EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4109294/14

Held at Glasgow on 31 May 2017 (Reconsideration Hearing);
21 July 2017 (Members' Meeting); and
15 August 2017 (Recusal Application)

Employment Judge: Ian McPherson
Members: Graham Piggott
Walter Stewart

Mrs Doreen Mafara	**Claimant** **Represented by:** **Mr John Flanagan - Solicitor**
Money Matters Money Advice Centre	**Respondents** **Represented by:** **Ms. Audrey Laing - Quality Controller**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The **unanimous** Judgment of the Employment Tribunal is that:-

(1) Having considered the respondents' application, sent at 09:44 on 21 July 2017, to postpone the listed Members' Meeting, assigned for private deliberation by the full Tribunal, following upon the Reconsideration Hearing held on 31 May 2017, the Tribunal **refused** that application, for the reasons already provided to both parties in the written Note and Order of the Tribunal dated 24 July 2017;

(2) Further, having then considered the respondents' application for the Tribunal member, Mr Piggott to recuse himself from the full Tribunal, and for the Tribunal to fix a separate Hearing to determine the respondents' recusal application in respect

of Mr Piggott, the Tribunal **refused** that application, for the reasons already provided to both parties in the written Note and Order of the Tribunal dated 24 July 2017;

(3) Thereafter, the Employment Judge having considered the respondents' application, dated 7 August 2017, to reconsider the Tribunal's judgment of 21 July 2017, **refused** that application as incompetent, for the reasons already provided to both parties in the written Note and Order of the Tribunal dated 15 August 2017;

(4) The full Tribunal having then considered the respondents' application, dated 7 August 2017, for the Tribunal to vary or set aside paragraph (2) of its Case Management Order, dated 21 July 2017, as set forth in the written Note and Order by the Tribunal sent to parties on 24 July 2017, **refused** that application, for the reasons already provided to both parties in the written Note and Order of the Tribunal dated 15 August 2017;

(5) Having carefully considered both parties' representatives' submissions, on the opposed application by the respondents dated 2 March 2017, for reconsideration of the Tribunal's Judgment dated 30 November 2016, entered in the register and copied to parties on 30 November 2016, the Tribunal, acting in terms of **Rules 70 to 72 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, and having heard parties' representatives on the opposed application by the respondents dated 2 March 2017, **reconsiders** the Judgment dated 30 November 2016, entered in the register and copied to parties on 30 November 2016, the interests of justice making it necessary to do so;

(6) Having done so, the Tribunal **varies** the Judgment dated 30 November 2016 in respect of paragraphs (6) to (9), but otherwise **confirms** its Judgment, and, following reconsideration, it substitutes, in lieu of those original paragraphs in the Judgment, the following revised terms for those paragraphs , as follows:-

> *(6) the claimant's complaint of unfair dismissal, **contrary to Section 94 of the Employment Rights Act 1996**, is upheld by the Tribunal, as well-founded, and in respect of that unfair dismissal, the Tribunal*

*finds that the claimant did by her conduct cause or contribute to her dismissal, and so it is appropriate that her compensation for unfair dismissal be reduced for that reason, and the Tribunal finds that it is just and equitable to reduce her basic and compensatory awards by **75%,** in accordance with the Tribunal's powers under **Sections 122(2) and 123(6) of the Employment Rights Act 1996;***

*(7) further, the claimant having failed to appeal internally against her dismissal, using the right of appeal offered to her by the respondents, the Tribunal further finds that it is just and equitable in all the circumstances that her compensatory award from the Tribunal be reduced by **10%,** in accordance with the Tribunal's powers under **Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992**;*

*(8) in respect of that unfair dismissal, taking account of those reductions in her compensation, the Tribunal makes a monetary award of **ONE THOUSAND, EIGHT HUNDRED AND NINE POUNDS, FORTY EIGHT PENCE** (£1,809.48) to be paid by the respondents to the claimant, and orders the respondents to pay that sum to the claimant;*

*(9) the prescribed element is **£7,094.36** and relates to the period from 11 April 2014 to 12 January 2015, and the monetary award does not exceed the prescribed element**;***

(7) In light of the statement made by the respondents' representative, at this Reconsideration Hearing, that in the event the Tribunal were to grant the reconsideration, the respondents do not seek to have the £350 Tribunal fee paid by them for this reconsideration application reimbursed by the claimant, the Tribunal makes no Order for reimbursement, in terms of **Rules 75(1)(b) and 76(4) of the Employment Tribunal Rules of Procedure 2013**;

(8) The respondents have paid Tribunal issue fees of **£350** in connection with this reconsideration. On 26 July 2017, 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. In these circumstances, the Tribunal shall draw to the attention of HMCTS that this is a case in which fees have been paid and they are therefore to be refunded to the claimant. The details of the repayment scheme are a matter for HMCTS; and

(9). In respect of the other opposed application by the respondents, dated 27 March 2017, for reconsideration of our subsequent Remedy Judgment in favour of the claimant, issued on 6 February 2017, and the subsequent Written Reasons for that Judgment issued on 13 March 2017, the Tribunal **orders** that that application be listed for a Reconsideration Hearing before this Tribunal on a date to be hereinafter assigned, in **February , March or April 2018,** after the completion and return of date listing stencils from both parties' representatives.

REASONS

Introduction

1. In terms of a Notice of Hearing issued to both parties' representatives, dated 3 April 2017, this case called again before us, as a full Tribunal, at a Reconsideration Hearing, held on Wednesday, 31 May 2017, to consider parties' representations, on the respondents' opposed application for reconsideration of our Judgment, issued on 30 November 2016, finding in favour of the claimant, following upon a 12 day Final Hearing, with 3 further days for our own private deliberation.

2. For present purposes, it is not necessary to repeat the full background to the case, which is still the subject of another opposed application by the respondents, dated 27 March 2017, for reconsideration of our subsequent Remedy Judgment in favour of the claimant, further to that Judgment issued on 6 February 2017, and the subsequent Written Reasons for that Judgment, issued on 13 March 2017.

3. Both of our Judgments have been appealed to the Employment Appeal Tribunal by the respondents, and proceedings in the EAT are sisted pending the outcome of both reconsideration applications by this Tribunal. For the sake of brevity, we refer to our respective Judgments for their full terms. Meantime, it will suffice to note here as follows:-

(a) So far as material, for present purposes, the relevant parts of our **unanimous** Judgment of 30 November 2016 were as follows:-

*(1) the claimant's complaint of harassment against her by the respondents, contrary to **Section 26 of the Equality Act 2010**, prior to her dismissal on 11 April 2014, is outwith the jurisdiction of the Tribunal, on the basis that the various acts complained of by her are time-barred, in terms of **Section 123 of the Equality Act 2010**, and it is not just and equitable to allow that head of complaint to proceed, although late;*

*(2) the claimant's complaint of unlawful discrimination against her on the grounds of her race is upheld by the Tribunal, but only in respect of her complaint of direct discrimination, contrary to **Section 13 of the Equality Act 2010**, on the basis of the difference in salary between her and her comparator, Mrs Marie Duncan, and not otherwise;*

*(3) in respect of that successful complaint, the Tribunal reserves judgment on the amount of compensation to be awarded to the claimant, in respect of arrears of pay, for consideration at a separate Remedy Hearing (time allocation 2 hours) to be held before the full Tribunal at the Glasgow Employment Tribunal, on a date to be hereinafter assigned by the Tribunal, in the proposed listing period **January, February or March 2017**, following the usual date listing process to ascertain parties' availability for such a Remedy Hearing;*

*(6) the claimant's complaint of unfair dismissal, **contrary to Section 94 of the Employment Rights Act 1996**, is upheld by the Tribunal, as well-founded, and in respect of that unfair dismissal, the Tribunal finds that the*

claimant did not by her conduct cause or contribute to her dismissal, and so it is not appropriate that her compensation for unfair dismissal be reduced for that reason;

(7) the Tribunal refuses, as not well-founded, the claimant's submission that the respondents unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures, and accordingly the Tribunal makes no statutory uplift to the compensatory award payable to the claimant;

*(8) further, the claimant having failed to appeal internally against her dismissal, using the right of appeal offered to her by the respondents, the Tribunal further finds that it is just and equitable in all the circumstances that her compensatory award from the Tribunal be reduced by **10%**;*

*(9) in respect of that unfair dismissal, taking account of that reduction in her compensation, the Tribunal makes a monetary award of **SEVEN THOUSAND, TWO HUNDRED AND THIRTY SEVEN POUNDS, NINETY THREE PENCE** (£7,237.93) to be paid by the respondents to the claimant, and orders the respondents to pay that sum to the claimant;*

*(10) the prescribed element is **£7,094.36** and relates to the period from 11 April 2014 to 12 January 2015, and the monetary award exceeds the prescribed element by **£143.57;***

(b) The Remedy Hearing was heard by the full Tribunal on 31 January 2017. Judgment only was thereafter issued by the Tribunal, on 6 February 2017, as follows, as per paragraph (7) of that Remedy Judgment, namely:

*(7) Thereafter, **of consent** of both parties' representatives, indicated orally at the Remedy Hearing, and in terms of its powers under **Rule 64,** the Tribunal **ordered** that, by way of compensation to be awarded to the claimant for her successful complaint of direct racial discrimination contrary to **Section 13***

of the Equality Act 2010, *the respondents shall pay to the claimant the sum of* ***ONE THOUSAND, FOUR HUNDRED AND NINETY SIX POUNDS, THIRTY TWO PENCE*** *(£1,496.32), being the amount identified by the respondents, and agreed by the claimant, as being the amount of pay difference between the claimant's earnings and those of her comparator, Mrs Duncan;*

(c) On 2 March 2017, the respondents made application, under **Rule 71 of the Employment Tribunals Rules of Procedure 2013**, for a Reconsideration of the Tribunal's Judgment sent out on 30 November 2016, and applied for an extension of time to do so, as a result of comments made by the presiding Employment Judge, at the Remedy Hearing held on 31 January 2017, when he commented that while an Appeal had been lodged to the EAT against the first Judgment, there had not been any application for Reconsideration brought by the respondents.

(d) That reconsideration application, intimated by letter of 2 March 2017 from a Mr Richard Rees of Peninsula Business Services Ltd, was intimated to the claimant's solicitor, Mr Flanagan, as per **Rules 71 and 92.** As the application was received more than 14 days after the date on which the Judgment was sent to the parties, on 30 November 2016, having considered the reasons given by Mr Rees for the delay, the presiding Employment Judge considered that it was in accordance with the overriding objective of the Tribunal to extend the time, and, as per letter sent to both parties' representatives by the Tribunal on 6 March 2017, the Judge allowed the respondents an extension of time in exercise of his powers under **Rule 5.**

(e) The Judge did not refuse the respondents' application, on initial consideration, and he gave the claimant's solicitor 7 days to provide

any response to the application, as well as asking both parties' representatives to express a view as to whether the application could be determined without a Hearing.

(f) On 13 March 2017, the Tribunal issued its Written Reasons for the Remedy Judgment issued on 6 February 2017.

(g) Also, on 13 March 2017, the Tribunal received from the claimant's solicitor, Mr Flanagan, with copy sent at the same time to Mr Rees, as the respondents' representative, a short e-mail, sent at 15:55, stating that: "***I refer to the Respondents' application for a Reconsideration and write to advise that we oppose same on grounds that the Respondents grounds as set out are factually incorrect and not competent."***

(h) Mr Flanagan requested that a Hearing be fixed to determine the opposed application. On 14 March 2017, Mr Rees, for the respondents, advised that they too required a Hearing.

(i) Having considered Mr Flanagan's objections, the presiding Employment Judge allowed him 7 days to further better specify his grounds of objections, and this instruction was conveyed in a letter from the Tribunal, sent on 16 March 2017, seeking a response by 23 March 2017.

(j) A short extension of time, to 4pm on Friday, 24 March 2017, was granted by the Tribunal, on Mr Flanagan's application, on 23 March 2017, when he sought an extension of time as he was preparing specific objections, and there was a problem with his office's internet system being broken.

(k) A four page letter to the Tribunal, dated 23 March 2017, but re-dated 24 March 2017, was submitted by Mr Flanagan, with copy sent at the

same time to Mr Rees for the respondents, by e-mail of 24 March 2017 at 15:59, further specifying the claimant's grounds of objection to the respondents' reconsideration application.

(l) On 27 March 2017, the respondents, again through Mr Rees, applied for reconsideration of our subsequent Remedy Judgment in favour of the claimant, issued on 6 February 2017, and the subsequent Written Reasons for that Judgment, issued on 13 March 2017.

(m) In subsequent correspondence with the Tribunal, Mr Flanagan, solicitor for the claimant, lodged objections to that further reconsideration application, and parties took differing positions on whether or not that reconsideration application could be determined without a Hearing. Mr Flanagan sought to have it determined on the papers, and without a Hearing, whereas Mr Rees, for the respondents, sought a Hearing.

(n) In the Tribunal's letter dated 13 April 2017, parties had been advised that the second reconsideration application had been intimated within time, and that the presiding Employment Judge had not refused it on initial consideration, but he had expressed a provisional view that he considered that the application could be considered in chambers, on the papers, and without a Hearing.

(o) Having considered Mr Rees' application for a Hearing for the second reconsideration, as intimated on 21 April 2017, as also Mr Flanagan's objections to the second reconsideration Application, intimated on 24 April 2017, the Judge, by letter from the Tribunal sent on 26 April 2017, sought further views from Mr Rees as to why the respondents felt an oral Hearing was required.

(p) Mr Rees provided further comments on 2 May 2017, and no further comments being intimated by the claimant's representative, Mr

Flanagan, within 7 days, or at all, by letter from the Tribunal sent on 16 May 2017, on the Judge's instructions, both parties were advised that the Judge had decided to agree to the respondents' request that there should be an in person Reconsideration Hearing listed for the second reconsideration, after the full Tribunal had heard the first reconsideration application, listed for 31 May 2017, and decided upon its decision in respect of that first application.

Respondents' Application for Reconsideration

4. On Thursday, 2 March 2017, by e-mail sent to the Glasgow Tribunal Office at 14:51, and copied at the same time to Mr Flanagan, the claimant's representative, Mr Richard Rees, Senior Appeals Consultant with Peninsula Business Services Ltd, Manchester, applied for Reconsideration of the Judgment issued on 30 November 2016, and for an extension of time to do so.

5. At the Final Hearing before us, the respondents had been represented by Mr Martyn West, their Deputy Head of Legal Services, and the claimant by her solicitor, Mr Flanagan. Mr Rees had not been involved in the conduct of the Final Hearing. In his reconsideration application, Mr Rees wrote as follows:-

"***Application for Reconsideration and an extension of time***

We act for the Respondent and we are instructed to make this application under Rule 71 of the Rules of Procedure for a Reconsideration of the Tribunal's Judgment sent out on 30 November 2016. In accordance with Rule 70, the respondent believes that interests of justice require a Reconsideration of a number of findings.

Extension of time

The Respondent acknowledges this application is out of time but applies for an extension. This application it is made as a result of comments of presiding Employment Judge McPherson at the remedy hearing on 31

January 2017 and the subsequent second written Judgment promulgated on 6 February 2017.

The original judgment is under appeal and this is recorded at paragraph 1 of the second judgment. Judge McPherson voiced his concern that an appeal had been lodged on behalf of the Respondents. He expanded on the advantages of a Reconsideration versus an appeal and it seemed clear he thought the better way would have been a Reconsideration. Consequently, the respondent now makes this application out of time. The appeal is still in the sifting process at the EAT and there is certainly a potential costs saving in avoiding the appeal hearing fee of £1,200.00.

Grounds for proposes Reconsideration – Liability and Remedy

Liability

Ground 1 – Equality Act 2010 time limit

Paragraph (1) of the Judgment found that the complaints of harassment were time barred and the Reasons address the law and submissions in relation to Time bar re harassment and direct discrimination at paragraphs 82 – 114. Paragraph 93 describes the harassment complaints as "separate and discreet acts" which were not complained of within the 3 month time limit. Paragraph 78 reproduces Section 123(3) Equality Act 2010 which provides that conduct extending over a period of is to be treated as done at the end of the period. The case law relating to that is cited at paragraph 89 of the Reasons. Although consequences from a one-off decision is identified in the ***Owusu v LFCDA (1995) IRLR 574 EAT*** *case, it refers to and reaffirms the* ***Sougrin v Haringey Health Authority [1992] ICR 650, CA*** *case which is not considered. In that case the Court of Appeal held that a decision not to regrade an employee was a one-off decision or act even though it resulted in the continuing consequence of lower pay for the employee who was not regraded. The respondent believes that to be analogous*

with this case and that the direct discrimination claim was therefore out of time.

Ground 2 – Application of section 23(1) Equality Act 2010

It is contended that the Tribunal's conclusion of direct discrimination should be reconsidered on the issue of whether the named comparator's circumstances were materially different from the claimants. There was a finding that the claimant's work "was broadly the same" as that of Marie Duncan "in that regard" i.e. covering reception "from time to time" (see paragraph 35 (61). Yet it is acknowledged that it was not approaching 'like work' and the comparator was main Receptionist with 30 years' experience, whereas the claimant was an Administration Assistant. There was a material difference and therefore no discrimination by the respondent.

Ground 3 – Finding of unreasonableness for unfair dismissal

Paragraphs 138 – 139 of the Reasons summarise the key points of law but the Tribunal did not find that the respondent failed to follow the ACAS Code of Practice, as submitted by the claimant – paragraph (7) of the judgment, page 3. Paragraph 189 is the actual finding of unfair dismissal. The Tribunal gave the following reasons for its conclusion that the respondent acted unreasonably.

- *Paragraph 198 seems to be stating that the CEO should have taken more time to decide whether to adopt the decision/recommendation of dismissal and paragraph 199 seems to be suggesting another invite to the disciplinary hearing.*

- *Paragraph 200 states that it was unreasonable for the CEO to sign off the dismissal letter (adopting the consultant's decision/recommendation) in view of the grievance that the claimant had recently brought against her and it could have come from the Staff sub-committee.*

- *Paragraph 195 finds that a reasonable employer would not have dismissed the claimant in her absence without considering her personnel file.*

These findings indicate substitution by the Tribunal because it is suggesting <u>further</u> actions rather than concentrating on what the respondent and claimant actually did, which goes beyond what could reasonably be expected in the circumstances.

<u>Remedy</u>

Ground 4 – Misapplying the legal submissions made by the respondent as to reductions

The Tribunal's actual assessment of compensation is at paragraphs 273 – 288. (Prior to paragraph 273 the Tribunal reproduces the submissions of the parties on compensation). The written submissions for the Respondents paraphrased by the Tribunal at page 134 para (16) clearly reveal two <u>separate</u> requests for deductions; 'for contributory fault and the inevitability of dismissal' and separately '25% should be applied due to the failure of the claimant to engage with the disciplinary and appeal process'. Paragraph 273 page 196 considers contributory fault and the respondent's submission that this should be "substantial" (with reference back to paragraph 187). This would be under Section 123(6) Employment Rights Act 1996.

However, notwithstanding the content of the paragraphs cited above, paragraph 276 goes on to state that Mr West for the respondents sought the 25% reduction "in terms of <u>Section 123(6),</u> rather than as a reduction for unreasonable failure to follow the ACAS Code. The Tribunal has conflated the two submissions together. The reduction sought for contributory fault was "substantial" and no percentage had been put upon it. As a result the Tribunal limited its consideration of a percentage reduction under Section 123(6) of no more than 25%. That is borne out by its conclusion at paragraph 282 of the Reasons, which states that the

claimant's failure to appeal internally should attract 10%, not 25% "sought by Mr West".

Ground 5 – The Tribunal's misreporting of its own conclusion on contributory fault

Notwithstanding paragraph 276 of the Reasons, which states

"…in terms of Section 123(6) of the Employment Rights Act 1996, we have however decided that a reduction is appropriate" and then applying a 10% reduction as explained above, paragraph (6) of the actual Judgment (page 3) states that "it is not appropriate" to reduce compensation for the claimant's conduct by way of contribution to her dismissal. This error is then compounded by paragraph (8) of the Judgment, which records the 10% reduction applied for failure to appeal internally against her dismissal, according to what is "just and equitable". It is not clear whether this is under TULCRA or the ERA. It is noted that paragraph (8) does not say "unreasonably" failed to appeal, so it could be ERA, but it is not clear. What is certain however, is that the Reasons and the Judgment contradict each other.

Ground 6 – The Tribunal's failure to make any finding at all as to the claimant's refusal to attend the disciplinary hearing – failure to apply Section 123(6) Employment Rights Act 1996 – Or 25% under TULCRA

The respondent submitted that there should be a "substantial" reduction in the compensatory award for the claimant's failure to engage in the disciplinary process by attending a disciplinary hearing. However, there is no finding either way as to whether that contributed to her dismissal or not, notwithstanding that paragraph 278 records the claimant's concession in submissions that she knew she should have attended. It is difficult to see how the claimant's refusal to attend a disciplinary hearing was not a contribution to the dismissal, especially in the circumstances of this particular case, as described above. In addition,

if the 10% reduction was under TULCRA then it should have been a 25% reduction in these circumstances.

Ground 7 – Polkey reduction

A Polkey deduction was pleaded throughout, was listed as a case in the Respondents' list of authorities (page 125 of judgment at 41), and continued to be argued both in written and oral submissions. The Tribunal did not consider a Polkey deduction appropriate in their application of the case law – 'sea of speculation' etc. (page 198 para 283-286.) The respondent believes that to be an incorrect application of Polkey on the facts of this case. It is perfectly possible to construct the world that never was here and to form a view that it would have made no difference to the decision to dismiss.

There is case law that an unfair procedure could be cured by a fair appeal process. The claimant availed herself of no opportunity to state her case and since no appeal no cure for any perceived procedural failing such as no investigatory hearing.

Therefore the deduction should have been a Polkey 100% as following any further procedure would have made no difference esto the deduction should have been substantial.

There does not need to be much speculation – The agent had enough statements which on the face of it would have merited dismissal on gross misconduct. There were three separate allegations upheld all of which were gross misconduct compounded by alleged gross misconduct in not attending disciplinary proceedings. The claimant does not deny these incidents and by the nature of the gross misconduct involving other members of the Respondents workforce (so the agent was always going to dismiss as the appointed agent for the respondent.)
"

Respondent's Objections to Claimant's Application

6. On Friday, 24 March 2017, by e-mail sent to the Glasgow Tribunal Office at 15:59, and copied at the same time to Mr Rees, the respondents' representative, Mr Flanagan, the claimant's solicitor, wrote in the following terms:-

"*I refer to the Employment Tribunal's correspondence of 16th March 2017 in which Employment Judge McPherson sought further specify grounds of objections in respect of the Respondents Reconsideration of the Tribunal's decision of 30 November 2016.*
Our objections are set out as follows;

1. *Out of Time: We oppose the Reconsideration being allowed out of time and while they have an Appeal pending. This is an attempt to have two opportunities to challenge the decision and is not in the interest of justice and is prejudicial to the Claimant.*

2. *Non Payment of Tribunal Fee: We understand that as of 6th March 2017 the Respondents had not paid the Tribunal fee in respect of the Reconsideration and on that ground the Reconsideration should be refused.*

3. *Objections to grounds set out by Respondents*

<u>Respondents Ground 1 - Equality Act 2010 time limit</u>

The respondent's claim that the circumstances in Sougrin v Haringey Health Authority [1991] ICR 650, CA are analogous with this case and that the direct discrimination claim was out of time is not correct. The Employment Appeal Tribunal considered the question of time bar in the case of ***Fairhead Maritime Limited v Mr V Parsoya [2016] WL 06397501 Appeal No. UKEAT/0275/15/DA***

The Respondent had operated an indirectly discriminatory policy of under-paying those with "employability issues" — effectively where it considered immigration issues might arise given an employee's visa status. The ET had found this put those sharing the Claimant's protected characteristic (he was an Indian national) at a disadvantage and also put him at a disadvantage. The Respondent did not challenge those findings but submitted that the Claimant was no longer disadvantaged by the policy after June 2013, when his pay was increased to the correct level after he had been granted a longer-term visa; the Claimant's ET claim, lodged in September 2014 was therefore out of time. The ET disagreed, finding the Respondent had adjusted its policy when it told the Claimant — in January 2012 — that, once his "employability" was resolved, the earlier shortfall in pay would be made good. Its failure to make good on that promise meant there was a continuing act of indirect discrimination until the termination of the Claimant's employment. The claim was therefore brought in time, alternatively it would have been just and equitable to extend time. The Respondent appealed.
Held: dismissing the appeal

The Employment Tribunal at paragraph 92 was entitled to form the opinion that the race discrimination complaint was not out of time having given the matter careful consideration as outlined in paragraphs 89 to 91 of the Reasons.

Respondents Ground 2 Application of section 23(1) Equality Act 2010

The Respondent claims that there was a material difference between the claimant and the comparator and therefore no discrimination and refers to paragraph 35(61) with emphasis on "like work".

The structure of this Tribunal judgment was to identify the issues and to determine, the oral and written evidence and other information on receiving, the relevant findings of fact, the legal framework, the submissions of the

parties and the discussion and conclusions leading to the determination of the issues.

The Tribunal carried out this role and paragraphs 35(52) to 35(61) must be read in their entirety The treatment of the claimant must be compared with that of an actual or a hypothetical person – the comparator – who does not share the same protected characteristic as the claimant and this has been carried out in full.

Example

- *A blind woman claims she was not shortlisted for a job involving computers because the employer wrongly assumed that blind people cannot use them. An appropriate comparator is a person who is not blind – it could be a non-disabled person or someone with a different disability – but who has the same ability to do the job as the claimant.*

- *A Muslim employee is put at a disadvantage by his employer's practice of not allowing requests for time off work on Fridays. The comparison that must be made is in terms of the impact of that practice on non-Muslim employees in similar circumstances to whom it is (or might be) applied.*

Respondents Ground 3 - Finding of unreasonableness for unfair dismissal*.*

The respondents claim that the Tribunal findings indicate substitution and in support of this refer to paragraphs 198, 200 and 195 in that order. The Tribunal was aware of the need to avoid substitution and refers to its own checks on avoiding falling into the ***"substitution mindset"*** *at paragraph 191. The Employment Tribunal had not been guilty of falling into the substitution mindset but had properly carried out its task in applying the band of reasonable responses test as shown in paragraphs 190 to 200. We refer to the recent Employment Appeal Tribunal case of* ***Portsmouth Hospitals NHS***

Trust v Ms S Corbin 2017 WL 00430801 *Appeal No. UKEAT/0163/16/LA, UKEAT/0164/16/LA which supports our position that the Tribunal applied the reasonable test.*

Respondent's Ground 4 - Misapplying the legal submissions made by the respondent as to reduction.

The Respondent's arguments are misconceived as the Tribunal did not misapply the legal submissions instead they gave great consideration to the submissions and in particular ***Sections 122 and 123 of the Employment Rights Act 1996*** *and* ***Polkey*** *along with the case of* ***Steen v ASP Packaging Ltd [2014] ICR 56*** *the Tribunal decided that it was not just and equitable to reduce the amount of the basic award. The Tribunal used its discretion to make a 10% deduction in terms of the compensatory award and there are no grounds to challenge this decision it was not for Mr West to decide upon a 25% deduction and the judgement of the Tribunal clearly sets out its reasons.*

Respondent's Ground 5 - The Tribunal's misreporting of its own conclusion on contributory fault.

The respondents are again misconceived and fail to appreciate the discretion of the Tribunal to fix a reduction of its choice and is not compelled by the sum claimed by the Respondents. We understand the Tribunal applied ERA as opposed to TULCRA.

Respondent's Ground 6 - The Tribunal's failure to make any finding at all as to the claimant's refusal to attend the disciplinary hearing -. failure to apply section 123(6) Employment Rights Act 1996 or 25% under TULCRA.

We find that this ground is unfounded and is repeating the arguments of ground 4 and 5 and fails to accept the discretion of the Tribunal.

Ground 7 - Polkey Reduction

The fact that the respondents repeatedly pleaded Polkey does not force the Tribunal to accept it and they have mentioned case law but not provided same. The Tribunal precisely explained how it considered Polkey in reaching its decision at paragraph 283 to 286 and used its discretion in reaching its decision."

Reconsideration Hearing

7. When the case called before us, just after 10.20am, on the morning of Wednesday, 31 May 2017, Mr Flanagan was in attendance representing the claimant, who was herself also in attendance. Mr Rees was not in attendance to represent the respondents, as we had anticipated would have been the case, given he had intimated the detailed reconsideration application on their behalf, and, at that time, he had been entered in the Tribunal's record as being their duly appointed representative.

8. Instead, the respondents were represented by their in-house Quality Controller, Ms. Audrey Laing, accompanied by their Chief Executive Officer, Mrs Geraldine Cotter, who had previously appeared at the Final Hearing as a witness for the respondents. Mrs Cotter had also attended, as an observer, at the subsequent Remedy Hearing, on 31 January 2017, when the respondents had then been represented by Ms Kimberley Clarke, a consultant with Peninsula, in lieu of Mr West from Peninsula, who had conducted the Final Hearing, and whom we were advised had since left Peninsula.

9. In light of our enquiry about Mr Rees not being present, Mrs Cotter explained to us that while Mr Rees was, and still remained, their duly appointed representative in these Tribunal proceedings, conduct of this Reconsideration Hearing would be by Ms. Laing on the respondents' behalf. Ms Laing advised us that while she had only recently joined the respondents' employment, she did have previous experience of the Employment Tribunal, although she did

not elaborate, and we did not enquire, any further. She did advise, however, that she had attended that Remedy Hearing, as an observer.

10. While both the reconsideration application and the objections made reference to some case law authorities, the Tribunal was not provided with a jointly agreed list of authorities, nor any Joint Bundle of agreed documents, in particular the Judgment of 30 November 2016, so the Tribunal members had to have regard to the copy Judgment held on the Tribunal's casefile, running to some 225 pages. We noted that the **Fairhead** judgment cited by Mr Flanagan is, in fact, **Fairlead.** However, we were provided individually, by the clerk to the Tribunal, with copies of each of the reconsideration applications and objections. The presiding Employment Judge clarified that, at this Reconsideration Hearing, the Tribunal would only be considering the first reconsideration application of 2 March 2017.

11. For the respondents, we were presented with a document entitled "***Respondent's Productions re Application for Reconsideration***", with 5 listed documents, extending to some 17 numbered pages, as follows:-

1. ***Soughrin v Haringey Health Authority*** **[1992] ICR 650 (CA)** **-** page 1

2. CV of Claimant Doreen Mafara - pages 2-3

3. CV of Comparator Marie Duncan - pages 4-5

4. ***Whitbread & Co Plc v Mills*** ***[1988] ICR 501(EAT)*** -page 6

5. ***Baker v Birmingham Metropolitan College*** (ET unreported) - pages 7 - 17

12. Unfortunately, documents 1 and 4 were only one page case digests, and not the full judgments in ***Soughrin***, and ***Whitbread***. Document 5 was a full 10 page liability Judgment from the Birmingham ET (case no: **1301355/2011**) on 23 June 2011 in ***Baker***, and a one page remedy Judgment in that case on 19 October 2011. None of these 3 authorities had been cited to, or produced to, this Tribunal at the Final Hearing, nor had the two CVs now produced as documents 2 and 3.

13. In these circumstances, the presiding Employment Judge, at the start of this Reconsideration Hearing, had some discussion with both parties' representatives, about the contents of the respondents' Bundle, and the lack of full copy judgments being available for the full Tribunal, although cases had been cited by both sides as to be referred to, or relied upon, by both parties' representatives.

Respondents' opposed Application to Lodge Documents

14. Ms Laing, the respondents' representative, invited the Tribunal to allow the two CVs produced to be received, and considered by the Tribunal, but her application was opposed by Mr Flanagan, the claimant's solicitor, and so we heard competing arguments from both parties' representatives, following which we adjourned, at around 10.55am, to obtain full copy case law authorities, and so that we could have private deliberation in chambers on the respondents' opposed application to allowed the two CVs to be produced and used at this Reconsideration Hearing.

15. In her submissions to the Tribunal, Ms Laing had stated that a reconsideration application is to set out one's stall, and not with every piece of information, or back-up, that might be produced at a Reconsideration Hearing. When Mr Flanagan had commented that he had only received the three copy authorities, when he arrived at the Tribunal, for this Hearing, Ms Laing stated that she did not know why they had not been produced earlier by Mr Rees at Peninsula. She explained that the ***Baker*** Judgment, from the Birmingham

(ET), was persuasive of a similar situation, where non-compliance with the ACAS Code had been involved in a case, albeit that Judgment was not from the EAT, or above.

16. As regards documents 2 and 3, being the two CVs, she explained that she understood evidence about these matters had been led at the Final Hearing, but the documents had not then been lodged as productions. Having sat at the Remedy Hearing, in January 2017, next to Kim Clark, the respondents' then representative from Peninsula, Ms Lang stated that she had heard the discussion about fresh evidence being led before a Tribunal, and she had noted the Tribunal's discussion of the relevant case law (in particular, ***Ladd v Marshall***, and ***Outasight***), as cited in our Remedy Judgment.

17. She invited the Tribunal to receive these two CVs, and, commented how, in the past, consideration had been given to the claimant, when her agent had not done things on time, and she was now asking that the respondents should receive the same latitude from the Tribunal. She stated that these two documents were not available to the Tribunal at the Final Hearing, because they were not lodged by the respondents' then agent, Mr West from Peninsula, albeit those documents were held by the respondents, and, she added, they had provided them, on four separate occasions, to Mr West, but he had not lodged them, and no explanation had been provided by Peninsula as to why those documents were not lodged at the Final Hearing.

18. Ms Laing clarified that it was not her position that further evidence required to be led, at this Reconsideration Hearing, but these documents reinforced the correctness of the evidence for parts 2 and 3 of the ***Ladd v Marshall*** test. She added that these were not documents compiled by the respondents, but by the claimant, and her comparator, Marie Duncan, and that as the respondents did not author these documents, they had nothing to challenge about them, but they were lodged as credibility of the claimant and her comparator should be at its highest from these documents.

19. In opposing the respondents' application, Mr Flanagan lodged a copy of a one page extract from **IDS Employment Law Handbook**, Volume 5 – **Employment Tribunal Practice and Procedure**, Chapter 15 – **Reconsideration of Tribunal Judgments and Decisions**, specifically paragraphs **15.20** and **15.21**, the latter paragraph referring to **Stevenson v Golden Wonder Ltd [1977] IRLR 474 (EAT)**.

20. In his submissions, Mr Flanagan, had stated that he opposed the CVs being lodged at this stage, as they were in the control of the respondents, and their agent, Mr West had, on Ms Laing's version, had them on four occasions, and they were the subject of evidence from Doreen Mafara and Marie Duncan, and that was about their employment, and their roles, and about their previous employment. If there had been any discrepancy between their evidence as given, at the Final Hearing, and those documents, then he submitted that the respondents' representative had the opportunity to question them further, as the respondents had the two CVs in their possession throughout the entire period.

21. Under reference to the EAT's Judgment in ***Stevenson***, as noted in the IDS Handbook, Lord McDonald, the EAT Judge in Scotland had said of the old review provisions that they were not intended to provide parties with an opportunity of a re-Hearing at which the same evidence could be rehearsed with different emphasis, or further evidence adduced which was available before. Mr Flanagan stated that it was not in the interests of justice to proceed in this Hearing to reconsider information given by the respondents, where he suspects that they were simply trying to get another bite of the cherry.

Interlocutory Ruling by the Tribunal, with further reserved Reasons

22. Following the adjournment, on resuming the public Hearing, at around 12 noon, the presiding Employment Judge read *verbatim* from the following note, written in chambers during that adjournment, and agreed with both members of the Tribunal, as follows-

"Having carefully considered Ms Laing's application, on behalf of the respondents, for the respondents to be allowed to lodge, as productions for use at this Reconsideration Hearing, and Mr Flanagan's objections on behalf of the claimant, the Tribunal, having regard to the interests of justice, and its overriding objective to deal with the case fairly and justly, refuses the respondents' permission to lodge the two CVs, and full reasons will be given by us, in writing, when our written Judgment and Reasons is issued following this Reconsideration Hearing.

Given the delay already this morning, while the Tribunal has sought to clarify matters, and adjourn to provide both parties with full copy of the case law Judgments noted this morning, the Tribunal has further decided, in order to ensure that this Reconsideration Hearing can be dealt with today, in terms of its one day allocation, and in terms of its timetabling powers under Rule 45 of the Employment Tribunals Rules of Procedure 2013 to limit both Ms Laing and Mr Flanagan to no more than one hour each in making their submissions to the Tribunal in support of, or in resistance to, the respondents' reconsideration application of 2 March 2017.

In absence of any indication by Ms Laing that the grounds for reconsideration, as set forth, in seven separate grounds, as per Mr Richard Rees's letter of 2March 2017 are being departed from, the Tribunal takes it as read, unless she otherwise advises us, that she is insisting on all seven grounds of reconsideration.

As regards her presentation of the respondents' arguments, and given the one hour time limit now imposed for the oral submission to this Tribunal, the Tribunal suggests she does not need to read the letter of 2 March 2017 verbatim, and it will suffice for her to summarise the respondents' arguments and, in making her submission within the one

hour, to address the respondents' reply to Mr Flanagan's stated grounds of objection in his letter of 24 March 2017.

Likewise, as regards Mr Flanagan's oral submissions for the claimant, similarly restricted to a maximum of one hour, the Tribunal suggests he does likewise, summarises his grounds of objection, and focuses his submission on his oral reply to whatever submissions Ms Laing makes on behalf of the respondents.

At the conclusion of both representatives' oral submissions to the Tribunal, the Tribunal may have questions for either, or both, representatives, following which the Tribunal will retire, for private deliberation, in chambers. On account of the presiding Employment Judge's forthcoming annual leave, it is not likely that a full Judgment and Reasons will be issued until six to eight weeks from now, so as to allow time for the Employment Judge to draft and consult with the two lay members of the Tribunal."

23. We pause here to record that when delivering that oral ruling from the Employment Judge, with us refusing permission for the respondents to lodge the two CVs from the claimant and Mrs Duncan, we stated that we would give full reasons in this our written Judgment and Reasons. We can do so shortly, adding that we did not then consider it to be in the interests of justice to do so at that stage, nor did we consider it in accordance with our duty under **Rule 2**, and the overriding objective to deal with the case fairly and justly, especially when neither party had sought to lodge these documents during the course of the Final Hearing, where we heard tried and tested live evidence from both the claimant and Mrs Duncan. They were both examined by professional representatives, cross-examined, and questioned by members of the Tribunal.

24. We agreed with Mr Flanagan that it was simply far too late to introduce those CVs at this Reconsideration Hearing, as the evidence from both parties had long since closed. Further, and in any event, we were not satisfied that they

were relevant evidence anyway, even if we had decided to allow them to be lodged, but without leading any further evidence. What a CV says, or does not say, is very much down to its author, and what they think, at the relevant time of preparing it, best represents a portrayal of their skills and experience, and how they are selling themselves as a prospective employee to a potential new employer. What is relevant for pay purposes, and setting an employee's remuneration, is what the employer decides to pay, having regard to its size and resources, and whatever pay system it may have in place.

25. Further, at the time of the Final Hearing, there was a live issue between the parties as to which party was going to call Mrs Duncan as a witness, and while she was going to be led by the respondents, in the event, she was called as a witness for the claimant. To our mind, the fact that neither party sought to lodge her CV, or that of the claimant, at the Final Hearing is significant, and we did not consider it in the interests of justice to allow those CVs to be received at a Reconsideration Hearing, at which no evidence was being led before us, when there was no good cause shown why, if it was felt appropriate to do so, they could not have been lodged during the course of the Final Hearing, when both the claimant and Mrs Duncan were giving their live evidence to us, and they were both open to cross-examination by the other party's representative.

Parties' Submissions to the Tribunal

26. We thereafter proceeded to hear from each of Ms. Laing and Mr Flanagan respectively, in support of, and in opposition to, the respondents' first application for reconsideration of our Judgment issued on 30 November 2016. They spoke to their previously intimated written application, and written objections, making some additional oral submissions as they talked us through their respective written submissions, as reproduced above in full, for the respondents' application (at paragraph 5 above), and the claimant's objections (at paragraph 6 above), and their respective points, by way of reply, to the other party's written submissions.

27. In the course of her oral submissions to the Tribunal, the presiding Employment Judge had to remind Ms Laing, the respondents' representative, on a few occasions, to speak slower, so as to ensure that the Judge and members fully captured her oral submissions in their note taking, and he suggested, as a methodology, for her to maintain eye contact with the Judge during his note taking, to ensure he had stopped writing before she moved on to her next point.

28. Whilst it appeared to the full Tribunal that she was reading from some, pre-prepared script, Ms Laing did not offer to provide a copy to the Tribunal, or to Mr Flanagan, and she proceeded by way of making oral submissions only to augment what was set out in Mr Rees' written application for the respondents, and to address orally points raised in Mr Flanagan's written objections.

Submissions for the Respondents

29. Ms Laing, the respondents' representative, addressed us with her oral submissions from just after 12.05 pm, until we adjourned for the lunch break at around 1.05pm. In doing so, the following points were made:-

(1) On **Ground 1**, she stated that ***Sougrin*** was a regrading case, and a one off act, with continuing consequences, and not a continuing act. In the present case, she submitted the respondents did carry out an assessment to regrade employees, known as the CCR 3 process, and if the Tribunal still think that the CCR 3 process is a "red herring", then at the point when there was no regrading, and she was refused regrading, that was a one off act, perhaps with continuing consequences, but not any discriminatory policy, and there were no linked acts,

(2) Ms Laing did not know why Mr West, the respondents' former representative, at a Final Hearing, did not identify the ***Sougrin*** case, in his closing submissions to the Tribunal, and she agreed, with the presiding Employment Judge's comments, that the

Tribunal had had to address the relevant law on time bar itself, as neither party's representative had directed it to the relevant law.

(3) At paragraph 107 of the Judgment, she suggested that the Tribunal seem to accept the respondents' arguments on time bar when (at page 1549 of the Judgment) it stated it preferred Mr West's arguments. However, under reference to paragraph 92, at page 133 of the Judgment, she further stated that the Tribunal's reasons are very unclear, and there is no finding of a continuing act under **Section 123(3) of the Equality Act 2010**.

(4) As regards Mr Flanagan's objection, to Ground 1, in his letter of 24 March 2017, Ms Laing stated she did not have a difficulty with the Judgment in ***Fairlead*** not being available, but submitted that that case was different facts and circumstances to the present case.

(5) On **Ground 2,** Ms Laing stated that the named comparator was being materially different from the claimant and she referred to pages 31 and 32 of the Judgment, at (paragraph 61), of paragraph 34, within the Tribunal's findings in fact, where there was a finding that the claimant's work was "***broadly the same***" as that of Marie Duncan.

(6) She added that the Tribunal had chosen to use terminology more to do with an equal pay complaint, but the rules for a comparator need to be engaged in like work with a comparator, as per **Section 65 of the Equality Act 2010** and she then referred the Tribunal to the definition of ***"like work***", in **Section 65,** and in particular **Section 65(2)(b),** dealing with differences in work not of practical importance.

(7) Further, submitted Ms Laing, there was a "***material difference***", under **Section 23 of the Equality Act 2010**, between the claimant and her comparator.

(8) Ms Laing then stated that the burden of proof was not averse to the respondents, and the respondents' argument has always been that Marie Duncan is not the right comparator, and that has been argued throughout, and in written and oral submissions by Mr West. She further submitted that it is not open to this Tribunal to take Marie Duncan as a comparator, and that finding should be revoked, as if there are material differences, there is not like work.

(9) Referring then to Mr Flanagan's reply to Ground 2, Ms Laing submitted that there was no hypothetical comparator, and Mr Flanagan's argument is unfounded, as he ran with a real comparator, Marie Duncan.

(10) On **Ground 3**, Ms Laing stated that the Tribunal's finding of unfair dismissal is at paragraph 189, on page 176 of the Judgment. She then referred us to paragraphs 198, 199, 200 and 195 on pages 137, 177, 178 and 177 of the Judgment. She stated that these findings indicate substitution by the Tribunal, and that is not appropriate, as what is appropriate is to concentrate on what the respondents actually did. While the Tribunal had given itself a direction about substitution, it then did not follow its own direction she submitted.

(11) Further, added Ms Laing, the claimant had availed herself of neither of two opportunities for the disciplinary hearing, and a (neutral party whom she identified as Mr Howson from Peninsula), who had not been involved in the situation before, and who was not part of Money Matters, had dealt with the disciplinary hearing. She argued that the respondents were trying to make a fair case, and put it in the hands of a neutral, and they took that person's advice, and they did not second guess Mr Howson's decision. The Tribunal, by asking for more, was clearly in substitution mode.

(12) It may be another employer, conceded Ms Laing, would have looked at the employee's personnel file, but looking at the whole

of what the respondents did, she submitted that there was an inevitability of dismissal for the claimant in this case. There were three supported allegations of gross misconduct, a potential new allegation of gross misconduct, as the claimant had not attended her disciplinary hearing, and the nature of the alleged incidents were such that they definitely breached trust and mutuality of the employment contract. It may have been easier if the allegation was a theft from the respondents, as that would just involve the employer and the employee, and perhaps taking mitigation into account.

(13) However, the nature of the allegations here involve other members of the respondents' staff, argued Ms Laing, and they were so obviously gross misconduct and affected the whole nature of the other respondents' staff, and it was very difficult to accept any form of mitigation. She further argued that the respondents did fall into the band of reasonable responses, and it was reasonable not to interfere with the neutral person's decision, and the claimant had clearly been given two chances to attend her disciplinary hearing, and she had made it clear to the neutral that any further offer would be futile.

(14) Referring to Mr Flanagan's objection, to this ground for the reconsideration, Ms Laing noted how Mr Flanagan had relied on the EAT's Judgment in ***Portsmouth Hospitals NHS Trust v Corbin*** having read that Judgment, she stated that she felt it was of no direct assistance in this reconsideration application, and further action was outside the Tribunal's proper consideration of reasonableness, and the respondents submit that what they did was reasonable.

(15) Referring then to **Ground 4**, the first of the grounds relating to remedy, Ms Laing submitted that the legal submissions from the respondent, delivered by Mr West at the Final Hearing, had been

misapplied by the Tribunal, and Mr West's written submissions had been paraphrased at paragraph 134 of the Judgment. Referring then to paragraphs 276, and 282, on pages 196/197, and page 198, she submitted that there should have been a substantial reduction in compensation, under Section 123(6) of the Employment Rights Act 1996, but the Tribunal had brought together two separate submissions, by Mr West, and mixed them up.

(16) In her view, **Grounds 4, 5 and 6** are all inter-related grounds for the respondents. As regards Mr Flanagan's reply to Ground 4, while he had mentioned the EAT's Judgment in ***Steen v ASP Packaging*** Ltd, she did not consider that that was appropriate in the present case, as the ***Steen*** Judgment dealt with a reduction in the basic award of compensation, and the respondents' submission at the Final Hearing, and in this reconsideration application, relate to a reduction of the compensatory award.

(17) As regards **Ground 5**, Ms Laing stated that, notwithstanding paragraph 276 of the Judgment, at page 196, the Tribunal has misreported its own conclusions on the contributory fault and comparing paragraph 276 of the Reasons, with paragraph (8) of the Judgment itself, on page 3, as regards Mr Flanagan's reply, to Ground 5, Ms Laing stated that the respondents do not fail to appreciate the discretion of the Tribunal, and that it is for a Tribunal to decide, but Mr Flanagan's responses, on behalf of the claimant, simply do not acknowledge the clear disparity between the Tribunal's Judgment, and its reasons.

(18) On **Ground 6**, Ms Laing stated that the Tribunal had not made any finding about the claimant's refusal to attend the disciplinary hearing and, as regards its finding; at paragraph 278 of the Judgment (at page 197) the claimant had conceded that she knew now that she should have attended her disciplinary hearing. Ms

Laing submitted that the claimant had failed to turn up twice, and had made no effort to take part in the disciplinary hearing or appeal processes.

(19) As regards Mr Flanagan's reply, to Ground 6, Ms Laing stated that Mr Flanagan had simply stated that he found this ground to be unfounded, and she accepted that the Tribunal has clearly mixed up the respondents' submissions, and what it probably intended to do. This was a very long running and taxing case for all concerned, she submitted, and a major feat to produce at 225 pages a Judgment, but it does require reconsideration.

(20) As regards **Ground 7**, and a ***Polkey*** reduction, Ms Laing stated that that had been argued throughout by the respondents' representative, Mr West, and the Tribunal had considered the matter at paragraphs 283 to 286 of the Judgment, at page 198, and the respondents submit that that part of the Judgment and Reasons needs to be reconsidered, as it is perfectly possible to construct the world that never was, and it would have made no difference to the decision to dismiss the claimant.

(21) Further, she submitted the respondents failure to have an investigatory hearing with the claimant would have made no difference to this case, as the claimant got a full explanation of what was being alleged, in her invite letter to the disciplinary hearing, and she could have presented anything at the disciplinary hearing, but she did not do so, and she did not appeal.

(22) Ms Laing further submitted that there was a reasonable investigation, and *prima facie* statements from reliable witnesses, and there is no speculation required here, as there were three serious gross misconduct allegations meriting summary dismissal, and the claimant did nothing to attempt to present her side of the case.

(23) Referring to the EAT's Judgment in ***Whitbread*** Ms Laing described that as "***settled law***", and, when asked where in that Judgment the Tribunal was to find the legal proposition on which she was relying, she drew our attention to the transcript at page 501, second column, stating that the claimant had had four bites of the cherry, as she could have attended two disciplinary hearings, and she had a right of appeal offered. Her letter and the respondents' reply confirmed the authority of Mr Howson, as the decision maker, and at that point, the claimant did nothing further.

(24) Nowhere submitted Ms Laing, did the claimant deny any of the incidents, and the allegations involved others in the respondents' workforce, and the "***neutral"***, Mr Howson, was always going to be in a position to dismiss, without any element of pre-determination. He had, *prima facie,* serious allegations against the claimant, and he was entitled to dismiss her.

(25) Referring to the objections from Mr Flanagan, to this Ground 7, Ms Laing stated how Mr Flanagan had mentioned the Tribunal's discretion, but added that deductions for ***Polkey*** are there because it is not appropriate for a claimant to get a "***windfall***", to put it colloquially, and that is why we have ***Polkey***, and reductions for contribution.

(26) In Ms Laing's view, the ***Polkey*** reduction in this case should really be 100%, as it is very difficult to see where, with three serious gross misconduct situations upheld, and four times not taking advantage to become involved in the process, and for that not to contribute to her dismissal. In her view, that is culpable and blameworthy conduct, by the claimant, and bringing that together, this should never be a situation of a "***windfall for the claimant"***, and reductions should be substantial, if the Tribunal is not with the respondents on the liability grounds for reconsideration.

(27) Ms Laing stated that the respondents were seeking a substantial reduction to the claimant's compensation. When the presiding Employment Judge asked her what the respondents mean by a "***substantial***" reduction, Ms Laing stated that the claimant was entirely responsible for her whole decisions, and therefore Ms Laing assessed her substantial reduction should be at 90 to 100%.

(28) She clarified that she seeks reduction of the basic award as well, of the same amount, and she further stated that she cannot underestimate the three situations of gross misconduct were upheld, by the disciplining officer, and, including an allegation that another member of staff had downloaded child pornography on a work computer, these were not things to be easily put under the carpet, and any other process by the respondents would have had no difference to the result.

(29) Accordingly, Ms Laing added, she sought a 25% reduction for the claimant's breach of the ACAS Code, and while she had included it, as Document 5 in her bundle of productions, lodged at the start of this Reconsideration Hearing, she would not be referring this Tribunal to the 2011 Judgment from the Birmingham Employment Tribunal in ***Baker***.

(30) Finally, when asked by the presiding Employment Judge, whether she had any submission to make on the fee paid by the respondents to the Tribunal, for this reconsideration application, Ms Laing stated that she had no submission on that matter, and if the respondents were to have their reconsideration application granted by the Tribunal, the respondents do not seek to have the claimant refund them the £350 Tribunal fee paid by them for this reconsideration application as the applicable Tribunal fee.

Submissions for the Claimant

30. In the morning session, just prior to the lunchtime adjournment, Mr Flanagan produced for the Tribunal, with copy for Ms Laing, full copy judgments for 2 of the 3 cases cited in his written objections, being **Portsmouth Hospitals NHS Trust v Corbin [2017] UKEAT/0163/16**, and **Fairlead Maritime Limited v Parsoya [2016] UKEAT/0275/15.** Unfortunately, they were produced by him to us, loose-leaf, unstapled, and not otherwise tagged together. The third case law authority relied upon by him, being **Steen v ASP Packaging Ltd [2013] UKEAT/0023/13**, **[2014] ICR 56 (EAT),** was produced over the lunch time adjournment, and so it was available to us prior to hearing his oral submissions to the Tribunal, which started just after 2.05pm.

31. Mr Flanagan, the claimant's solicitor, addressed us with his oral submissions from just after 2.05 pm, until around 3.10pm. In making his oral submissions, the following points were made by Mr Flanagan, namely:-

(1) Mr Flanagan referred to his written objections as set forth in his letter to the Tribunal dated 24 March 2017.

(2) Referring to the respondents' **Ground 1**, he submitted that the circumstances in the ***Sougrin*** case are not analogous with this case, and he further submitted that the direct discrimination claim was not out of time, as submitted by the respondents.

(3) He referred the Tribunal to the EAT's Judgment in ***Fairlead Maritime Ltd v Parsoya,*** and, when asked by the presiding Employment Judge, to identify the legal proposition in that Judgment, by her Honour Judge Eady QC, the EAT Judge, that vouches safe his contention that this reconsideration application should be refused, Mr Flanagan referred this Tribunal to the first sentence, in paragraph 43 of Judge Eady's Judgment, at page 25 of the full Judgment transcript, reading as follows:- "***I bear in mind that the ET is afforded a wide discretion to extend time in***

discrimination cases and it will not be for the EAT to interfere with the proper exercise of that discretion.

(4) Mr Flanagan further stated that Mrs Mafara had asked the respondents for an increase in pay, on discovering the difference between her salary, and that of Marie Duncan, and she had referred to the CCCR3 assessment process in her evidence at the Final Hearing, where evidence had been led about her job, and her comparator's job, and the claimant had received no increase in her pay.

(5) He stated that the claimant was "***strung along***" by the respondents, and left suspended for an extraordinary time before any disciplinary stage was invoked, and this has a bearing, he submitted, on matters being ongoing, and not a single incident. He submitted that this Tribunal did apply the proper test, and did consider time bar, and took all matters into consideration in reaching its Judgment.

(6) Replying to the respondents' **Ground 2**, and the comparator point, Mr Flanagan stated that the respondents took the view that the Tribunal did not consider **Section 23(1) of the Equality Act 2010** correctly, but he submitted that the comparator's circumstances are not materially different from those of the claimant. He stated that Mrs Duncan, in her evidence, and with 30 years experience, had stated to the Tribunal that she had struggled in that reception job at Money Matters, and that she had had to learn from Mrs Mafara about how to carry out that job, and that she did not have that length of receptionist experience.

(7) Mr Flanagan then referred to the Tribunal's findings in fact, at pages 30 and 31 of the Judgment, paragraph 35(58), and stated that he did not accept that there is a material difference between the claimant and Mrs Duncan, as at finding 35(52), the Tribunal had recorded that Mrs Duncan was a Receptionist/Admin

Assistant, whereas the claimant's job title was Admin Assistant, and, he submitted, the jobs were similar in what was done on a day to day basis. He emphasised how, at finding 35(55), the Tribunal had referred to Mrs Duncan's 30 years experience, including reception, not a finding that she had 30 years reception experience.

(8) He further submitted that the respondents' argument is incorrect, and misleading in the way it is recorded, at page 2 of the reconsideration application letter of 2 March 2017. He added that he does not believe that there is a material difference, and there may have been different job titles, but ultimately her work was virtually the same, or similar, as described by the Tribunal.

(9) When asked to explain the two examples cited by him, at the bottom of page 2, and the top of page 3, of his letter of objections dated 24 March 2017, referring to a blind woman, and a Muslim employee, Mr Flanagan stated that he thought they came from past case law, but he was unable to comment on the presiding Employment Judge's suggestion that perhaps those examples came from guidance on the Equality Act 2010, and/or from the Equality and Human Rights Commission's website. The important point, he emphasised, is that the claimant and Mrs Duncan were doing like work, but the claimant was being paid less by the respondents.

(10) Turning then to the respondents' Ground 3, Mr Flanagan referred us to the Judgment of her Honour Judge Eadie QC, in the EAT's Judgment in ***Portsmouth Hospitals NHS Trust v Corbin*** and he disputed the respondents' assertion that the Tribunal were guilty of the substitution mind set, and stated that the Tribunal properly carried out its task.

(11) When the presiding Employment Judge asked Mr Flanagan to identify which of the 46 paragraphs in the ***Portsmouth Hospitals***

NHS Trust v Corbin Judgment he was inviting us to refer to, and which identified the relevant legal proposition that supported his argument objecting to the reconsideration application, Mr Flanagan stated that he was unable to identify which paragraph he was relying upon and he further accepted that it was not for the Tribunal to search for a needle in the haystack, and that it was for him to tell the Tribunal where the relevant legal proposition was to be found in the cited Judgment.

(12) Thereafter, by way of clarification for the assistance of the Tribunal, Mr Flanagan referred to paragraph 16 of the Judgment, on page 6, citing ***Iceland Frozen Foods v Jones***, and ***London Ambulance v Small***, as also paragraph 18, on page 7, and how it is only too easy to challenge the "***substitution mind set***", and he submitted that this Employment Tribunal did not slip into the substitution mind set, and it was properly carrying out the appropriate exercise, under **Section 98(4) of the Employment Rights Act 1996,** having regard to the evidence that it had heard at the Final Hearing.

(13) Referring to the comments, at paragraph 17 and 18, of the Judgment in ***Kefil***, by Mr Justice Langstaff, former EAT President, (as quoted in the EAT's Judgment in ***Portsmouth Hospitals NHS Trust v Corbin)***, Mr Flanagan stated that the respondents cannot go as far as to say that the Tribunal in the present case was perverse.

(14) At this point, around 2.40pm, the presiding Employment Judge enquired of Ms Laing, the respondents' representative, about the basis of the respondents' appeal to the EAT in the present case, given that while the EAT had advised the Tribunal that an appeal had been marked, the Tribunal had not had sight of the notice of appeal lodged by Mr Rees, at Peninsula, on behalf of the respondents.

(15) In response to that request for clarification, Ms Laing stated that she could see no prejudice to the Tribunal in clarifying the basis of the respondents' appeal, and she confirmed that ***"perversity***" does appear in the grounds of appeal submitted to the EAT. While she had not used that word in her submission to this Tribunal that morning, she stated that her submissions were heading in that direction, in that it was perverse of the Tribunal not to make substantial reductions under the various grounds now submitted in the reconsideration application.

(16) Further, while, that morning, the respondents had said they had tried to be fair by appointing a "***neutral party***", Mr Flanagan stated that Mr Howson, from Peninsula was not entirely neutral, and the Peninsula letterhead shows that they are there to protect the employer, and further, Mr Howson did not have the claimant's personnel file, and he did a paper exercise in his home in the North of England.

(17) Turning then to **Ground 4**, in the respondents' application for reconsideration, Mr Flanagan stated the Tribunal did not misapply Mr West's legal submissions for the respondents at the Final Hearing, and that Mr West had every opportunity to explain his position, and he did refer to ***Polkey,*** but the Tribunal spent time considering all the facts, and what was put forward, and he did not believe that there had been any misapplication in the Tribunal's approach. The Tribunal had decided it was not just and equitable to reduce the basic award, but it had made a 10% reduction to the compensatory award, while Mr West was looking for 25%.

(18) It should not be forgotten, Mr Flanagan submitted, that while the claimant did not attend with Mr Howson, it was not a fair Hearing, as he was not neutral, and it was "***just a paper exercise"*** that was carried out, after the length of time that the claimant had been

left at home, on pay, but waiting to be contacted by the respondents. The Tribunal had been right to make a 10% reduction, and the respondents' arguments had been clearly put forward by the Tribunal in its reasoning.

(19) Mr Flanagan then referred to the Judgment, at paragraphs 273 and 274, on page 196, and how the Tribunal had stated, at paragraph 274, that the Tribunal had considered all relevant law, and its powers. Further, at paragraph 275, the Tribunal had stated it was not just and equitable to reduce the basic award, and that, in Mr Flanagan's view, clearly indicates that the Tribunal did not misapply the law, but considered it very carefully. It was given substantial consideration by the Tribunal, he submitted, and looked into in great depth by the Tribunal.

(20) In developing this aspect of his submissions, Mr Flanagan referred us to paragraph 276 of the Judgment, which he submitted again shows that the Tribunal was very careful, considerate and detailed in its approach to reductions to compensatory award under **Section 123(6).** Further, at paragraph 282, on page 198, he referred to how the Tribunal had stated it had carefully considered the extent to which the claimant's compensatory award should be reduced, and he stated that the 25% reduction sought by Mr West was excessive in all the circumstances.

(21) Further, Mr Flanagan submitted, that paragraph 283 of the Judgment shows that ***Polkey*** reductions were dealt with by the Tribunal, and he entirely refuted the respondents' grounds for reconsideration at Grounds 4, 5, 6 and 7.

(22) Thereafter, Mr Flanagan stated that this was a very detailed Judgment, and it does cover the work of the Tribunal, and shows that all the matters were considered, showing submissions were heard, and carefully considered, and that the Tribunal weighed those submissions against the facts of the case, and the

appropriate action for the Tribunal to take in reaching its final decision. He further stated that it had been very carefully dealt with, and the Tribunal had gone above and beyond recording and discussing all the facts and submissions, and reaching the decision reached by the Tribunal.

(23) Further, added Mr Flanagan, the Tribunal has a discretion, and it had used that productively, and in an accountable manner, looking at all of the facts of the case. While, at Ground 5 of the reconsideration application, the respondents had submitted that the Judgment and Reasons contradicted each other, Mr Flanagan stated that he did not accept that view.

(24) In his view, all appropriate steps had been taken and outlined by the Tribunal, and he added that he could find no evidence of contradiction, having gone through the Tribunal's Judgment on several occasions, and in his view it was a sound Judgment, where the Tribunal has analysed the facts, and what it can and cannot do, and it is quite clear in its Judgment, and it has dealt with everything in a proper manner, and without any contradictions at all.

(25) Continuing his submission, Mr Flanagan stated that he felt the respondents were trying to stretch things, to say that it was contradictory, where it is not, and that the respondents had not considered the Judgment as a whole, but had been looking at particular parts in isolation, in what is a very long, but very sound and helpful Judgment. He disputed that Mr Howson was neutral, as referred to by Ms Laing.

(26) While Mr Flanagan admitted that there were allegations against the claimant involving other staff of the respondents, he added but to say that it is difficult to have a formal investigation appears as if the decision was made some time ago by the respondents to

dismiss the claimant, and that raises issues of whether the claimant had a fair Hearing.

(27) Ms Laing had referred to a "***windfall for the claimant***", but Mr Flanagan stated that it was not a windfall, and that even that phrase is inappropriate where she had had a period out of work, and she had suffered discrimination by the respondent.

(28) Concluding his submission, and in summary, Mr Flanagan stated that he invited the Tribunal to refuse the reconsideration application by the respondents completely, and to uphold its Judgment from November 2016. He added that the Tribunal has acted in a fair and reasonable manner, having considered all the facts, and matters raised by the respondents in their reconsideration are not factually correct, and should not be upheld.

(29) Further, added Mr Flanagan, it has been a long process for the claimant, and a difficult time for her, and this reconsideration is causing her greater stress and anxiety, and she seeks to conclude matters as soon as possible, but she knows that there is an appeal to the Employment Appeal Tribunal, and there is an ongoing process there at present.

(30) Mr Flanagan then finished his submission by stating that the respondents should have accepted the November 2016 Judgment by the Tribunal, but he recognises they do have the right to appeal, and seek reconsideration of that Judgment.

Reply for the Respondents

32. Having heard from Mr Flanagan, we called upon Ms Laing to reply for the respondents. In her further oral submissions, she made the following points:-

(1) Ms Laing invited the Tribunal to overturn the Judgment in respect of liability and the finding of direct discrimination and unfair dismissal, failing which, inviting us to make three separate reductions to compensation, for contributory conduct, and for a ***Polkey*** reduction too.

(2) She commented that there had been some quite distressing words from the claimant's representative, Mr Flanagan, and it seemed to her that the claimant's agent was attempting a second bite of the cherry. He stated that nothing she had said at this Reconsideration Hearing was not there before, and in the respondents' appeal, and that reconsideration was only taken after comments by the presiding Employment Judge at the Remedy Hearing on 31 January 2017.

(3) Ms Laing added that she felt Mr Flanagan was struggling to understand the law here, as the ***Fairlead*** case cited by him is to do with an ongoing policy for years, and it is not in analogous circumstances, to the present case, and there is nothing similar to this case. Further, she added, it is not correct that she was stringing things along, as the claimant's suspension was due to the ongoing grievance, and the illness of a Board member at the respondents. As regards the claimant and Marie Duncan, the two jobs were different, and the Tribunal has found that, and no matter how many times Mr Flanagan said so, the Judgment says it was not like work.

(4) Further, added Ms Laing, it is a contradiction between the Tribunal's Judgment and Reasons, and Mr Flanagan does not appreciate the intricacies of the law. This must have been a ***bête noire*** for the Tribunal, and it is not beyond the pale that it is not all correct, and she invited the Tribunal to take a more sanguine approach than Mr Flanagan, and see whether there had been mistakes, not carried through to the Judgment.

(5) In making these comments, Ms Laing stated that she was not detracting from the time and effort put in by the Tribunal, and that she hoped that this did not stop the Tribunal seeing professionally that things just got mixed up. Mr Flanagan had referred to discretion, and that being an exercise of Judgment, but discretion is more than Mr Flanagan has suggested, as the Tribunal needs to balance discretion, with application of the law, and she stated that she felt Mr Flanagan had not grasped that approach.

(6) Further, she added, Mr Howson was a "***neutral"***, another point not grasped by Mr Flanagan, and the respondents are a small organisation, and the respondents went out of their way to get a neutral, that is a person not involved so far, and while Mr Flanagan states that there was not a fair Hearing, and a proper exercise, the respondents refer to the fact it was the claimant who left the procedure that way, and what else could be done if she did not come to her disciplinary hearing.

(7) As regards the EAT Judgments in ***Steen***, and ***Portsmouth Hospitals NHS Trust***, Ms Laing stated that she felt those Judgments were more in favour of the respondents than the claimant, and she specifically stated that the Judgment in ***Steen*** gives a good gloss on the legal position, but that Mr Flanagan does not seem to have appreciated the claimant's culpable and blameworthy conduct in this case.

(8) Further, she added, there are not the same facts and circumstances here, as in the ***Portsmouth Hospitals NHS Trust*** case, and gross misconduct involves repudiatory breach of contract and in the ***Portsmouth*** case, the employee's conduct was not wilful, whereas, in her submission, it was wilful conduct by the claimant in the present case.

(9) Ms Laing then referred to the EAT's Judgment in ***Khan v Stripestar (UKEAT/0002/15)***, and apologised that she did not

have a copy of that Judgment here to present to this Tribunal, but she stated that that Judgment has an edict that, at the end of the day, you can have an employee who should be dismissed for gross misconduct, but who, due to a procedural failing, is unfairly dismissed, and there would be a windfall to that claimant, and that is why the law is there for reductions.

(10) In closing, Ms Laing invited the Tribunal to "***put their hands up, where necessary"***, and perhaps certain aspects of this matter will not require the attention of the Employment Appeal Tribunal, in due course, if the reconsideration application is granted.

Clarifications sought by the Tribunal

33. We adjourned for private deliberation, just after 3.20pm, so that the Tribunal could privately discuss any questions they wished to ask of either party's representative, arising from their submissions to the Tribunal, and for the presiding Employment Judge to arrange for the clerk to the Tribunal to copy for the Tribunal, and both parties' representatives, a full copy of Lady Wise's EAT judgment in **Khan v Stripestar Ltd [2016] UKEATS/0022/15,** as had been referred to by Ms Laing.

34. On resuming, in public Hearing again, at around 3.35pm, questions were asked by Mr Piggott and the Judge. Mr Piggott asked Ms Laing, the respondents' representative, in respect of her first ground of reconsideration, about time bar, and whether she had any further submissions to make in light of the Tribunal's findings at paragraphs 127 and 128, at page 163 of the Judgment.

35. In reply, and as an outsider, at the material time, as she was not then employed by the respondents, Ms Laing stated that she did not understand the result of those paragraphs, and she did not make a causal connection between not having salary scales set out to mean that salary on an *ad hoc* basis cannot be offered, and that this does not show a continuing discriminatory pay policy, but that the respondents look at pay, individually,

on the job, at the time, based on the job, the needs of the business, and the experience of the employee.

36. Further, Ms Laing added, looking at the Tribunal's findings in fact at paragraph 35(39) to (44), she had to "***dispute those findings in fact***", as going through the evidence of witnesses that showed that the pay system was transparent, and although there was no fixed system, there were assessments.

37. When the presiding Employment Judge intervened and reminded Ms Laing that, earlier in the proceedings at this Hearing, she had stated there was ***"no challenge to the Tribunal's findings in fact",*** Ms Laing couched her reply to Mr Piggott's questions by stating that it was a ***"personalised observation"***, and that she does not agree with the Tribunal's findings in fact. The Judge had no questions for her, nor did Mr Stewart, the other lay member of the Tribunal.

38. After that questioning, the Tribunal again adjourned, for 10 minutes, just after 3.40pm, for both parties' representatives to consider whether or not they wished to make any further oral submissions to us arising from Lady Wise's judgment in ***Khan.***

39. On resuming again, in public Hearing, just after 3.50pm, Ms Laing, for the respondents, stated that a thorough appeal can save the day, as per ***Taylor v OCS Group Ltd,*** and while she accepted that the ***Khan*** judgment does not refer to "***windfall***", she repeated her earlier submission that we have reductions where the circumstances merit not full compensation to a successful claimant, and that appeals can be held to cure any earlier defects in procedure.

40. Mr Flanagan, for the claimant, stated that we had referred to ***Taylor*** in our Judgment in this case, and as this Tribunal had, in his view, spent a lot of time, and determined the present case correctly, he had nothing further to

add to his already stated opposition to the respondents' reconsideration application.

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Reserved Judgment

41. At the close of the Reconsideration Hearing on 31 May 2017, having heard both parties' representatives' oral submissions, and it then being after 4.00pm, there was insufficient time there and then for the Tribunal to meet and have private deliberation on the respondents' first reconsideration application of 2 March 2017.

42. Following consultation with members of the Tribunal, about their availability, and having regard to the Judge's other diaried commitments, the Tribunal agreed to meet again on Friday, 21 July 2017, for a full day's private deliberations, being the earliest mutually convenient date for the full Tribunal, having regard to annual leave for the Judge, and one of the lay members of the Tribunal, Mr Stewart, in the intervening period.

Respondents' Application for Postponement and Recusal refused by the Tribunal

43. We met again, as scheduled, on 21 July 2017, for private deliberation. That Members' Meeting was, however, conducted against the background of an application by the respondents, from Mr Richard Rees, at Peninsula, seeking postponement of the Members' Meeting, and for Mr Piggott to recuse himself from the full Tribunal, and for us to fix a separate Hearing to determine the respondents' recusal application in respect of Mr Piggott., which application was sent, at 09:44 am that morning, just shortly before we were due to meet at 10.00am, and have our private deliberations in chambers.

44. Through the Tribunal clerk, we sought urgent comments from the claimant's solicitor, Mr Flanagan, but there being no reply from him we convened at 10.30am.We refused both applications from the respondents, and we

proceeded as per paragraphs (1) to (3) of the Employment Judge's written Note and Orders of the Tribunal dated 24 July 2017. Having done so, the full Tribunal proceeded with the Members' Meeting and agreed that its full written Judgment and Reasons on the respondents' first reconsideration application dated 2 March 2017 would be issued in due course.

45. Further to the Members' Meeting held on 21 July 2017, this case was still before the full Tribunal for consideration of the respondents' opposed application, dated 2 March 2017, for reconsideration of our Judgment dated 30 November 2016. We were still deliberating on our Judgment and Reasons, when on account of a further application from the respondents, the case had to be relisted before us again, on 15 August 2017, for a Case Management Preliminary Hearing in private, conducted by telephone conference call, where, on the papers only, we considered an application by the respondents, dated 7 August 2017, under **Rule 30** for variation or set aside of a part of our Case Management Order of 21 July 2017, and / or an application under **Rule 71** for reconsideration of the Judgment of 21 July 2017.

46. At that Case Management Preliminary Hearing, the Employment Judge explained to us that, in terms of **Rule 72**, the reconsideration application was before him alone for preliminary consideration, and he had refused that application on the basis that the respondents' application for reconsideration of the Judgment of 21 July 2017 is incompetent, because there is no Judgment dated 21 July 2017, which can be the subject of a reconsideration application under **Rule 71**.

47. The document concerned, issued by the Tribunal on 24 July 2017, is clearly drafted and issued by the Judge as a Case Management Order of the Tribunal, made under **Rule 29**. The decision of the Tribunal sent out on 24 July 2017 was not a "***judgment***" in terms of **Rule 1(3) (b)** but rather a "***case management order"***. The respondent's application of 7 August 2017 was therefore considered under **Rules 29 and 30**, and not as an application under **Rule 71.**

48. Having considered Mr Rees' e-mail application of 7 August 2017 and there being no reply from the claimant's solicitor, Mr Flanagan, within 7 days, or at all, we unanimously decided to refuse that application to vary or set aside paragraph (2) of our Order of 21 July 2017. It was suggested by the respondents that it was at odds with the overriding objective under **Rule 2** for a panel which included Mr Piggott to hear the recusal application. However, it is clear from the case of **British Car Auctions v Adams [2013] ICR D25, EAT,** that this is the correct procedure both in relation to the initial decision and to any application for that decision to be varied or reconsidered.

49. The matter properly called before the full Tribunal, including Mr Piggott as a member of that panel on 21 July 2017. Recusal applications are generally dealt with by the Judge or Tribunal dealing with the case, and not re-assigned by them to a differently constituted Tribunal. The full Tribunal heard both parties' submissions at the Reconsideration Hearing on 31 May 2017, and it was appropriate that the full Tribunal consider those submissions in private deliberation at the Members' Meeting held on 21 July 2017.

50. The respondents' application was therefore considered by the original Tribunal (including Mr Piggott) and it was refused for the detailed reasons given in the written Note and Orders of the Tribunal dated 15 August 2017, to which Note we refer for the sake of brevity. This our further written Judgment and Reasons represents the product of our private deliberations, and our reserved decision on the respondents' opposed application for reconsideration of our Judgment issued on 30 November 2016.

Issues for the Tribunal

51. This case called before us in connection with the respondents' opposed application for reconsideration of the Judgment dated 30 November 2016. At this Reconsideration Hearing, as per the Notice of Hearing issued by the Tribunal to both parties' representatives on 3 April 2017, they were then

advised that the Judgment might be confirmed, varied or revoked and, if revoked, the case would be re-listed for a Hearing at a future date.

52. As such, the postponement and recusal applications made by the respondents having been refused by us, on 21 July and 15 August 2017, the live issue remaining before the Tribunal was to consider the opposed application for reconsideration, and to decide whether, in the interests of justice, it is necessary to reconsider that Judgment and, if so, whether to confirm, vary or revoke that Judgment.

Relevant Law

53. Insofar as relevant to the subject matter of this Judgment, the relevant provisions of the **Employment Tribunal Rules of Procedure 2013** provide as follows:-

> ***"INTRODUCTORY AND GENERAL***
>
> **Rule 2 – Overriding Objective**
>
> *The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*
>
> *(a) ensuring that the parties are on an equal footing;*
>
> *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
>
> *(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

Rule 5 - Extending or shortening time

The Tribunal may, on its own initiative or on application of a party, extend or shorten any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired."

RECONSIDERATION OF JUDGMENTS

Principles

Rule 70*: "A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again."*

Application

Rule 71*: "Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision*

was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary."

Process

Rule 72.—

"(1) *An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.*

(2) *If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.*

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by

the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part."

Discussion and Deliberation

54. We have carefully considered both parties' written and oral submissions, and also our own obligations under **Rule 2 of the Employment Tribunal Rules of Procedure 2013**, being the Tribunal's overriding objective to deal with the case fairly and justly. Having done so, we have decided, after our most careful and detailed consideration of the competing arguments presented to us by both parties' representatives, to allow the respondents' reconsideration application, but only to a limited extent. Accordingly, we have issued this our Reconsideration Judgment in specific terms. The Judge sincerely apologises for the delay in the issue of this Judgment, on account of a combination of factors, as previously explained to both parties' representatives in correspondence from the Tribunal.

55. As a consequence arising, further procedure now requires to be ordered in respect of the respondents' opposed second application for reconsideration, intimated on 27 March 2017, in respect of our Remedy Judgment in favour of the claimant, issued on 6 February 2017, and our subsequent Written Reasons issued on 13 March 2017. We have ordered that that second application be listed for a Reconsideration Hearing before this full Tribunal on a date to be hereinafter assigned, in **February, March or April 2018**, after the completion and return of date listing stencils from both parties' representatives.

56. In the following paragraphs, we now set out more fully our detailed reasoning for this decision by the Tribunal. In deciding this matter, we have acted, under **Rule 72(3),** as the Tribunal who made the original decision, and it being practicable for us to consider the application. Although both Mr Piggott and Mr Stewart are now retired from sitting as members, they have been recalled to deal with this reconsideration application, as they were for the Remedy Hearing, rather than have a fresh Tribunal constituted for the purpose.

57. When the respondents' application dated 2 March 2017 was intimated to the Tribunal by Mr Rees, it was treated as being an application by the respondents for reconsideration under **Rule 71,** and it proceeded thereafter to preliminary consideration, under **Rule 72(1),** for the Judge alone to consider whether it should be refused, at that stage, on the basis that he felt there were no reasonable prospects of the Judgment dated 30 November 2016 being varied or revoked.

58. On that preliminary consideration, the Judge allowed the respondents' application to proceed to the next stage, which led to this Reconsideration Hearing, once Mr Flanagan had advised that the application was being opposed on behalf of the claimant.

59. While, as per Mr Rees' reconsideration application of 2 March 2017, the section entitled "***Extension of time***", as reproduced earlier, at paragraph 5 of these Reasons above, refers to: ***"Judge McPherson voiced his concern that an appeal had been lodged on behalf of the Respondents***", the point arising was not that we were concerned there was an Appeal, for parties have the right to appeal, if so advised, but that we were unaware there was an Appeal submitted, notwithstanding ongoing litigation before us at this Tribunal, as parties had not advised us, even as a courtesy, nor had the EAT by that stage.

60. We feel that the position is perhaps better explained by Mr Rees' following sentence: ***"(Judge McPherson) expanded on the advantages of a Reconsideration versus an appeal and it seemed clear he thought the better way would have been a Reconsideration."*** We pause to note here that a Judgment by His Honour Judge Serota QC in the case of **Wolfe v North Middlesex University Hospital NHS Trust [2015] ICR 960** refers in this regard. At paragraph 4 of the summary to that EAT Judgment, the learned EAT Judge stated that:

> ***"Where a would be Appellant believes that there has been a material omission on the part of an Employment Tribunal to deal with a significant issue or to give adequate reasons in respect of a significant finding, the proper course is not to lodge a Notice of Appeal but to go straight back to the Employment Tribunal and ask that the omission be repaired. If reasons are given orally, this should be done as soon as practicable after completion of the judgment and if Written Reasons are later handed down, as soon as practicable after the Judgment is received. It is the duty of advocates to adopt this course."***

61. The fact that the normal 14 day time limit for applying for a reconsideration had expired does not prevent an application for an extension of time being made. As per the overriding objective under **Rule 2**, the Tribunal must seek to give effect to that overriding objective, to deal with a case fairly and justly, in interpreting or exercising any power given to it by the Rules.

62. An extension of time is a discretionary power for the Judge to exercise in the interests of justice. He decided to grant that extension of time, under his **Rule 5** powers, given his comments at the Remedy Hearing, expanding on the advantages of a reconsideration versus an appeal, as he thought the better / quicker route to get anything sorted, by the Tribunal at first instance, rather than have a successful appeal point before the EAT, but then find the outcome is a remission back to the Tribunal, in due course, would have been

by way of a reconsideration application first of all, as the EAT usually sists appeals, if a reconsideration application is pending. Both parties' representatives were accordingly so advised, by the Tribunal's letter dated 6 March 2017, that the Judge had granted the necessary extension of time.

63. While, in Mr Flanagan's letter of 24 March 2017, he objected to the reconsideration application being made out of time (and he also objected in respect of non-payment by the respondents of the Tribunal fee for a reconsideration), the appropriate fee of £350 was duly paid by the respondents, and the Judge, as per his decision intimated to both parties' representatives, by the Tribunal's letter of 6 March 2017, had already made a judicial decision to grant the respondents the extension of time sought by Mr Rees for them to make their application, although late.

64. As Ms Laing put it to us, the Judge having decided, under **Rule 72(2),** that the reconsideration application was not refused, it was listed for this Reconsideration Hearing, and so Mr Flanagan's objection on "***time-bar"*** was "***a horse that had bolted***." As such, those two preliminary points raised by Mr Flanagan, in his objections of 24 March 2017, were not revisited in the course of this Reconsideration Hearing.

65. On the test of ***"in the interests of justice",*** under **Rule 70**, which is what gives this full Tribunal jurisdiction in this matter, there is now only one ground for "***reconsideration***", being that reconsideration "***is necessary in the interests of justice***." That phrase is not defined in the **Employment Tribunals Rules of Procedure 2013,** but it is generally accepted that it encompasses the five separate grounds upon which a Tribunal could "***review"*** a Judgment under the former **2004 Rules**.

66. While there are many similarities between the former and current Rules, there are some differences between the current **Rules 70 to 73** and the former **Rules 33 to 36**. Reconsideration of a Judgment is one of the two possible ways that a party can challenge an Employment Tribunal's

Judgment. The other way, of course, is by appeal to the Employment Appeal Tribunal.

67. **Rule 70** confers a general power on the Employment Tribunal, and it stands in contrast to the appellate jurisdiction of the Employment Appeal Tribunal ("***EAT***"). In most cases, a reconsideration will deal with matters more quickly and at less expense than an appeal to the EAT.

68. Returning to the respondents' reconsideration application of 2 March 2017, there is no dispute that our reserved Judgment dated 30 November 2016 is a Judgment as defined in **Rule 1(3) (b) of the Employment Tribunals Rules of Procedure 2013.** It finally determined the claimant's unfair dismissal head of complaint, and it found for her, and made a monetary award of compensation in her favour.

69. As regards the race discrimination part of the claim, that reserved Judgment of 30 November 2016 again found for the claimant, but reserved consideration of remedy for that successful part of her claim for a subsequent Remedy Hearing. That, in turn, led to the Remedy Hearing before us, held on 31 January 2017, our Remedy Judgment of 6 February 2017, and the associated Written Reasons of 13 March 2017.

70. Further, we note and record here that we are aware that there is an underlying public policy principle in all proceedings of a judicial nature, and that includes this Tribunal, that there should be finality in litigation, which is in the interests of both parties. Reconsideration is thus best seen as a limited exception to the general rule that Judgments should not be reopened and relitigated.

71. As is often stated, it is not a method by which a disappointed party to proceedings can get "***a second bite of the cherry***" The process is not intended to provide parties with the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis, or further

evidence adduced which was available before, but not led at the original Final Hearing.

72. While the ground of "***interests of justice***" gives this Tribunal a wide discretion, it does not mean that in every case where a party is unsuccessful, they are automatically entitled to reconsideration, as virtually every unsuccessful litigant thinks that the interests of justice require the decided outcome to be reconsidered.

73. The overriding objective, under **Rule 2,** requires an Employment Tribunal to seek to give effect to dealing with the case fairly and justly whenever it exercises a power conferred by the Rules or is required to interpret its provisions.

74. While exceptional circumstances are not required, as that would be to construe the statutory ground for reconsideration too narrowly, the function of the Tribunal, as we see it, is to do justice between the parties, not allowing its process to be used as a means of achieving injustice, and so the interests of justice must have regard to the interests of both parties, and not just the party seeking the reconsideration, as well as having regard to the wider administration of justice.

75 We have carefully considered the competing arguments presented to us at this Reconsideration Hearing by both Ms Laing for the respondents, and Mr Flanagan for the claimant. In doing so, we have re-read our original Judgment of 30 November 2016, and paid particular attention to those specific paragraphs of that Judgment to which we were referred by parties' representatives in their respective submissions to us.

76. In the course of submissions made to us, at the Reconsideration Hearing, as we have already noted above, both parties' representatives referred, in their own ways, to the task that had been undertaken by the full Tribunal in coming to its written Judgment and Reasons following the Final Hearing.

77. At point (22) of our record of the submissions made for the claimant, at paragraph 31 above of these Reasons, we recorded that:

> "*Thereafter, Mr Flanagan stated that this was a very detailed Judgment, and it does cover the work of the Tribunal, and shows that all the matters were considered, showing submissions were heard, and carefully considered, and that the Tribunal weighed those submissions against the facts of the case, and the appropriate action for the Tribunal to take in reaching its final decision. He further stated that it had been very carefully dealt with, and the Tribunal had gone above and beyond recording and discussing all the facts and submissions, and reaching the decision reached by the Tribunal."*

78. Further, in Ms Laing's reply for the respondents, as recorded at points (4) and (5) of our record of the submissions made by her, at paragraph 32 above of these Reasons, we recorded that:

> *"…This must have been a **bête noire** for the Tribunal, and it is not beyond the pale that it is not all correct, and she invited the Tribunal to take a more sanguine approach than Mr Flanagan, and see whether there had been mistakes, not carried through to the Judgment.*
>
> *In making these comments, Ms Laing stated that she was not detracting from the time and effort put in by the Tribunal, and that she hoped that this did not stop the Tribunal seeing professionally that things just got mixed up… "*

79. Taking account of both of those points of view, we think it appropriate to record that the Final Hearing, initially allocated 5 days, in fact, took 11 days for evidence, and a twelfth day for closing submissions, and we had two further days for our own private deliberation on the evidence and closing submissions, as well as requiring further written representations from parties,

and then having a third day for our final deliberation, before issuing our unanimous written Judgment and Reasons dated 30 November 2016.

80. While Ms Laing referred to it as a ***bête noire*** for the Tribunal, we have to say that her use of that phrase seems somewhat odd, when we understand that French phrase (literally "***black beast***") to mean a thing that one particularly dislikes or dreads, or which annoys you, or sometimes meaning a bugbear, according to the various dictionary definitions we have noted. As befitting our judicial role, we approached this case, without fear or favour, independently and objectively, as an industrial jury of an experienced Judge and two lay Members, carefully assessing the evidence as we had it led before us at the Final Hearing, and thereafter applying the relevant law to the facts that we found established.

81. Holding a Judgment in his client's favour, it is unsurprising to us and we well understand how Mr Flanagan, as the claimant's solicitor, was seeking to have us uphold it, and in so doing, he argued that we had considered all matters most carefully, whereas Ms Laing, for the respondents, was submitting her points as to why we should reconsider our Judgment. Again, as befitting our judicial role, we have approached this reconsideration, without fear or favour, addressing the arguments presented to us by both parties' representatives, and thereafter coming to this our final determination on the opposed reconsideration application.

Conclusions

82. For ease of reference, and so as to lay out our final deliberation and disposal, in a structured fashion, we note and record here our conclusions on each of the 7 stated grounds of the reconsideration application, the first 3 related to liability, and the further 4 related to remedy, as follows:-

(1) Ground 1 – Equality Act 2010 time limit

83. We start by commenting that the respondents' representative at the Final Hearing, Mr West, did not advance the argument before us that is now being run, in writing, in this reconsideration application by his colleague, Mr Rees. It is not included in Mr West's written closing submissions provided to us, at the Final Hearing, nor did he raise it orally.

84. Indeed, it is fair comment for us to note that, after the Final Hearing, when we were deliberating, it was the Tribunal that had to request further written representations from both parties' representatives. **Soughrin** was not cited to us at the Final Hearing, and it was our Judgment that referred to **Owusu.**

85. While the respondents argue that the claimant's **Section 13** direct discrimination claim is out of time, because the respondents' decision not to regrade the claimant was a one-off decision or act, even though it resulted in the continuing consequence of lower pay for the employee who was not regraded, that argument, which as we say was not advanced before us on the respondents' behalf, despite them being professionally represented by an employment consultant from Peninsula, is at odds with our findings in fact, where when the claimant raised with Mrs Cotter, the respondents' Chief Executive Officer, the disparity in pay, her pay was not changed, and all the respondents did was to put in place the ***CCR3*** assessment process, which we found was not a pay review.

86. There was no evidence led before us at the Final Hearing that the respondents had conducted any re-assessment of the claimant's pay, in light of the disparity raised by her directly with Mrs Cotter. **Soughrin** involved a regrading decision. That was not the factual situation here in the present case. There was a continuing act by the respondents to pay her at her then existing rate, but there was no pay regrading.

87. To our collective industrial experience, for any employer to regrade a post, there needs first to be some open and transparent pay scale, or salary

structure, and what we had in this case was no evidence led by the respondents that there was any transparency in their pay arrangements. Put simply, there was no cogent explanation offered to us by the respondents, and the claimant continued to receive the same pay right up to the date when she was dismissed from the respondents' employment. The respondents continued to pay the claimant the same as before, which was less than her comparator, and we regard that as a continuing act.

88. Having carefully considered this ground for reconsideration, we are not satisfied that it is in the interests of justice to reconsider our Judgment on this ground, and so we reject this ground advanced by the respondents.

(2) <u>Application of Section 23(1) Equality Act 2010</u>

89. On this ground advanced by the respondents, we note and record that, at the Final Hearing, we dealt with matters on the basis of the evidence led before us by both parties, including oral evidence from the claimant and Mrs Duncan, as well as witnesses from the respondents, and the many documents produced to us by both parties.

90. So too we had regard to the written and oral closing submissions made to us by Mr Flanagan for the claimant, and Mr West for the respondents. The two CVs which Ms Laing tendered at this Reconsideration Hearing were not produced to us at the Final Hearing by either party. If either party had wished to do so, they could and should have done so during the currency of that Final Hearing.

91. We have already addressed the matter of those 2 CVs earlier in these Reasons, at paragraphs 14 to 25 above, and so we need say nothing further in that regard, because we made our interlocutory ruling on 31 May 2017, and we have provided further reserved Reasons earlier in this document. Addressing this ground for reconsideration, we refer to the fact that evidence about the claimant and Mrs Duncan was tried and tested

in evidence before us, and we made our findings in fact based on our assessment of that evidence.

92. We further pause to note and record that the respondents' representative at the Final Hearing, Mr West, did not advance the specific argument before us that is now being run in this reconsideration application by his colleague, Mr Rees, as per his written application. It is not included in Mr West's written closing submissions provided to us, at the Final Hearing, nor did he raise it orally.

93. That said, at paragraph 31 of his written submissions for the Final Hearing, Mr West did discuss liability for the pay difference, and he made some reference to comparators, but he did not refer us to **Section 23(1).** His closing submission was that the reason for the disparity is not related to race, but more related to the different recruitment routes for those involved and the budget available at the time of recruitment.

94. At this Reconsideration Hearing, the respondents' representative, Ms Laing, referred us to **Section 65 of the Equality Act 2010**, but we were not referred to that statutory provision by either of Mr West, at the Final Hearing, nor Mr Rees, in the respondents' reconsideration application. This was very much a ball bowled from left field at this Reconsideration Hearing by Ms Laing, and not a point that had been foreshadowed at any earlier stage in these proceedings.

95. Further, in referring us to **Section 65**, we felt Ms Laing was perhaps conflating two separate legal tests under the **Equality Act 2010**, for equal pay complaints and direct discrimination complaints, proceed under different statutory provisions in different chapters and different Parts of that Act.

96. Having carefully considered this ground for reconsideration, we are not satisfied that it is in the interests of justice to reconsider our Judgment on this ground, and so we reject this ground advanced by the respondents.

(3) <u>Finding of unreasonableness for unfair dismissal</u>

97. In this ground for reconsideration, we are conscious that the respondents advance an argument that we have given ourselves a direction against substitution, but, in essence, gone on to ignore our own self-direction, and entered the "***substitution mind set***". We have carefully considered the cases to which we were referred, and return to our Reasons, at paragraphs 198 and 199, where we refer not to our view, but to what a "***reasonable employer***" would have done.

98. We do not believe that we entered the substitution mindset, and, having carefully considered this ground for reconsideration, we are not satisfied that it is in the interests of justice to reconsider our Judgment on this ground, and so we reject this ground advanced by the respondents.

(4) <u>Misapplying the legal submissions made by the respondents as to reductions</u>

99. On this ground advanced by the respondents, it is stated that: ***The written submissions for the Respondents paraphrased by the Tribunal at page 134 para (16) clearly reveal two <u>separate</u> requests for deductions; 'for contributory fault and the inevitability of dismissal' and separately '25% should be applied due to the failure of the claimant to engage with the disciplinary and appeal process'.***

100. In addressing this ground, we have referred back to Mr West's written closing submission, where he stated as follows:-

"52. Substantial reductions should be applied for contributory fault and the inevitability of dismissal.

53. Additionally, no ACAS uplift should be applied, the processes were all ACAS compliant in respect of the Respondent, but a reduction of 25% should be applied due to the failure of the Claimant to engage with the disciplinary and appeal process."

101. We recall well from the claimant's evidence at the Final Hearing that she recognised, with hindsight, that she should have participated in the disciplinary hearing which she was invited to attend by the respondents. Mr West sought a 25% reduction in any compensation for the claimant due to her failure to engage with the disciplinary and appeal process. We decided that a 10% reduction should apply due to the claimant's failure to appeal internally. We did not reduce by the full 25% sought by Mr West, as we saw, and still see, a distinction between the disciplinary and appeal processes, which are separate things, and so need to be considered individually.

105. In that regard, the ACAS Code of Practice on Disciplinary and Grievance Procedures, at paragraphs 11 and 12, states that a meeting should be held with the employee to discuss the disciplinary issue, and that: ***"Employers and employees (and their companions) should make every effort to attend the meeting."***

106. There is, however, no legal obligation on an employee to attend a disciplinary meeting, although they should be invited to a meeting convened by the employer, whilst allowed reasonable time to prepare their case, and allowed to be accompanied, if they so wish, at that disciplinary hearing.

107. The associated ACAS Guide on Disciplinary and Grievance Procedures, at paragraph [4.19], deals with what an employer should do if an employee repeatedly fails to attend a disciplinary hearing, and that where an employee continues to be unavailable to attend the meeting, the employer may conclude that a decision will be made on the evidence available.

108. Paragraph 24 of the ACAS Code similarly provides that: "***Where an employee is persistently unable or unwilling to attend a disciplinary meeting without good cause the employer should make a decision on the evidence available."***

109. On the facts established by this Tribunal in this case, the claimant did not attend her disciplinary hearing. Mr Howson, the external consultant from Peninsula, proceeded with the disciplinary hearing, in the claimant's absence, and, on the basis of the papers available to him as the respondents' appointed disciplinary officer, that resulted in the claimant's summary dismissal for gross misconduct, effective 4 April 2014.

110. Given that we found the claimant gave her "***blessing***" to Mr Howson to proceed, and indeed her letter to Mr Howson on 15 April 2014 (pages 213 and 214 of the Bundle) says so expressly, as per our finding in fact at (231) , we do not see how, given our finding in fact (205) about her telephone conversation with Mr Howson, on 10 April 2014, that can be regarded as a failure on her part to engage with the disciplinary process, nor do we see it as a "***refusal to attend***" the disciplinary hearing, as the respondents' application for reconsideration suggests at ground 6, which we will deal with later on in these Reasons..

111. As we found from the evidence led before us, at the Final Hearing, the claimant chose to opt out, and let matters take their course, in full knowledge that Mr Howson had cautioned her that the disciplinary hearing would take place in her absence, and he would decide the case based solely upon the documentary evidence submitted and without any mitigation

arguments from her, as she had not provided any counter-evidence, or evidence for investigation.. She simply requested that his decision be sent to her, as it duly was by letter dated 11 April 2014 (pages 84 to 87 of the Bundle), pp'd by Mrs Cotter, the respondents' Chief Executive Officer.

112. Paragraph 25 of the ACAS Code provides that; "***Where an employee feels that disciplinary action taken against him is wrong or unjust they should appeal against the decision".*** Paragraph 26 of that Code further provides that: "***The appeal should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case."***

113. While the claimant entered into post-termination correspondence with the claimant, as per our findings in fact (230) to (234), challenging Mr Howson's authority to act, she did not submit any letter of appeal against her dismissal by the respondents, nor reply to Mrs Cotter's letter of 24 April 2014 confirming his authority to act as impartial disciplinary officer, and confirming her dismissal on 11 April 2014.

114. In our Judgment and Reasons, following the Final Hearing, we did address the relevant law, including reductions under **Sections 122(2) and 123(1), (4) and (6) of the Employment Rights Act 1996,** as also **Polkey,** and **Section 207A of TULRCA 1992**, the latter for a statutory uplift / downlift, for unreasonable failure to comply with the ACAS Code. Paragraphs 150 to 155 of our Reasons for the Judgment of 30 November 2016 refer.

115. Here, on re-reading our earlier Judgment and Reasons, and having carefully considered the respondents' written application for reconsideration, as adopted by Ms Laing in her oral submissions to us, we see now that we approached matters too broad brush, and, on further reflection, we can see now that we have conflated certain matters taken into account by us, which merits us, on this reconsideration, revisiting our earlier decision making process on these aspects of any reductions applicable to the

compensation we awarded to the claimant for her unfair dismissal by the respondents.

116. We accept that, in his closing submissions, Mr West sought a "***substantial"*** reduction for contributory fault, albeit he put no particular percentage forward as being an appropriate level of reduction. So too he sought a 25% reduction for the claimant's alleged unreasonable failure to follow the ACAS Code. He did not seek to limit our consideration of an appropriate percentage reduction under **Section 123(6)** to no more than 25%. As we have already commented, Mr West put no particular percentage forward as being an appropriate level for any specific type of reduction.

117. On reconsidering our Judgment and Reasons, we wish to make it clear and unequivocal that while paragraph (6) of our Judgment states : ***"the Tribunal finds that the claimant did not cause or contribute by her conduct to her dismissal, so it is not appropriate that her compensation for unfair dismissal be reduced for that reason"***, on reconsideration we have decided, in the interests of justice, that it is appropriate for us to reconsider that part of our judgment, and **vary** it to state that : ***"the Tribunal finds that the claimant did cause or contribute by her conduct to her dismissal, so it is appropriate that her compensation for unfair dismissal be reduced for that reason".***

118. In coming to this decision, we have referred ourselves to Mr Justice Langstaff's judgment from the Employment Appeal Tribunal in **Lemonious v Church Commissioners [2013] UKEAT/0253/12,** and we have also considered the further judgment by him, as the then EAT President, in **Steen v ASP Packaging Ltd [2013] UKEAT/0023/13**, reported at **[2014] ICR 56.**

119. At paragraph 24 in **Steen**, the learned EAT President observed:- " ***It is therefore all too often an error of law that a Tribunal simply states its conclusion as to contributory fault and the appropriate deduction for it***

without dealing with the four matters which we have set earlier in this decision. We add for the comfort of Tribunals that there is no need to address these matters at any greater length than is necessary to convey the essential reasoning."

120. In **Lemonious**, at paragraph 35, Mr Justice Langstaff stated that: ***"Further, even if the conduct were wholly responsible for the dismissal it might still not be just and equitable to reduce compensation to nil, although there might be cases where conduct is so egregious that that is the case. It calls for a spelling out by the Tribunal of its reasons for taking what is undoubtedly a rare course. In particular, it must not be the case that a Tribunal should simply assume that because there is no other reason for the dismissal therefore 100% contributory fault is appropriate. It may be the case but the percentage might still require to be moderated in the light of what is just and equitable."***

121. We have also noted paragraph 60 in **Lemonious**, where the learned EAT President stated: ***"What is 'just and equitable' may or not always be easy to explain at any length. However given that the employer had not dealt fairly with a long serving employee in respect of whom (though he lied) the offending emails were (per paragraph 43) 'relatively mild', it is not obvious why the tribunal felt it was just and equitable to reduce what would otherwise have been his compensation to nil. Even a few short words might have sufficed, but they are not there. In a case such as this there is a clear distinction to be drawn between the basic award and the compensatory award. The latter requires causation for the dismissal to be established. The former requires no such matter to be proved. Though usually (see the cases set out at paragraph 29 above) the percentage reduction may be the same for both basic and contributory awards, this does not have to be the case: and since the employer is necessarily at fault, since it has acted unfairly towards its employee,***

cogent reasons are required to show why nonetheless it is just and equitable that compensation should be nil."

122. We have also found it helpful, in considering this part of the reconsideration application before us, to have regard to what the EAT President, Mr Justice Langstaff, had to say in **Steen** at paragraphs 8 to 15, as follows:-

> *"8. In a case in which contributory fault is asserted the Tribunal's award is subject to sections 122(2) and 123(6) of the* ***Employment Rights Act 1996****. Section 122(2) dealing with the basic award provides:*
>
> > ***"Where the Tribunal considers that any conduct of the complainant before the dismissal or where the dismissal was with notice before the notice was given was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."***
>
> *Section 123(6) provides:*
>
> > ***"Where the Tribunal finds that the dismissal was to any 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."***
>
> *The two sections are subtly different. The latter calls for a finding of causation. Did the action which is mentioned in section 123(6) cause or contribute to the dismissal to any extent? That question does not have to be addressed in dealing with any reduction in respect of the*

basic award. The only question posed there is whether it is just and equitable to reduce or further reduce the amount of the basic award to any extent. Both sections involve a consideration of what it is just and equitable to do.

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.

It should be noted in answering this second question that in unfair dismissal cases the focus of a Tribunal on questions of liability is on the employer's behaviour, centrally its reasons for dismissal. It does not matter if the employer dismissed an employee for something which the employee did not actually do, so long as the employer genuinely thought that he had done so. But the inquiry in respect of contributory fault is a different one. The question is not what the employer did. The focus is upon what the employee did. It is not upon the employer's assessment of how wrongful that act was; the answer depends what the employee actually did or failed to do, which is a matter of fact for the Employment Tribunal to establish and which, once established, it is for the Employment Tribunal to evaluate. The Tribunal is not constrained in the least when doing so by the employer's view of wrongfulness of the conduct. It is the Tribunal's view alone which matters.

(3) The Tribunal must ask for the purposes of section 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 not do so to any extent there can be no reduction on the footing of section 123(6), no matter how blameworthy in other respects the Tribunal might think the conduct to have been. If it did cause or contribute to the dismissal to any extent then the Tribunal moves to the next question, (4).

This, (4) is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. A separate question arises in respect of section 122 where the Tribunal has to ask whether it is just and equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a Tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so.

In any case therefore, a Tribunal needs to make the findings in answer to questions 1, 2, 3 and 4 which we have set out above…."

123. Mr West, in seeking a "***substantial"*** reduction in any compensation did not quantify the level that he might suggest to the Tribunal as being appropriate. His list of legal authorities, included as part of his written closing submissions, did not draw our specific attention to any relevant case law authorities, other than he cited **Sillifant v Powell Duffryn Timber Ltd [1983] IRLR 91,** a judgment from the Employment Appeal Tribunal, which

we know, from our judicial experience, was cited, with approval by Lord Bridge, in the House of Lords, in the familiar authority of **Polkey v A E Dayton Services Ltd 1988 ICR 142 (HL),** where Lord Bridge was at pains to point out that there is no need for an ***"all or nothing***" approach when making an appropriate reduction.

124. Indeed, Lord Bridge in **Polkey** quoted from the judgment of Mr Justice Browne-Wilkinson (as he then was) in **Sillifant** that 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.

125. We have also reminded ourselves, for neither party's representative referred to it, either at the Final Hearing, or at the Reconsideration Hearing, of the equally well-known and familiar case law authority of **Hollier v Plysu Ltd 1983 IRLR 260**, where the Court of Appeal suggested that contribution should be assessed broadly and should generally fall within certain categories, being : ***wholly to blame (100%), largely to blame (75%), employer and employee equally to blame (50%), and slightly to blame (25%).***

126. Although the **Hollier** judgment contains useful guidance, we are aware, from our own judicial experience, and other reported cases, that Tribunals must retain their discretion and findings in the range from 90% down to 10% are sometimes made by Tribunals. While the power of Employment Tribunals to reduce compensation extends to a finding of 100% contribution, such reductions to nil are few and far between, and we do not consider that a 100% reduction is appropriate in all the circumstances of the present case.

127. Further, we have also reminded ourselves, for neither party's representative referred to it, either at the Final Hearing, or at the Reconsideration Hearing,

of the equally well-known and familiar case law authority of **Nelson v BBC (No.2) 1980 ICR 110,** where the Court of Appeal held that for conduct to be the basis for a finding of contributory fault under what is now **Section 123(6),** it is not just and equitable to reduce a successful claimant's compensation unless the conduct on the employee's part is culpable or blameworthy.

128. Put another way, if a person is blameless, it can neither be just nor e equitable to reduce their compensation on the ground that they have caused or contributed to their own dismissal. In **Nelson,** the Court of Appeal recognised that culpable and blameworthy conduct can also include conduct that is perverse or foolish, bloody-minded, or merely unreasonable in all the circumstances.

129. We have decided that it is not appropriate to make a contributory fault reduction in respect of the claimant's refusal to participate in the disciplinary process prior to dismissal, Her failure to do so cannot be said to be blameworthy and culpable. Employees are entitled to say that they do not wish to ask or answer questions in the context of a disciplinary hearing, and although we can observe that such behaviour may make it more likely than not that disciplinary allegations brought against an employee will be established, it cannot be said to amount to blameworthy and culpable conduct justifying a reduction in any compensation awarded by a Tribunal.

130. Equally, we are of the view that an employee's failure to make use of an internal appeals process to seek to reverse an employer's decision to dismiss the employee from their employment cannot normally be considered under **Section 123(6)** because it is not conduct that can in any way be said to have contributed to the dismissal.

131. Having carefully considered this ground for reconsideration, we are satisfied that it is in the interests of justice to reconsider our Judgment on this ground, and so we uphold this ground advanced by the respondents. We

have varied paragraph (6) of our Judgment accordingly, as set forth at paragraph 117 above.

132. In consequence of that variation, it is necessary for us to also further vary paragraph (6) to quantify the extent of reduction to the claimant's compensation, and clarify the legal basis on which we have decided to make that reduction.

133. Following careful consideration, we have decided that it is just and equitable to reduce her basic and compensatory awards by **75%,** in accordance with the Tribunal's powers under **Sections 122(2) and 123(6) of the Employment Rights Act 1996**, and, accordingly, we have had to re-assess the further reduced amounts now payable to the claimant. So too, while we have kept **10%** at paragraph (7), we have added text at the end to clarify the legal basis on which we have decided to make that reduction.

134. In so doing, and as we explain later, when considering our response to grounds 6 and 7 (below), we adhere to our **10%** downlift for the claimant's failure to appeal internally, and we have adhered too to our previous decision that it is not appropriate to make a **Polkey** reduction, but, even if we are wrong in that respect, and it is considered that we should have made a **Polkey** reduction, we would not have further reduced the claimant's compensation, as we consider that it would have been unjust and inequitable to do so, in addition to the other reductions made by us. .

135. In our judgment of 30 November 2016, at paragraph (9), having taken account of the **10%** reduction to her compensatory award of **£7,444.36**, we made an Order for the respondents to pay a total monetary award of **£7,237.93** to the claimant, representing a basic award of **£538** (at paragraph 240 of our Reasons), plus compensatory award, including loss of statutory rights at **£350** (as per paragraph 267), reduced by 10% to £6,699.93. Our calculation schedule was set forth at paragraph 287 of our Reasons to that Judgment.

136. Recalculating now, to take account of this Reconsideration Judgment, we have re-assessed compensation payable to the claimant, for her unfair dismissal, as follows, taking into account that, in terms of **Section 124A of the Employment Rights Act 1996**, adjustments under **Section 207A of TULRCA 1992** shall be applied immediately before any reduction under **Section 123(6) of ERA 1996**. That being so, our revised assessment computes, as follows:-

(A) Basic Award:	**£538.00**
Less 75% reduction under Section 122(2)	**(£403.50)**
= after reduction	**£134.50 (A)**
(B) Compensatory Award:	
Past loss of Earnings, less income from Agency, as per paragraph 287 of original Reasons	**£7,094.36**
Future Loss of Earnings	**£ nil**
Loss of Statutory Rights	**£350.00**
	£7,444.36
Less 10% reduction under Section 207A, TULRCA	**(£744.43)**
	£ 6,699.93
Less 75% reduction under Section 123(6)	**(£5024.95)**
= after reduction	**£1,674.98 (B)**

Total (A) and (B) = £1,809.48

137. Accordingly, we have required to vary paragraph (8) of our Judgment to show the revised, and further reduced amount which now constitutes the monetary award payable to the claimant.

138. Finally, we have also required to vary paragraph (9) of our Judgment, as while the prescribed element for recoupment purposes, and the relevant period remain as before, at **£7,094.36,** and from 11 April 2014 to 12 January 2015, on account of the reduced monetary award, now **£1,809.48**, rather than **£7,237.93** as per the original Judgment, the monetary award no longer exceeds the prescribed element, so the final part of that original paragraph (9) has been revised accordingly.

(5) The Tribunal's misreporting of its own conclusion on contributory fault

139. We have taken this ground into account in our consideration of ground (4) above, and, as such, there is nothing further that we need to add here.

(6) The Tribunal's failure to make any finding at all as to the claimant's refusal to attend the disciplinary hearing – failure to apply Section 123(6) Employment Rights Act 1996 – Or 25% under TULCRA

140. Again, we have taken this ground into account in our consideration of ground (4) above, and, as such, there is nothing further that we need to add here. The simple fact of the matter is that the claimant did not refuse to attend the disciplinary hearing – she gave her ***"blessing***" to it proceeding in her absence.

141. On the matter of a 25% reduction under **TULRCA**, while the respondents advised the claimant of her right of internal appeal, which she did not

exercise, we considered it appropriate to leave the statutory downlift at **10%**, under **Section 207A of TULRCA**, because while it was clear to us she was offered but did not pursue an internal appeal, the evidence led before us at the Final Hearing clearly showed that the claimant had previously asked for an independent appeal against her grievance outcome, and she did not get that independent appeal, and after the claimant's concerns about Mr MacLean from Peninsula's handling of the grievance investigation, the respondents did not tell the claimant that Mr Howson was also from Peninsula, a fact that, when it came to her knowledge, led her to challenge proceedings at her disciplinary hearing as being ***"a kangaroo court."***

(7) Polkey reduction

142. Under this ground, we note that the respondents argue that there should have been a 100% **Polkey** reduction. We remind ourselves here that the task of the Employment Tribunal in considering any application for a **Polkey** reduction is to assess what the respondent employer would have done if they had acted fairly. We are helpfully guided in this regard by the valuable judgment of Mr Justice Langstaff, then President of the EAT, in **Hill v Governing Body of Great Tey Primary School [2013] IRLR 274,** at paragraphs 23 and 24, as follows:-

> *"23. Because of the frequency with which tribunals have found employers wanting in the procedures they have adopted to effect dismissals which might otherwise have been fair this latter aspect of the broader question of compensation is known as the 'Polkey' deduction …*
>
> ***24. A 'Polkey deduction' has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would***

> ***have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand."***

143. We have reminded ourselves, for neither party's representative referred to it, either at the Final Hearing, or at the Reconsideration Hearing, of the Employment Appeal Tribunal's judgment in **Software 2000 Ltd v Andrews and others [2007] ICR 825**, where, at paragraph 54, Mr Justice Elias, then EAT President, helpfully distilled a great deal of judicial guidance on the question whether compensation for unfair dismissal should be reduced because of a chance that the employer might, if they had acted fairly, in any event have dismissed the employee. In particular, at his point (1), he stated that Tribunals should use their "***common sense, experience and sense of justice"***

.

144. We believe we have done so. As we have already stated above, at paragraph 134 of these Reasons, we have decided that it is appropriate to adhere to our previous decision that it is not appropriate to make a **Polkey** reduction, but, even if we are wrong in that respect, and it is considered that we should have made a **Polkey** reduction, we would not have further reduced the claimant's compensation, as we consider

that it would have been unjust and inequitable to do so, in addition to the other reductions made by us. On that basis, there is nothing further that we need to add here.

145. Having carefully considered this ground for reconsideration, we are not satisfied that it is in the interests of justice to reconsider our Judgment on this ground, and so we reject this ground advanced by the respondents.

Reimbursement of Respondents' Tribunal Fee for this Reconsideration

146. The respondents have paid Tribunal fees of **£350** in connection with this reconsideration. The respondents' representative stated, at this Reconsideration Hearing, that, in the event of success, they were not seeking to be reimbursed by the claimant, in terms of the powers open to the Tribunal under **Rules 75(1)(b) and 76(4).** Accordingly, we decided to make no Order for reimbursement, in terms of **Rules 75(1)(b) and 76(4) of the Employment Tribunal Rules of Procedure 2013.**

147. In the event, matters have moved on. On 26 July 2017, 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. In these circumstances, we shall draw to the attention of HMCTS that this is a case in which fees have been paid and they are therefore to be refunded to the respondents. The details of the repayment scheme are a matter for HMCTS.

Closing Remarks

148. We are conscious that these Tribunal proceedings have been ongoing for some years now. We are equally conscious that there is still a second reconsideration application, and appeals to the EAT, outstanding. While it is a matter for both parties to carefully reflect upon, and come to their own

decisions, with appropriate professional advice, we do pose the question whether they might wish to consider some form of alternative dispute resolution.

149. Taking account of the fact that the respondents are a charity, and time and expense is being occasioned to both parties by the ongoing Tribunal proceedings, we close with a reminder that a Tribunal shall, in terms of **Rule 3 of the Employment tribunals Rules of Procedure 2013,** wherever practicable and appropriate encourage the use by the parties of the services of ACAS, judicial or other mediation, or other means of resolving their disputes by agreement. We so encourage both parties.

Employment Judge: GI McPherson
Date of Judgment: 29 December 2017
Entered in register: 03 January 2018
and copied to parties