informed at the very outset of the hearing of his right to ask for time. It is true that his own cross – examination was lengthy, but given that his witness statement was some 150 pages long, and he had raised a number of issues in his evidence upon which questions had to be asked, this was not surprising, nor was it inappropriate. The claimant made no complaint at the time, and was not restricted in the time he was afforded to cross – examine the respondent's witnesses. Whether he respondent's counsel did or did not provide an estimate that cross –examination would take two days is irrelevant, it took as long as was needed, and the time it took to a large extent was influenced by the answers the claimant gave, and the manner in which he did so. Some 15 days of oral hearing were held, during which the claimant was afforded all the time he needed. The tribunal does not agree that the claimant was "not consulted" in relation to extending the listing of the hearing. He was invited to comment upon any application made, and did so. His propensity (exhibited in this application too) continually to seek to add further matters late in the day did prolong matters , but the tribunal is quite satisfied that the claimant, who is an intelligent, articulate, literate, diligent and resourceful litigant was in no way disadvantaged by the manner in which the hearing was conducted.

Other applications.

29. Whilst the above findings could suffice to deal with what the tribunal understands to be the basic grounds for his application, there are other matters which the claimant has sought to raise, which require comment.

30.. Firstly, the claimant sought to amend his claims in several respects. He has previously sought to raise claims of race and sex discrimination, and that his dismissal was automatically unfair by reason of his having made a protected disclosure.

31. In relation to the s.103A issue, there is a simple , but overlooked point. An application was indeed made by the claimant for permission to amend his claims to include a claim under s.103A , which was heard and determined on 1 May 2015 by Employment Judge Sherratt. The application was refused. The claimant did not appeal that judgment, and did not pursue the matter any further, and it cannot now be revisited , post – judgment by this tribunal. In any event, whilst not a necessary

consideration, to the extent that the claimant seems to consider that the dismissal of his protected disclosure detriment claims was the result of any form of "pleading" error, he is mistaken. His detriment claims were dismissed because the tribunal accepted the respondent's explanations for his treatment as not being by reason of the protected disclosure which the tribunal found he had made. The tribunal would have been equally satisfied that his dismissal (which was in any event very much linked to the detriments of which he was complaining) was similarly unconnected to the protected disclosure but was for the reasons that David Hunter said it was. The claimant may disagree with those findings, but they would have been the same in respect of detriment or dismissal. The absence of a s.103A claim, therefore, even if the claimant was entitled to seek , for a second time, to amend to include one, has had no effect upon the tribunal's judgment.

32. In relation to any discrimination claims, the first and obvious point is that no such claims were included in the claim form drafted and submitted by the claimant's solicitors. He was legally represented at the time, and , however ill he may have been, he is to be taken to have instructed his solicitors in the claims he wanted to bring, in broad terms, and to have approved the (very fully pleaded) claim form drafted and submitted on his behalf. Given the claimant's gender, and that of Lisa Riley, and his ethnicity, the possibility of such claims arising is an obvious one, which any employment lawyer would have been likely to have considered when presented with the facts of these claims. That no such claims were made at the time strongly suggests that the claimant did not believe he had any such claims, or for whatever reasons, chose not to advance them.

33. In any event, as noted above the claimant, then acting in person, and aware that his solicitors had not included a s.103A that he did want to pursue, made the application to amend referred to above. It would have been a simple matter , at the same time, to seek to amend to include discrimination claims that the claimant also wished to pursue. He made no such application. He made no such application throughout the 15 days of hearing.

34. In relation to the amendments he sought to make on 31 May 2017, irrespective of the fact that his application comes far too late, the first "claim" seems to be a complaint in relation to homophobic comments and bullying, which could be some form of discrimination claims, and the second is for a claim under the Protection from Harassment Act 1997. In relation to the former, even if sustainable as causes of action, which is doubtful , it is far too late to seek to add these claims, especially when the tribunal does not see any grounds upon which to reconsider its judgment, save as set out. It is noted that the claimant claims that these are "new issues" which have come to light , which were not apparent at the time of issue. He cites lack of familiarity with the processes and rules, and health reasons for the application not being made earlier. He states, however, that the application would be based on the same set of facts.

35. It is manifestly too late for the claimant now to seek to add clams that were not before the tribunal. The claimant appears to consider that these claims can simply be added, the tribunal further deliberate, and then adjudicate upon them. That cannot be so. If permission to amend were to be given now, the hearing would have to be re-convened , and these matters put to the witnesses, and indeed the claimant,

in evidence. That would clearly be highly disruptive, and not in the interests of justice. The claimant accepts that no new facts are relied upon, so these are clam s that could, and should, have been included in his original claim form, submitted at a time when he was professionally represented. There is no prospect whatsoever of the tribunal acceding to this application, and it is not a ground for reconsideration.

36. In relation to the second claim, the tribunal, in any event, has no jurisdiction to determine clams under the Protection from Harassment Act 1977.

Further observations.

37. Taking one of the other points raised by the claimant, in relation to the issues he raises in para. 11 of his submissions about the DVD of 2 April 2013 being viewed by the tribunal, the tribunal takes the respondent's point that it was the claimant who asked the tribunal to view it. He cannot now complain because he does not like the findings that the tribunal has made having seen it.

38. One vitally important facet of the tribunal's judgment that has received scant attention in the substantial submissions made by the claimant pertains to the finding (paras. 47 to 48 of the judgment) that the finding that , by reason that the claimant had contacted Birse (Lisa Riley's former employer) and the University of Warwick (the educational establishment responsible for Lisa Riley's qualifications) , factually undisputed findings, he would have been dismissed in any event, or had thereby contributed to his own dismissal by 100%. David Hunter's evidence , which the tribunal accepted, was that this alone was serious enough to have led to the claimant's dismissal. The tribunal agrees, although the claimant does not, and cannot see how it should do,.

39. The claimant , in his reconsideration application, only addresses this aspect of the judgment in para. 317. In this paragraph he refers to the fact that Lisa Riley first went to the Police, as some form of justification for this conduct. He notes (but does not appear to dispute) that David Hunter would have dismissed him for these actions alone, but goes on to say that this entitles him to "question the actions of Lisa Riley, Susan Moore, Heather MacLeod, Gary Evens, and Nick Sinacola" in going to an external body. With respect, it does nothing of the sort. Two wrongs do not make a right, and the only relevance the alleged actions of others can have is in relation to the fairness of the treatment of the claimant. This issue was considered in para.62 of the tribunal's judgment, where the relevance of arguments as to consistency was considered. The respondent did not consider, and was entitled to do so, that the alleged (for the respondent did not accept that the other employees referred to had acted improperly, whatever the claimant may contend) misconduct of the other employees, effectively the claimant's accusers, was such as would amount to misconduct. Whilst the claimant alleged that they were motivated by malice, the respondent did not so find, and in any event, concentrated on the claimant's own conduct.

40. The claimant refers to David Hunter choosing to conclude that his actions were gross misconduct, as he puts it (para. 317) , "despite what I seem to providing adequate explanations on both matters." This is, again, the claimant seeking to re-argue the case. David Hunter did not consider the claimant's explanations for his

conduct to be adequate, based as they were on his view that he was somehow entitled to take these steps to "defend" himself, and was entitled to seek to undermine Lisa Riley in this way. David Hunter did not accept the claimant's explanation as in any way mitigating what he considered was very serious misconduct, and the tribunal considers he was entitled to take that view, and was entitled to dismiss the claimant, and would have done so, for those reasons alone.

41.. Whatever the merits of any other issues raised by the claimant (and the tribunal does not accept that there are any) these findings alone are fatal to the claimant's application for reconsideration., as even if his dismissal for other reasons may have been substantively unfair , the tribunal would still have found that a 100% ***Polkey*** reduction would be appropriate for these reasons, or would find that in this regard alone the claimant contributed to his own dismissal to the extent of 100%..

2.The respondent's application for reconsideration.

42. Additionally, the respondent seeks reconsideration of one aspect only of the tribunal's judgment. This is sought in relation to the proposal (for no award was actually made) to award the claimant a basic award in respect of his unfair dismissal. The parties have since agreed a figure for such an award of £4,176.00. The respondent, however, invites the tribunal not to make any award by way of basic award. It argues that as the tribunal has found contribution, and would reduce the compensatory award by 100%,, so too should it reduce the basic award. The respondent's application points out , correctly, that the respondent did plead at para.50 of the particulars of the response, that both the basic and compensatory awards should be reduced by reason of the claimant's conduct. The issue was also referred to in the List of Issues.

43. The claimant did not address this issue specifically in his submissions, it being implicit in his own application for reconsideration that the tribunal should make no reduction for contribution or ***Polkey*** in any event. In his written response, the "Comments" document of 10 February 2017, however, he seems basically to challenge the basis upon which any reduction should be made to either award, effectively re-arguing the tribunal's findings discussed above, in respect of which his application has been rejected. He does, also, contend that the respondent's conduct of the procedure was such that they were in breach of the ACAS codes of practice, and were to blame for the unfairness of the process.

44. In the alternative, however, it could be argued for him that, even if the tribunal is not persuaded by his application not to reduce the compensatory award, the tribunal should none the less not make any reduction from the basic award. The argument that any lawyer would advance for the claimant in these circumstances would be to the effect that a basic award is intended to compensate all successful claimants for being unfairly dismissed, regardless of what losses they suffer, and what reductions may be made in the compensatory award. Reductions in the basic award are, it could be submitted, rare, and should only be made in the clearest of cases. To some extent, some of the matters referred to in paragraph 9 of the Comments document in relation to whether the appeal , had it gone ahead, would have resulted in the same outcome, could be

seen as germane to this issue, and the tribunal has taken these points into account.

45. In addition to making a reduction from the compensatory award for contribution, the tribunal has a similar, but not identical power, to reduce the basic award on the grounds of the claimant's conduct under s.122(2), which provides:

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(2) 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.

46. The difference between the provisions of s.122(2) in relation to the basic award , and s.123(6) in relation to the compensatory award, is that for the latter, the conduct must have contributed to the dismissal, whereas for the former, it need not have done so. That said, as the EAT held in ***RSPCA v. Cruden [1986] ICR 205***, whilst the two provisions are differently worded, it would only be in exceptional circumstances that the deductions from the basic award and from the compensatory award would differ. Given that the tribunal has determined that it will not reconsider its awards in respect of the compensatory award, and would have (had it not been rendered otiose by its ***Polkey*** reduction of 100%) reduced the compensatory award by 100% for the claimant contributory conduct as found in its judgment, if the tribunal were to accede to the claimant's argument it would indeed be making different reductions the two awards which the authority of ***RSPCA v Cruden*** confirms will rarely be justified.

47. An example of different reduction being applied to the basic award and the compensatory award is to be found in ***Charles Robertson (Developments) Ltd v. White [1995] ICR 349*** , where although a 100% reduction in the compensatory awards , the claimants' basic awards were only reduced by 50%. Ion the facts of that case the employees who were dismissed had stolen sweets, but were dismissed with no disciplinary process , first instance, or appeal, whatsoever being followed. The tribunal satisfied the claimant had stolen the sweets, (they were caught on camera) and reduced the compensatory awards by 100%, but the basic awards by only 50%. The EAT upheld that judgment as an instance of the perfectly valid exercise of the discretion conferred by both sections of the Act. It is to be noted that in that instance, even where there was no procedure whatsoever followed by the respondent, the reduction in basic award was 50%.

48. The matter was considered most recently by the EAT in ***University of Sunderland v Drossou [2017] IRLR 1087*** . The tribunal at first instance in that case made a 35% reduction in the compensatory award for contributory fault, but made no such reduction to the basic award. In holding that tribunal erred in not doing so, or in not explaining why it had not applied the same reduction to the basic award as it had to the compensatory award, Slade, J. said this:

"In making a compensatory award where there is a finding of contributory fault that contributed to the dismissal, the employment tribunal shall reduce or further reduce the amount of the award. Where in the case of a basic award the complainant's conduct before the dismissal is such that the award should be reduced, the employment tribunal is required to reduce the award. The amount by which the awards are to be reduced is at the discretion of the employment tribunal. The employment tribunal can assess that reduction at zero if it thinks it is appropriate in all the circumstances. However, where, as here, the employment tribunal found that the conduct of the claimant caused or contributed to her dismissal it is difficult to see how that is not also to be regarded as conduct falling within s.122(2) attracting a consideration of an amount or percentage by which a basic award should be reduced. As at paragraph 35 of the ***RSPCA*** *case, which was considered, amongst other cases, in* ***Charles Robertson (Developments) Ltd v White [1995] ICR 349****, it is difficult to see that there is a differentiation to be made between the conduct if the same conduct is asserted in support of a reduction of the basic award as well as the compensatory award. In this case, the employment tribunal did not identify any differentiation in the conduct that, in their view, attracted a reduction in the compensatory award but not in the basic award. In the absence of an explanation as to why the conduct of the claimant for the purposes of the compensatory award was regarded as blameworthy attracting a reduction but attracted no reduction to the basic award, in my judgment the challenge made to the failure to reduce the basic award by 35% is well founded. Ground 3 of the notice of appeal succeeds."*

49. This tribunal considers that it too must consider whether there is any reason not to reduce the basic award by the same amount as the compensatory award, .i.e. by 100%. It has concluded that there is no good reason not to. Firstly, the procedural failure which led to the finding of unfair dismissal in this case was at the appeal stage, by contrast to the facts in ***Charles Robertson (Developments) Ltd.*** Secondly, as identified in the tribunal's judgment , the claimant's side too adopted something of a stand off approach, with the appeal not being pressed for weeks on end. Thirdly, reduction for pre-dismissal conduct is an appropriate penalty when an employee has brought even a procedurally unfair dismissal, upon himself. We have no hesitation in finding that in his actions of harassing Lisa Riley, and contacting Birse and the University of Warwick to undermine Lisa Riley's qualifications and position, as he did, the claimant brought his dismissal upon himself, and it would not be just and equitable to make a basic award.

50. To that extent the tribunal does reconsider its judgment sent to the parties on 5 January 2017 by revoking para. 4 , and replacing it with the following:

"4. The claimant's conduct prior to the dismissal in harassing Lisa Riley, and contacting her former employer Birse and the University of Warwick was such that it would be just and equitable to reduce the amount of any basic award by 100%, pursuant to s.122(2) of the Employment Rights Act 1996."

Employment Judge Holmes
Dated : 11 January 2018

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

18 January 2018

FOR THE TRIBUNAL OFFICE