# THE EMPLOYMENT TRIBUNALS

**Claimant:** **Mr Obiukwu Iwuchukwu**

**Respondent:** **South Tyneside & Sunderland NHS Foundation Trust (formerly City Hospitals Sunderland NHS Foundation Trust)**

**Heard at:** **North Shields Hearing Centre** **On: 8 & 9 October 2019**
**Deliberations 15 October 2019**

**Before:** **Employment Judge AM Buchanan**

**Non-Legal Members:** **Mrs A Tarn and Mrs S Mee**

***Representation:***

**Claimant:** **Mr C Echendu – Non-Practising Barrister**
**Respondent:** **Ms C Millns of Counsel**

## JUDGMENT ON REMEDY

It is the unanimous judgment of the Tribunal at Stage 1 of the remedy hearing that:-

1. There will be an award for injury to feelings for the proven acts of discrimination awarded pursuant to section 124(2)(b) of the Equality Act 2010 ("the 2010 Act").

2. Any award for personal injury arising from the proven acts of discrimination to be compensated pursuant to section 124(2)(b) of the 2010 Act requires expert medial evidence.

3. There will be no award for loss of earnings arising from the proven acts of discrimination and victimisation pursuant to section 124(2)(b) of the 2010 Act.

4. There will be an award of compensation for unfair dismissal made to the claimant pursuant to section 123 of the Employment Rights Act 1996 ("the 1996 Act"). That award will be reduced by 80% to reflect the chance that a fair dismissal could and would have taken place in any event.

5. There will be a basic award of compensation paid to the claimant for unfair dismissal pursuant to section 119 of the 1996 Act. That award will be reduced by 25% pursuant to section 122(2) of the 1996 Act.

6. Any further heads of damage referred to in the following reasons will be assessed and awarded at the Remedy Hearing Stage II.

7. Case management orders are issued in order to provide for a private preliminary hearing by telephone to make arrangements for Stage II of the Remedy Hearing at which all sums due to the claimant will be calculated by the Tribunal and awarded as detailed in this Judgment and Reasons.

# REASONS

## Preliminary Matters

1. This litigation has a long history. Since this matter was last before this Tribunal in 2016 the respondent has changed its name. This litigation continues against the respondent in its changed identity as set out above. This Tribunal issued its liability judgment to the parties ("the Judgment") on 2 November 2016 in which the claimant succeeded in part in respect of his claims of direct race discrimination and victimisation and in which the claimant succeeded in his claim for unfair dismissal. A private preliminary hearing by telephone took place on 21 November 2016 to make arrangements for a remedy hearing. At that hearing the claimant indicated that his preferred remedy for unfair dismissal was an award of compensation and not an award of re-employment of any kind. At that hearing, issues between the parties were apparent as to the losses which flowed from the findings of discrimination and victimisation set out in the Judgment. The parties were reminded that discrimination is a statutory tort and that the measure of damages is based on principles in tort. Orders were made for a schedule of loss to be prepared and responded to. In accordance with that order, the claimant filed a schedule of loss in which the claim for damages was £5.2 million. The respondent replied to that schedule and indicated its view that the appropriate level of compensation did not exceed a basic award under the 1996 Act, a compensatory award under the 1996 Act capped at £78335 or a year's salary (whichever was the lower) and an award for injury to feelings under the 2010 Act at the lower end of the lower Vento band.

2. Subsequently both parties lodged appeals against the Judgment with the Employment Appeal Tribunal ("EAT").

3. On 5 January 2017 this Tribunal agreed to stay consideration of remedy pending the resolution of the appeals to the EAT. The principal reason for that decision was that the claimant was seeking an award of over £5 million and the respondent submitted the claim under the Judgment was worth less than £100,000 and described the claimant's schedule of loss as "*absurd".* The claimant indicated a wish to call up to three expert witnesses which was bound to involve the parties in considerable expense and time which would potentially be wasted depending on the outcome of the appeals to the EAT.

4. Both appeals were considered on the sift in the EAT by Simler J (as she then was) in accordance with Rule 3(7) of the Employment Appeal Tribunal Rules 1993 ("the 1993 Rules") and by letters dated 6 April 2017 both appeals were rejected as disclosing no reasonable grounds of appeal.

5. Subsequently the claimant applied for a review of that decision pursuant to Rule 3(10) of the 1993 Rules. That application came before the EAT on 15 November 2017. By a judgment promulgated on 8 February 2018 the application for leave to appeal was denied and so the claimant's appeal to the EAT against the Judgment came to an end.

6. In the meanwhile, the respondent also applied for a hearing under Rule 3(10) of the 1993 Rules and by a decision dated 20 July 2017 His Honour Judge Richardson granted permission to appeal. That appeal came before the EAT on 22 and 23 February 2018. By a judgment handed down on 26 April 2018 His Honour Judge Shanks allowed the respondent's appeal. In relation to the discrimination findings in the Judgment, Judge Shanks was of the view that the Tribunal made an error of law in drawing the inference of race discrimination and victimisation and therefore allowed the appeal in relation to those findings and substituted his own decision to dismiss the findings of race discrimination and victimisation contained in the Judgment. In respect of the finding of unfair dismissal, Judge Shanks concluded that the decision of this Tribunal was erroneous and reversed it and remitted that claim to be reheard by a different tribunal.

7. It was determined that the remitted case on unfair dismissal should be heard by Employment Judge Garnon and orders were made on 11 July 2018 with a view to bringing that matter on for hearing. The remitted hearing took place in October and November 2018 and a judgment was issued on 26 November 2018. In view of the decision of the Court of Appeal referred to below, it is not necessary to consider any further the judgment of Employment Judge Garnon.

8. The claimant applied for and obtained leave to appeal to the Court of Appeal in respect of the judgment of HH Judge Shanks in the EAT. That matter came before the Court of Appeal on 5 March 2019 and by a Judgment promulgated on 26 March 2019 the Court of Appeal reversed the decision of HH Judge Shanks in the EAT and restored the Judgment.

9. On 16 April 2019 Employment Judge Garnon formally revoked his judgment in light of the decision of the Court of Appeal on 26 March 2019.

10. In light of the judgment of the Court of Appeal, a telephone private preliminary hearing to discuss arrangements for a remedy hearing took place before Employment Judge Buchanan on 29 May 2019. An updated schedule of loss and counter schedule were ordered and the matter was scheduled for a further discussion on 25 June 2019. The claimant then filed an updated schedule of loss which totalled £1.175,591. The respondent filed a counter schedule which confirmed its position as previously set out namely that the claimant was entitled to no more than a basic award, a compensatory award capped at no more than £78335 or a year's salary if lower and an award for injury to feelings only. The

claimant again referred to the necessity to hear from several expert witnesses: the respondent objected to orders for expert evidence on the basis that no award for loss of earnings could result from the findings of discrimination and victimisation. On 25 June 2019 Employment Judge Buchanan formed the view, with which neither party disagreed, that it was appropriate to have a remedy hearing in two stages. The first stage would be to address the questions of what heads of damage could flow from the acts of discrimination and victimisation found by the Tribunal and also to address the question of the chance of a fair dismissal of the claimant taking place notwithstanding the unreasonableness found by the Tribunal in the Judgment – the so-called Polkey question. Accordingly, the first stage of the remedy hearing came before this Tribunal as set out above.

11. There was insufficient time at the end of the hearing to issue an oral judgment and the decision was reserved. Accordingly, this Judgment is issued in writing with full reasons in order to comply with the provisions of Rule 62(2) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

## The Issues for the Remedy Hearing - Stage 1

12. The issues to be decided as set out in the Orders of the 25 June 2019 were as follows:-

12.1 To determine the heads of loss to the claimant which could flow from the findings of race discrimination and victimisation set out in the Judgment and in particular to determine if losses arising from the dismissal of the claimant flow from the acts of discrimination and victimisation and if there was only a chance that such losses flowed to assess that chance.

12.2 To determine in respect of the claim of unfair dismissal whether and, if so, when a fair dismissal of the claimant could and would have taken place. If the Tribunal is not able to make a definitive finding on that question then to assess the chance of a fair dismissal taking place – the Polkey question.

## The Remedy Hearing Stage 1

13. At the hearing the Tribunal heard from the following witnesses:
13.1 The claimant and then from the following two witnesses on his behalf -
13.2 Robert Quick - a national officer with the Hospital Consultants and Specialists Association who represented the claimant in his dealings with the respondent prior to the claimant's dismissal. The evidence from this witness did not greatly assist the Tribunal in relation to the issues it was required to resolve.
13.3 Professor Philip Drew – NHS Consultant Oncoplastic Breast Surgeon who assisted the claimant to remediate his practice after his dismissal by the respondent. The evidence of this witness was of considerable assistance to the Tribunal on the question of remediation and thus issue 2.
13.4 For the respondent we heard from one witness namely Julia Pattison ("JP") who was the officer who chaired the capability panel in 2015 which decided to dismiss the claimant on 8 May 2015. The evidence from this witness was of

considerable assistance in relation to the thought processes of the members of the capability panel and on the Polkey question.

14. The Tribunal had a bundle of documents before it prepared for the Remedy Hearing and extending to some 631 pages. Any reference in this Judgment to a page number is a reference to the corresponding page in that bundle.

15. In this Remedy Judgment various abbreviations are used. These are defined in the Judgment and the interpretation section of the Judgment is to be read as part of this Remedy Judgment even though not included in it. The Grievances are defined in the Judgment as being raised in July 2014 and 7 October 2014. The reference to July 2014 is erroneous and should read 31 May 2014 (page 499). All claims against the second respondent were dismissed in the Judgment. The second respondent is referred to in this Remedy Judgment as "IM".

16. At the outset of this hearing an issue arose in respect of a report from Doctor Obadiah Elekima ("OE") which had been obtained by the claimant and served on the respondent a few days before the hearing. The Tribunal was surprised to see that document as the remedy hearing in two stages had been ordered specifically to prevent the parties having to engage the service of expert witnesses unnecessarily. In any event no order for the preparation of a report had been made by the Tribunal. The Tribunal listened to an application from the claimant to call OE and to the objections from the respondent to that course of action.

17. The respondent noted that no permission had been obtained to call an expert witness as OE purported to be. The report had only been disclosed on 23 September 2019 and the respondent simply was not in a position to deal with it. The report extended to 45 pages, the letter of instruction had not been produced, the report did not include a certificate to the effect that the witness understood his duty to the Tribunal as an expert witness, the majority of the report (section 2) contained a summary of what the claimant had told OE and it was clear that OE had not been shown a copy of the Judgment which found no reference in the report at all. We looked at the report and found ourselves in agreement with the comments made by the respondent. We noted that if the report was admitted the respondent would seek and be granted an adjournment of the stage one remedy hearing. We declined to hear from OE and reiterated that if expert evidence was to be needed at all, it would be heard at stage 2 of the remedy hearing. In light of that explanation, the claimant did not disagree with this decision. We did not therefore take account of the report of OE.

18. The Tribunal was engaged for two days with the various witnesses. The statement from the claimant extended to 104 paragraphs and sought to reopen many of the matters which were resolved by the Judgment. The statement also referred to various matters, such as the dealings with the GMC since these proceedings were instituted which were not before us and which do not feature in the Judgment at all.

19. At the conclusion of the evidence the respondent produced written submissions which were supplemented orally. The claimant through his representative made oral submissions. The Tribunal reserved its decision and

indicated that it would deliberate in the absence of the parties in Chambers on 15 October 2019. Before the in chambers deliberation took place, the claimant sent to the Tribunal a written submission which purported to confirm the oral submissions made on 9 October 2019. Permission was not sought so to do. Notwithstanding that, a copy of the claimant's written submissions was sent to the respondent for comment. The respondent made brief written comment on those submissions and did not object to the Tribunal considering that document during its deliberations. Accordingly, the Tribunal considered the written and oral submissions of both parties when deliberating on this matter.

**Submissions – Respondent**

20. The respondent submitted that a careful consideration of the Judgment was necessary to address the issues before this Tribunal at stage I and referred the Tribunal to the relevant findings so far as the respondent was concerned. It was submitted that the Tribunal had investigated as part of this litigation the allegations of discrimination asserted by the claimant in the Grievances and found there to be no evidence of race discrimination and is so doing reached the same conclusion as Sean Fenwick in the Fenwick Review. The Tribunal found that there was a failure to investigate the Grievances under the terms of the grievance policy of the respondent and not that no investigation into those matters took place at all.

21. The aim of compensation for an act of discrimination is to put the claimant in the position he would have been in had the wrongful conduct not taken place – in other words what loss has been caused by the discrimination in question. The loss suffered must be directly attributable to the act of discrimination – **Coleman -v- Skyrail Oceanic Limited: 1981 IRLR 398.** It was submitted that only an award for injury to feelings could be found to be directly attributable to the acts of discrimination found by the Tribunal. There is no direct causal link between the alleged loss of earnings and the acts of discrimination and victimisation. The claimant was given the opportunity in his meeting with Sean Fenwick to provide additional evidence to expand on his allegations of discrimination but was unable to do so. The acts of discrimination do not taint the process which led up to the capability panel considering the question of the claimant's continued employment and there can be no award for loss of earnings resulting from the dismissal. A detailed schedule was produced which sought to set out that the claimant could not prove that the losses he claims arising from his dismissal flowed from any failure by the respondent to investigate the grievances. The table attached to the schedule purported to show either that the complaint contained in the grievance was looked at directly by Sean Fenwick or was considered by the RCS or by the Tribunal. Even if discrete matters were not considered, the claimant does not claim that the effect of that failure led to specific losses but rather he blames the losses on alleged false information fed by Ian Martin to the GMC which led the GMC to restrict his practice by the IOP but this argument must fail given the conclusions of the Tribunal at paragraph 11.53 of his reasons that false evidence was not provided to the GMC or at all by Ian Martin.

22. In respect of the second issue for this hearing, it was submitted that the Tribunal had found that the reason for the dismissal had been established as capability and that there were reasonable grounds for that belief. There were five

procedural matters which led to the finding of unfair dismissal. Submissions were made that any award of compensation for unfair dismissal under section 123 of the 1996 Act had to be "*just and equitable".* By reference to the decision in **Polkey -v- A E Dayton Services Limited 1987 IRLR 503** it was submitted that that involved an assessment of what might have occurred and the likely thought processes and evidence that would have been available to the respondent. It was submitted that a 100% reduction form the compensatory award should be made.

23. It was submitted that no lesser exclusion than a full exclusion from clinical duties could have been made given the important patient safety concerns. Regular reviews of the claimant's suspension would not have made any difference to the outcome. The delays to the process identified by the Tribunal have made no difference to the outcome of the capability panel which would have been the same whenever it deliberated. The witness JP sets out in her witness statement whether the decision of the panel she chaired would have been any different if more information about remediation or redeployment had been available: she reasons that there would have been no difference and her reasoning should be accepted – first because the claimant lacked insight as to the nature and extent of the deficiencies in his performance and secondly because there was no role within the respondent's organisation into which the claimant could have been assigned for the purposes of remediation. In any event the IOP conditions meant that the respondent could not comply with those conditions and not unreasonably so. The recommendations from the RCS review meant that the impact of patient safety could only be addressed by the claimant being supervised during patient advice on consultations and that was not considered by the respondent to be reasonable or appropriate.

24. It was submitted that the basic award should be reduced under the provisions of section 122(2) of the 1996 Act to reflect the claimant's conduct prior to his dismissal.

25. In oral submissions, the case of **Home Office -v- Coyne 2000 EWCA Civ 236** was distinguished as the causal link established in that case was simply lacking in the claimant's case. It was submitted that the claimant effectively sought to reopen the decision of the Tribunal and it was only by doing so that he could attribute his loss of earnings from dismissal to acts of discrimination but that door was closed. It was submitted that the detailed table referred to above was in fact not necessary because the claimant's witness statement blamed his losses not on the grievances but rather on the false information said to have been provided by IM to the RCS and the GMC. The Tribunal have already made a clear finding that IM did not do so.

26. In respect of the second issue for this hearing, in oral submissions it was submitted that there were five matters which showed that dismissal was inevitable. First, it was submitted that it would be to embark in an unacceptable way on the sea of speculation to conclude that dismissal would not have occurred or that there was a chance dismissal would not have occurred. On any basis patient safety was at the heart of all the respondent did in 2013. There were concerns about the work of the claimant and the respondent could not move the claimant to general surgery without an investigation and it is not realistic to suggest that the

claimant could have been remediated in 2013. Secondly, it was right to involve the RCS in order to understand the extent of the problem with the claimant's work. Regular reviews of that suspension would not have altered that matter. Thirdly, it was clear from the evidence that the capability panel had disregarded all conduct concerns which had been raised before them and they had concentrated purely on capability matters. Fourthly, even now the claimant does not have insight into the problems in relation to his work and that would effectively have prevented any successful remediation. Finally, the GMC restrictions placed on the claimant meant he was unable to effectively undertake remediation. The serious concerns uncovered by the RCS in relation to the claimant's work meant that the period of suspension was in fact reasonable. There would have been no difference to the outcome even had the procedural matters identified by the Tribunal been addressed.

27. It was submitted in responding to the claimant's written submissions that the **Lim** case (below) was not followed by the High Court in **Chakrabarty -v- Ipswich Hospitals NHS Trust 2011 EWHC 2178** where an employer could proceed to a capability hearing even if NCAS had not assessed the practitioner. In any event, the decision in **Lim** was not part of the claimant's case at the original hearing and the respondent does not accept it has any relevance to the matters to be resolved by the Tribunal at this stage I remedy hearing.

**Submissions - Claimant**

28. The **Polkey** application made by the respondent was totally misconceived. The employment contract provided to the claimant (page 616) employed the claimant as a consultant general surgeon with a special interest in breast surgery. The RCS made it plain in their report that there were no particular concerns relating to the non-reconstructive work of the claimant. Dismissal should not have been an option for the capability panel in those circumstances. Even the Fenwick report concluded that there was no evidence of competence concerns regarding the claimant's non-reconstruction work and therefore the option of dismissal was not available given that the claimant was employed as a consultant general surgeon.

29. Given the fact that Sean Fenwick had seen no competence concerns, there should be no reduction in compensation for unfair dismissal at all. In addition, the claimant was wrongfully dismissed and full compensation should be awarded.,

30. It was submitted that the MHPS framework was a legally binding framework which required mandatory application. The failure of the respondent to apply the framework was a breach of contract and also rendered the decision of the capability panel null and void. Reliance was placed on the decision of **Lim -v- Royal Wolverhampton Hospitals 2011 EWCA 2178.**

31. In respect of the failure to deal with the claimant's Grievances, it was submitted that the failure to investigate the Grievances was not only fatal to the claimant's dismissal but also to his professional career, person, family, health and this has caused both health injury and financial injury.

32. The RCS report was infected with false information and the chair of the capability panel had little knowledge and did not take the members of the panel through some of the information before them as she should have done. Sean Fenwick did not investigate the Grievances as he confirmed that he was appointed to review the evidence of what IM had done and not actually to investigate the Grievances. If he had investigated the Grievances, he would have interviewed Ian Martin and he would have investigated further the documents which the RCS had before them. There was a missed opportunity to investigate the false information provided to the RCS and the capability panel. The failure to investigate the claimant's concerns about IM meant IM continued his conduct of deceitful misrepresentation which resulted in the destruction of the claimant's career.

33. Had the Grievances been investigated, the false information would have been discovered and it would have been recognised that the claimant was held out as a globally recognised expert in his field of surgery. This has led to the claimant suffering the loss of opportunity to speak at and chair international conferences and earn income from such events. The losses to the claimant in relation to his profession, health, family and reputation all flown from this failure.

34. Various examples were set out as to false information said to have been provided to the RCS and thus to the capability panel: for example, it was suggested that the RCS was given false information in respect of the responsibility of the claimant for the serious incident in the operating theatre on 13 August 2013. In addition, there was reference in the RCS report to conduct matters in respect of Dr Sensarma and Dr Bhaskar.

35. The information given to the RCS was falsely manipulated and, as a consequence, the reliance by the capability panel on that report was flawed. If the Grievances had been investigated the claimant would not have been dismissed but also some of the matters which caused damage to him such as the malicious and deceitful acts of IM would have been prevented.

36. The claimant submitted that the first GMC IOP restrictions were based on false information presented to the GMC by IM and matters alleged against the claimant in respect of cosmetic surgery operations which had not been investigated at all.

37. The claimant submitted that the failure to investigate the Grievances had caused serious health conditions, loss of income and loss of his career. Reliance was placed on the decision in **Home Office -v- Coyne 2000 EWCA Civ 236**. In that case it was submitted that the claimant had been the victim of sexual harassment which had not been investigated but which had resulted in an adverse appraisal of her which led to her dismissal. The claimant in that case recovered her losses and the claimant in this case should do the same.

## The Law

### Issue one

38. We have reminded ourselves of the provisions of sections 124 and 119 of the 2010 Act. We note that if a tribunal awards compensation for a claim of

discrimination it must be calculated in the same way as damages in tort - the aim being to put the claimant as far as possible in the position he would be in but for the unlawful conduct. Another way to look at the question is to ask what loss has been caused by the discrimination in question. This principle can work for or against claimant and we set out an extract from the IDS Employment Law Handbook "*Discrimination at Work"* page 1242: "*For example, if the claimant is selected for redundancy for a disability-related reason, but it is established that he or she would have been selected for redundancy in any event, he or she cannot recover any financial losses flowing from the dismissal. He or she will however be able to claim for any injury to feelings caused by the treatment and, in exceptional cases, where psychiatric illness results, damages for personal injury".*

39. The calculation of loss under the law of tort is limited by the principle of foreseeability. In **Sheriff -v- Klyne Tugs (Lowestoft) Ltd 1999 ICR 1170** the Court of Appeal concluded that the tribunal can award compensation for damage if it is caused by the act of discrimination and there is no need for the claimant to show the damage was reasonably foreseeable.

**Issue two**

40. We have reminded ourselves of the provisions of Section 123 of the 1996 Act in relation to the fact that compensation must be 'just and equitable' and have reminded ourselves of the decision of **Polkey –v – A E Dayton Service Limited 1988 ICR142**. We note that the **Polkey** principle applies not only to cases where there is a clear procedural unfairness but also to what used to be called substantive unfairness. However, whilst a Tribunal may well be able to speculate as to what would have happened had a mere procedural lapse or omission taken place, it becomes more difficult, and therefore less likely that the Tribunal can do so, if what went wrong was more fundamental and went to the heart of the process followed by the respondent. We have noted the guidance given by Elias J in **Software 2000 Limited –v- Andrews 2007 ICR825/EAT.**

41. We reminded ourselves of the guidance given by Elias J in **Software 2000 Limited –v- Andrews 2007 ICR825/EAT** where it was stated in respect of a **Polkey** type deduction:-

*"The following principles emerge from these cases:*

*(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.*

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

*(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.*

*(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.*

*(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.*

*(6)The s.98A(2) and **Polkey** exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.*

*(7) Having considered the evidence, the Tribunal may determine*

*(a)That if fair procedures had been complied with, the employer has satisfied it – the onus being firmly on the employer – that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2).*

*(b)That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.*

*(c)That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the **O'Donoghue** case.*

*(d) Employment would have continued indefinitely.*

*(8) However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored".*

We recognise that this guidance is outdated so far as reference to section 98A(2) of the 1996 Act is concerned but otherwise holds good.

42. We have reminded ourselves of the more recent guidance from Langstaff P in **Hill –v- Governing Body of Great Tey Primary School 2013 IRLR 274** and as to the correct approach to the Polkey issue.

*"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 certainly 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".*

## Discussion and Conclusions

### General remarks

43. We note that the exercise on which we are now embarked is to provide a remedy to the claimant in respect of the Judgment issued in 2016. We remind ourselves that we are not embarking on an exercise of re-opening consideration of the matters which were finally concluded in the Judgment on promulgation in November 2016. Our function is to look at the proven acts of discrimination and the finding of unfair dismissal and to provide, at this stage, a decision on the appropriate remedy under the provisions of the 2010 Act in respect of the claims of discrimination and victimisation and under the provisions of the 1996 Act in respect of the claim of unfair dismissal. A careful consideration of the Judgment is necessary in order to carry out this task.

44. During cross examination the claimant was asked whether he had read the Judgment. His reply was equivocal and it became clear that the claimant had not read the Judgment in any detail or at all. That is evident from a perusal of the witness statement prepared by the claimant for this Stage I remedy hearing. That long, not to say rambling, statement reads as though to seek to reopen many of the issues which we resolved in the Judgment after very thorough analysis in 2016. The claimant refers in his statement for this hearing to matters about which we had not previously heard. For example, at paragraph 26 he refers to celebratory pictures being taken in his absence. He refers at paragraph 30 to a process which was *"a manipulation and fabrication of false information and documents concocted by a few individuals to stop me from leading a combined breast surgery in Gateshead".* The claimant repeats his allegations of conspiracy by IM and others at paragraph 32 – claims which we investigated in the Judgment and dismissed. The claimant refers to institutional racism at paragraph 34 which is the first we have heard of that. The claimant refers to being purposely overworked at paragraph 35. The claimant refers back to the Overbeck incident in 2010 and

seeks to say that the finding of this Tribunal in the Judgment was erroneous. The claimant refers at paragraph 60 to IM instructing JJ to falsify his CHKS report but we have made plain in the Judgment that that did not happen. At paragraph 66 the claimant states that the RCS report was "*manipulated and doctored by IM and Kevin Clark to suit their selfish destructive purposes".* We note and we accept the submission of the respondent that at paragraph 11.53 of the Judgment, this Tribunal made a clear finding that no false evidence was fabricated by IM nor that any false evidence was produced to the GMC. The claimant may wish he had presented his claims to the Tribunal in 2016 in a different and more focussed way. However, the purpose of this hearing is to consider in what way the matters we found proved in the Judgment should be remedied: it is not for the purpose of allowing the original case to be presented differently or with additional allegations.

45. In addition, the claimant refers in his witness statement to events which have occurred since the institution of these proceedings in 2015.Those matters are of no relevance to this Tribunal. If the claimant considers that he has been the victim of discrimination of some kind since his dismissal at the hands of the respondent, then it was open to him at any time, and is still potentially open to him, to institute further proceedings but those matters are not relevant at this stage. At the end of his statement, the claimant refers to a request that the Tribunal makes a recommendation in respect of ongoing matters between the claimant and the GMC. That matter was not raised at the hearing and does not feature on the claimant's schedule of remedies. It asks the Tribunal to recommend the respondent accepts it did things which this Tribunal decided in the Judgment that the respondent did not do. The request for that recommendation is flawed but it is a matter which will be resolved at stage II of the Remedy Hearing.

46. We accept that a key consideration for the respondent in this matter has been the issue of patient safety. We have given that consideration due weight in the course of our deliberations on this matter.

**Issue One**

47. We have given detailed consideration to the schedule of loss produced by the claimant and the respondent's comments on it. We reach the following conclusions in respect of the heads of loss identified in respect of the claims of discrimination/victimisation.

**Injury to Feelings**

.

48. It was common ground between the parties that the proven acts of discrimination and victimisation will result in an award to the claimant of injury to feelings. We conclude that interest on that award should be considered pursuant to the provisions of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. That award including any interest will be calculated at the second stage of the Remedy Hearing.

**Damages for Personal Injury.**

49. We accept the claimant's evidence that since the events referred to in the Judgment beginning in 2013 and indeed events which have occurred after the time period covered by the Judgment, the claimant has suffered from a variety of health concerns and continues so to do. An award for personal injury is potentially appropriate but if an award of damages is to be made to the claimant under this head of loss, then the Tribunal will need to assess the extent to which the proven acts of discrimination and victimisation have caused such health conditions. It is clear that there were many other events taking place which could have caused or contributed to such ill health - not least the breakdown of the claimant's marriage, his dismissal and the ongoing proceedings before the GMC. We conclude that this question can only be answered with the assistance of expert medical evidence in a report obtained in accordance with orders of this Tribunal. That matter will be discussed at a case management hearing.

**Aggravated Damages**

50. This matter will be determined at the Remedy Hearing Stage II in light of the other findings made at that hearing.

**Uplift pursuant to section 207A Trade Union and Labour Relations (Consolidation) Act 1993**

51. This matter will be determined at the Remedy Hearing Stage II in light of the other findings to be made at that hearing.

**Loss of Earnings**

52. This is the first of two central issues for determination by the Tribunal at this hearing.

53. We have considered the question whether the claimant has established that the loss of earnings resulting from his dismissal by the respondent is directly attributable to the proven acts of discrimination and victimisation namely the failure to investigate the Grievances in accordance with the grievance policy. We conclude that the claimant has not established such a direct causal link and we reach that conclusion for the reasons which follow.

54. We have considered the contents of the Grievances and considered whether, and, if so, in what way, the various grievances were in fact investigated albeit not under the grievance policy of the respondent. We refer in particular to our findings in the Judgment in respect of the Fenwick review and the matters which were considered in that review. We have also considered whether the matters contained in the Grievances were in fact advanced by the claimant before this Tribunal as acts of discrimination and, if so, the conclusions we reached in relation to such matters. We have carried out this exercise in order to check and support our conclusion that the necessary causal link has not been established.

55. In reaching the conclusion we did in relation to the Grievances, we were concerned more with the processes used to investigate the Grievances rather than a failure to investigate the contents of the Grievances themselves.

56. We accept the general submission of the respondent that in his witness evidence at the remedy hearing, the claimant largely blames his losses on the alleged false information provided by IM to the GMC which in turn he alleges led the GMC to restricting his practice through the IOP. We have noted our clear finding at paragraph 11.53 of the Judgment and at paragraphs 11.22 – 11.24. The Judgment makes it plain that we did not find any fabrication of evidence by IM or by any member of the respondent. If matters have come to light since the Judgment was promulgated then we refer again to our comments at paragraph 45 above. Those matters cannot be re-opened for the purposes of the assessment of remedy.

57. We have considered the grievance dated 31 May 2014 (page 499). The first allegation related to the claimant working as a lone surgeon and generally being without support. This was advanced by the claimant as an allegation of race discrimination and was rejected by us particularly at paragraph 11.9 of the Judgment. Whilst we accept that the claimant did work as a lone surgeon, we accepted the respondent's explanation for that and concluded that it was not an act of race discrimination.

58. The next allegations related to the claimant working without a regular secretary which we rejected and to the claimant being unsupported in his clinics which we also rejected at paragraph 11.15 of the Judgment.

59. The next allegation related to the claimant taking telephone calls during MDT meetings. This matter was investigated in the Fenwick review but no conclusion critical of the claimant was reached (page 327 – paragraph 7.87).

60. The next allegation related to the claimant being left unsupported in the operating theatre which this Tribunal investigated and, at paragraph 11.15 of the Judgment, the substance of this allegation was rejected by us.

61. The next allegation related to the claimant not being kept up-to-date with all communications between the respondent and NCAS. This matter was investigated by the Fenwick review (page 319 – paragraph 7.34) and was accepted as having happened. It was noted that although there was no right for the claimant to have been involved in the correspondence, it was concluded that it would have been beneficial to do so in order to reduce the claimant's concerns. We accept the respondent's submission that the claimant has not proved that any losses flow from the failure to investigate this matter.

62. The next matter of complaint related to an alleged altercation with a Doctor Bhaskar being referred to NCAS. This matter was not investigated in the Fenwick review or by the Tribunal. However, we accept the submission of the respondent that the claimant has not proved that any loss of earnings or otherwise flowed from the failure to look at this matter under the terms of the grievance policy.

63. The next matter related to IM ignoring findings made by Steve Holtham ("SH") to the effect that there were no issues concerning the claimant's behaviour at MDT meetings. It is clear that this matter was investigated by SH (page 374) and the conclusion which he reached was that there were issues with the operation of the MDT that the claimant was reminded of the importance of remaining professional at all times and demonstrating respect for colleagues. This matter was also investigated by the RCS and the situation with the MDT was considered so serious that it was recommended that the claimant should not be allowed to be the clinician relaying breast MDT decisions.

64. The next complaint related to the claimant being accused by IM of not adhering to MDT decisions. This matter was investigated by the Fenwick review and by the RCS - as we have referred to in the previous paragraph with the resulting recommendation from the RCS.

65. The claimant next complained about being wrongly accused of leaving clinics early. This matter was investigated by the Fenwick review and it was concluded that no evidence had been seen of clinical staff or patient safety being compromised as a result of the claimant leaving any clinic early and thus there was no basis for any concern.

66. The claimant next made the serious complaint about being suspended for eight months without review. This matter was investigated by this Tribunal and, whilst forming a central plank of the decision that the claimant was unfairly dismissed, the Tribunal found that the failure to review was not for discriminatory reasons at paragraph 11.35 of the Judgment.

67. The next complaint related to investigations against the claimant in 2010. These matters were investigated by this Tribunal and rejected as acts of discrimination at paragraph 11.5 of the Judgment

68. The claimant next complained that the CHKS reports had been falsified and sent to the RCS. This really is the central complaint made by the claimant and one which he continues to make. The matter was investigated both by the Fenwick review at paragraph 7.24 (page 318) and also by this Tribunal and any suggestion of falsifying reports was rejected. In his witness statement for this hearing, the claimant referred to events which have occurred since these proceedings were instituted and asserts that the GMC have now accepted that the data was in some way inaccurate. Those matters were not before this Tribunal and, as we have pointed out above, if claimant considers further acts of discrimination and/or victimisation have occurred since his dismissal he has appropriate remedies available to him but not within this litigation.

69. The claimant makes an assertion that nothing was done to address the systemic failings in the organisation of the breast cancer services. This matter was not addressed in the Fenwick review but this Tribunal considered the matter and concluded the respondent took no action to address the situation because of the proposed transfer of the breast care services to Gateshead. This complaint was not formally investigated in any way but we accept the respondent's submission that the claimant has not proved that the failure to investigate this matter has

caused any loss to the claimant in terms of loss of income and he does not so assert in his witness statement.

70. The claimant complained that no meeting or review was held with him to discuss the outcome of the RCS report. This matter was investigated in the Fenwick review and at paragraph 7.42 (page 320) it was concluded that the RCS had sent a draft of the report to the claimant for review and that what occurred was the required procedure.

71. The claimant complained that audit meetings were held on Thursdays purposely to exclude him. The Fenwick review investigated that matter at paragraph 7.59 (page 322) and found no evidence of race discrimination.

72. The claimant complains next of an incident in 2009/2010 involving Dr Sensarma. This matter was not investigated given its age but we accept the respondent's submission that the claimant has failed to establish any loss of earnings arising from that incident and his witness evidence does not seek to do so.

73. The claimant next complains about the failure to award him a clinical excellence award to him. This matter was investigated by this Tribunal and comprehensively rejected as an allegation of race discrimination at paragraph 11.4 of the Judgment.

74. The claimant complains that he was working beyond what was expected of him. This vague allegation was not investigated but we accept the respondent's submission that the claimant has failed to establish any loss of earnings arising from that and his witness statement to this Tribunal does not seek to do so.

75. In the grievance of 7 October 2014 the above matters were repeated with two additional matters. The first related to the failure of the respondent to contact clinicians in other trusts with a view to discussing remediation for the claimant. This matter was investigated in the Fenwick review and at paragraph 7.47 (page 320) it was concluded that what IM did in contacting medical directors of other trusts was the usual practice given that the medical directors make the decision as to whether or not to accept a person for remediation.

76. The final matter related to the allegation made by the claimant that no action had been taken against another doctor when he had killed a patient. This matter was investigated in the Fenwick review and rejected and also investigated by this Tribunal at paragraph 11.32 of the Judgment. Any claim of race discrimination in respect of that matter was rejected.

77. In the Judgement at paragraph 11.77 we note we reached this conclusion: "*The claimant does not assert any allegation of discrimination against the capability panel itself and thus their decision to dismiss can only be tainted with race discrimination if the process leading up to the capability hearing was tainted with discrimination. We conclude that the failure to deal with the Grievances did not taint the process leading to dismissal in any material way and thus the decision of the capability panel is not tainted with race discrimination. That panel had no*

*involvement in the decision not to allow the Grievances to be investigated and by the time the panel became involved that was no longer a live issue".*

78. It is for the claimant to show that the loss of income which results from his subsequent dismissal was directly attributable to the failure by the respondent to investigate the Grievances under its Grievance Policy. We have considered the decision in **Coyne** but do not accept that that decision assists the claimant. The facts of that matter were very much removed from the facts of this case and the causal link in **Coyne** between the failure to investigate the grievance and the subsequent dismissal was starkly clear: not so in this matter. We have considered the decision in **Lim** but conclude that the decision in **Chakrabarty** makes it clear that the failure to fully adhere to the MHPS procedure does not necessarily affect the lawfulness (as opposed to the reasonableness) of any investigation under that policy. But that is not the issue for this Tribunal at this stage. The issue is whether the claimant has established the necessary link between the proven discrimination and the loss of earnings. Given that all matters of substance and importance raised by the claimant in the Grievances were investigated either by SH or the Fenwick Review or this Tribunal, we conclude that the claimant fails to establish that required causal link. From that it follows that there can be no award of loss of earnings arising out of the discrete acts of discrimination and victimisation established by the claimant and confirmed by the Judgment. The other losses referred to above which are, or might yet, be established will be dealt with at the remedy hearing stage II.

**Issue Two**

79. We have given detailed consideration to the schedule of loss produced by the claimant and the respondent's comments on it. We reach the following conclusions in respect of the heads of loss identified in respect of the claimant for unfair dismissal.

**The Basic Award**

80. The Tribunal concludes that it is appropriate to make a basic award in respect of unfair dismissal to the claimant calculated pursuant to section 119 of the 1996 Act. We have considered whether it is appropriate to reduce that award pursuant to the provisions of section 122(2) of the 1996 Act by reason of any conduct of the claimant prior to his dismissal. We conclude that it is just and equitable to reduce the basic award by 25%. We accept the submission of the respondent that the claimant's conduct prior to his dismissal by delaying the investigations and unreasonably challenging the RCS review, by making unfounded allegations about IM's behaviour and by refusing to accept any failing on his part renders it just and equitable to reduce the basic award. The appropriate reduction is 25%.

**The Compensatory Award**

81. The findings of this Tribunal at paragraphs 11.77 – 11.90 of the Judgment are central to our consideration of this matter which is issue two defined above.

82. We remind ourselves that the amount of any compensatory award must be what is just and equitable compensation for the unfair dismissal. In answering that question, we must use our common sense, experience and sense of justice. We must have regard to all the reliable evidence before us. It is for the respondent to adduce the relevant evidence on which it seeks to rely and it is for the respondent to establish that a fair dismissal would have taken place despite its unreasonable original approach. We note that we are assessing what this respondent could and would have done on the assumption that this time the respondent acted reasonably. This of necessity involves a degree of speculation and conjecture but just because that is so, it does not mean we must not embark on the exercise.

83. We note that at paragraphs 11.78 – 11.80 of the Judgment, we found that the respondent had established the reason for the claimant's dismissal as being related to his capability and that there were, through the medium of the RCS report, reasonable grounds for that conclusion. In spite of what the claimant asserted in 2016 and asserts again in 2019 about that report being based on falsified and/or inaccurate date we made a clear finding to the contrary in the Judgment. We take account of the fact that the concerns relating to the work of the claimant dealt with in the RCS report arose before any unreasonableness for the purposes of this exercise on the part of the respondent occurred. Accordingly, when considering the Polkey question at this stage those central findings remain unaltered. We remind ourselves again that the issue of patient safety was rightly a key factor in the consideration of the respondent but it could not be the only factor for the respondent to consider.

84. In considering this question, we have given close attention to all the evidence before us but in particular to that of the claimant, of Professor Philip Drew and in particular of Julia Pattison.

85. We note that our findings in relation to MHPS at paragraph 11.81 of the Judgment are in place and in particular that capability concerns relating to a doctor should be dealt with in a way which makes every effort to retain the doctor in the workplace and carrying out clinical duties. The reason for that is obvious: if a doctor ceases to work he becomes de-skilled and that makes the already difficult process of remediation all the more so. In this case the respondent removed the claimant from all clinical duties for over 18 months.

86. We have considered each area of unreasonableness set out in the Judgment and the evidence relating to those areas.

87. The exclusion of the claimant from all clinical duties on 2 September 2013 was precipitated as a result of the serious incident in theatre on 13 August 2013 and, as we set out at paragraph 11.82 of the Judgment, no analysis was carried out of the extent of the claimant's practice which was giving rise to concern and no consideration was given to anything other than a blanket exclusion. We reject any evidence to the contrary of JP. Everything points to the exclusion on 2 September 2013 being a knee-jerk reaction to the serious incident on 13 August 2013 on the assumption that the claimant was responsible for it but it became clear by early November 2013, at the latest, that the incident on 13 August 2013 was not the fault of the claimant. There was no review of the blanket exclusion of the claimant

from clinical duties once that matter became clear and indeed we find that the claimant was not told of that conclusion for a long period of time after it had been reached. If the respondent had acted in accordance with MHPS and either not imposed a blanket exclusion from clinical work at all or had reviewed it and imposed a lesser exclusion once the outcome of the enquiry into the serious incident was known, then it is possible that the claimant could have been retained in the workplace carrying out some clinical work. If that was so, then the claimant who presented himself to the capability panel some 16 months later would have been less "de-skilled" and potentially much easier to re-mediate.

88. We have considered all that JP told us about the difficulties of doing other than impose a blanket restriction from clinical duties. We refer to paragraph 7.3 of the Judgment and note the size and resources of the respondent. We note that the claimant was in fact employed as a general surgeon and attached to that large department. We do not accept that there was no possibility of the claimant being assisted by colleagues in the Department of Surgery in non-reconstructive work or at least assisted to address some of the so called non-clinical aspects of his work such as patient selection, record keeping and relationships with colleagues. If proper consideration had been given by the respondent to its duties under MHPS at the point of suspension of the claimant from clinical duties then a very different claimant in terms of his level of de-skilling and proven ability could have presented himself to the RCS Panel and ultimately to the GMC and to the Capability Panel itself. It must not be forgotten that the claimant was a surgeon of international repute and one with a good track record of hard work and success. If things were going wrong in 2012/2013 then there was much which could have been done at that point in accordance with MHPS to assist the claimant to put it right but it was not done. Matters went very badly wrong at the point of suspension on 2 September 2013 and we are not satisfied from the evidence before us that the decision to dismiss 16 months later was bound to have occurred no matter what. If proper consideration had been given at that crucial point in the narrative in September-November 2013, the position could have been different and dismissal might have been avoided.

89. We do not accept the evidence from JP that the suspension from all clinical duties was reviewed as it was required to be under the guidance issued by NCAS if not under the terms of MHPS is itself. Any review necessitated sitting down with the person excluded and reviewing the suspension and that was not done. The claimant's work was seen as a problem and the problem was solved by the blanket restriction which, once imposed, was not properly reviewed. We do not accept the evidence of JP that reviews were carried out as they should have been and our finding at paragraph of the Judgment 11.83 stands.

90. We do accept the evidence of JP that the capability panel disregarded completely the conduct concerns which were referred to in the papers placed before the capability panel. Those concerns should not have been placed before them and it was unreasonable to do so but we accept the evidence of how the capability panel approached that particular matter. We can accept that, had that been the only area which had rendered the decision to dismiss unfair, then the Polkey exercise would have been an easy one to carry out and the respondent's contention that its unreasonableness had made no difference would in all

probability have succeeded. However, there was much more substantial unreasonableness than that identified in the Judgment.

91. In terms of the long delay in bringing this matter before the capability panel, we have noted the evidence of JP. Once the process of the RCS review and then a capability panel was embarked on, there were factors which caused delay which were outwith the control of the respondent. However, that should have brought into sharper focus the necessity to properly review the ongoing blanket exclusion from clinical duties but it did not. We reject the respondent's position that the delays identified in the process have made no difference.

92. We have noted all that is said by JP in relation to the question of remediation. That process is bound never to be an easy one but it is one which MHPS requires. We note our clear finding at paragraph 11.89 of the Judgment that JP was not aware of the existence, let alone the terms, of the respondent's own Remediation Policy when she chaired the panel which decided on the claimant's dismissal in May 2015. That is hardly a sound basis on which to argue that remediation was given proper consideration. We were particularly assisted by the evidence of Professor Drew as to the steps he was able to take within a few months only of the claimant's dismissal to begin a process of remediation for the claimant in Cornwall: we note that process involved an application to the GMC to vary the restrictions on the claimant's practice imposed by the IOP. Our findings of the steps taken by IM in August 2014 are set out at paragraph 11.86 of the Judgment and stand. If the respondent had either not imposed the blanket exclusion from clinical duties or had kept it under proper review, as it should have done, then the process of remediation would potentially have been easier for the capability panel to deal with because the claimant would not have presented to those considering that question with the level of "de-skilling" and consequent difficulties as he did.

93. JP makes no mention in her evidence of the fact that there was a delay on the part of the respondent in organising an appeal against dismissal for the claimant. We note the claimant withdrew from the appeal process but he did so because of the respondent's delay in organising the appeal. It is not a sustainable argument to advance that an appeal, had it taken place, would have been bound to reach the same conclusion as the capability panel. If the respondent had acted within the timescale of MHPS then an appeal might have taken place and it might have been succeeded.

94. Against all we accept the evidence JP when she and her colleagues came to decide this matter they had before them a report from the RCS which raised serious concerns about the claimant's work - concerns which had arisen before any unreasonableness on the part of the respondent occurred. By that time the GMC through the IOP had imposed restrictions on the practice of the claimant.

95. We have assessed all the evidence before. We have applied our knowledge and experience. We conclude that had the respondent acted reasonably there was still a high chance that the claimant would have been dismissed simply because of the contents of the RCS report and the GMC restrictions. However, we conclude that that dismissal was not inevitable as the respondent would have us say. There was a chance, if the procedural flaws identified had not occurred, that the claimant

would have come before the capability panel with considerably less disadvantage in terms of being "de-skilled" than he did or might have succeeded on an appeal against his dismissal. We conclude that there is an 80% chance that the claimant would still have been dismissed by this respondent even if it had acted reasonably but there is a 20% chance that he would not. Accordingly, the compensatory award will be calculated and then reduced by 80% to reflect the chance of a fair dismissal taking place. Any appropriate deductions will then be made and the statutory cap then applied. In that way compensation will be paid to the claimant which we consider to be just and equitable.

**Final Matters**

96. With this judgment in place, a real opportunity arises now for the parties to resolve this matter between themselves without further recourse to the Tribunal. After the Judgment was promulgated on 2 November 2016 both parties embarked on appeals against that Judgment which were ultimately unsuccessful and the Judgment now remains in place in every particular. Of course, the parties were at liberty to take that action and no criticism at all is levelled against them for so doing, but the effect of doing so has been to delay this matter for some three years. It is high time the matter was resolved.

97. Case management orders are issued simultaneously with this judgment convening a preliminary hearing to make arrangements for stage II of the Remedy Hearing as set out above. A short period has been allowed before that hearing takes place to enable the parties to try to take advantage of the opportunity to resolve this matter which now presents itself. The parties are strongly urged to take advantage of that opportunity.

98. In case some preliminary views of this Tribunal would be of assistance to the parties in resolving this matter, we have decided to set out our preliminary views on the issue of quantum now that the issues identified at stage I of the remedy hearing have been resolved. In setting out these preliminary views, we make it absolutely clear that we have formed no final view on any of these matters because they have not been directly addressed before us. However, we have given this matter detailed consideration and have formed some preliminary views which may be of assistance to the parties.

99. In terms of injury to feelings, we note that the claimant was subjected to two refusals by the respondent properly to investigate the Grievances. We have decided that the Grievances were in fact investigated but not in accordance with the grievance policy and, as set out above, we have decided that if they had been so investigated the claimant would still have been dismissed. However, in denying the claimant access to the grievance policy, it is clear that his feelings were injured and we are of the preliminary view that such injury will fall towards the upper end of the middle Vento band as adjusted. There would seem to be no reason why interest should not be added at the full rate for the whole of the period since the discrimination and victimisation took place.

100. In terms of personal injury, we note that medical evidence is going to be necessary first to identify exactly what injury the claimant has suffered and

secondly what has caused that injury. By any standards there were many factors impacting on the claimant's life during the relevant period above and beyond the failure by the respondent to investigate the Grievances. Our pragmatic but as yet uninformed view in respect of causation is that the failure to investigate the Grievances was only a relatively minor factor when compared to all other matters which were ongoing for the claimant at the relevant time. The parties may decide to take a robust view of this head of damage and assess it without medical evidence. We give our preliminary view that the effect of the discrimination and victimisation on causation for personal injury would not be greater than 25%.

101. There was a failure by the respondent to investigate the grievances in accordance with its grievance policy and therefore in breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015. However, it is clear that the Grievances were in fact investigated but the claimant was denied access to the grievance policy and the right of appeal. Any uplift would in our preliminary view not exceed 10%.

102. The claimant in his witness statement sets out a claim which would support a claim for aggravated damages. However, as we have made clear above, much of the claimant's witness statement for this hearing fails to take account of the contents of the Judgment. It is our preliminary view that there should be no award of aggravated damages.

103. It is clear from the schedule of loss that the claimant's losses arising from what was an unfair dismissal are very considerable. They involve loss of pension, loss of earnings, loss of private income and other financial losses. The Tribunal will need to calculate those losses with precision before applying the statutory cap set out in section 124 of the 1996 Act which appears in this case to be £78335 given the date of institution of these proceeding and the high level of the claimant's annual earnings for the purposes of section 124(1ZA) of the 1996 Act. Given the size of the losses, it is our preliminary view, subject to any argument which might be advanced about failure to mitigate or otherwise, that the claimant will achieve that statutory maximum award even on a 20% compensatory award as it will be in accordance with this Stage I Remedy Judgment.

104. The judgment of Employment Judge Garnon on the remitted hearing resulted in a modest award of compensation to the claimant for unfair dismissal. It is understood that the respondent has paid that award. Clearly anything paid under that now revoked judgment must be credited by the claimant against any sum for which the respondent will be responsible either by agreement or otherwise.

105. It is hoped that these preliminary remarks will be of assistance to the parties in resolving this matter and we urge them so to do with the consequent saving of cost and time and anxiety.

**EMPLOYMENT JUDGE A M BUCHANAN**

**JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 19 December 2019**