EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Markham	**v**	**Aesica Queenborough Ltd**

HELD AT Ashford **ON 2 December 2019**

BEFORE Employment Judge G Phillips

Appearances
For Claimant: In person
For Respondent: Mr M Huggett, Legal Executive

REMEDY HEARING
RESERVED JUDGMENT

As set out in more detail below, it is the decision of the Tribunal that the Respondent should pay to the Claimant the sum of **£19,501.76** in respect of his unfair dismissal claim. The payment of that award is stayed pending the final determination (or withdrawal) of the Respondent's appeal on liability.

REASONS

1. I shall for ease refer to the parties as the Claimant and the Respondent. By a Reserved Judgment signed on 7 June, (the Judgment) following a full merits hearing on 24 May 2019, I held that the Claimant had been procedurally and substantively unfairly dismissed. This hearing arises out of that finding and is concerned with assessing the remedy to which the Claimant is entitled as a result of that finding. I should also record that, at the time of this hearing, the Respondent has an appeal to the EAT pending arising out of a number of matters in the Judgment, with which it disagrees and wishes to challenge. The Respondent did apply to have this hearing adjourned pending that appeal, but that request, which was opposed by the Claimant, was rejected. Given that appeal, the award I have made I have stayed pending the outcome of the appeal.

2. Where appropriate I will refer to paragraph numbers of the Judgment, but I will not, unless I feel it is of particular significance, set out again all the details.

3. In the Judgment, I found a number of what I regarded as procedural irregularities relating to (i) suspension [#80-81] (ii) the failure to provide a copy of a particular document, which I regarded as of significance, to the Claimant, [#85]; (iii) the grounds relied upon for dismissal [#90-91]; and (4) the appeal [#92-95]. I held that while these would not individually, in isolation, necessarily have made the dismissal procedurally unfair, when taken together, they did to my mind render the overall dismissal process as unreasonable and so I found this was a procedurally unfair dismissal. Further, I found, for reasons set out in the Judgment [#101], that the Claimant's dismissal fell outside the realms of reasonableness in the circumstances of the case and that it was also a substantively unfair dismissal.

Evidence

4. Mr. Markham and Ms. Mort for the Respondent both submitted short witness statements. Mr. Markham also answered some brief questions under oath. Other than for one matter at para 14 of her statement, Ms. Mort's evidence, (in particular on the redundancy exercise carried out by the Respondent in early 2019, which had resulted in the closure of the part of the plant at the end of March 2019 and the cessation of the type of work being carried out by the Claimant), was not challenged. In addition, I had a small agreed bundle of relevant documents ("the Bundle"). Where I refer to any pages in that Bundle, they will be referred to by their page number as [xx]. The Bundle included at [1], the Claimant's Schedule of Loss and, at [2-5], the Respondent's version of the same.

Submissions

5. The Respondent provided some written submissions and Mr. Markham provided oral responses as well as a written summary of his position. Where an issue was contentious, I have summarised, briefly, below the relevant submissions.

Relevant findings of fact for the purposes of the remedies hearing

6. The Respondent was at all material times a pharmaceutical contract development and manufacturing company providing both Active Pharmaceutical Ingredients (APIs) and finished dose forms, operating from premises in Queenborough, Kent. The Claimant had been employed by the Respondent, latterly as an API Charge hand, from 29 January 2002 [35] until his dismissal on 26 February 2018, a period of some 16 years.

7. The Claimant was summarily dismissed for gross misconduct, after a valve, which should have been shut, had been found to have been left open on 14 February 2018, which had allowed Freon gas (an active pharmaceutical ingredient) to escape into the environment. This was a matter which required the Respondent to file a report to the Environment Agency and to carry out an internal technical investigation and report. Up until this time, the Claimant had an unblemished 16 years of service and was well respected by his managers. Although the Claimant's evidence was that he did not recall leaving the valve open, he had signed to say it had been closed, but he accepted that he must have left this open and apologised that he had put himself and everyone else in this position.

8. Within a week of his dismissal, the Claimant's evidence was that he had found new work as a fork lift truck operator [40-45]. The Claimant said to get this job, he had to complete a forklift truck training course, which he said lasted over two days and cost him £400. This job was initially obtained through an agency. By August 2018, some 5 months or so later, the Claimant had managed to obtain permanent employment [29/30]. By the beginning of October this year, 2019, [39] he had managed to get promoted back to an almost similar level to the one he had held prior to his dismissal, at the Respondent. His salary by that time was in the region of £100 per month less than he had been earning, so he had almost achieved parity.

9. At the end of March 2019, the Respondent made the whole of its API workforce redundant. This included everyone, bar those with a specialist skill set (not possessed by the Claimant) who worked in the same role at the Respondent as the Claimant had done.

Issues

10. The Claimant seeks preparation time costs. Further, in additional to the usual calculations involved in assessing compensation in an unfair dismissal claim, the following additional matters fell to be determined by the Tribunal with regard to assessing the Claimant's basic and compensatory award:

I. What were the appropriate net and gross figures to use in any calculation?

II. Are there any other sums that should be compensated for?

III. What was an appropriate period for the Claimant's future losses claim?

IV. Should there be any reductions made for (1) *Polkey*; and / or (2) contributory fault?

V. What, if any, was an appropriate uplift in accordance with section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992?

Law

11. If the tribunal considers that an unfair dismissal complaint is well founded, (and no order for reinstatement or re-engagement is sought or made), it must make an award of compensation. The award will consist of two elements: (a) the basic award; and (b) the compensatory award (ERA 1996, s.118).

12. Basic award. The basic award is calculated by applying a set formula based on an age factor, length of service and one week's [gross] pay. There is a set maximum number of years' service [20] and a set maximum for the weekly wage, in this instance, £489 (as at the effective date of termination) (ERA 1996, s.119). There is also a maximum basic award (£14,670, as at the effective date of termination). The formula for calculating a week's pay is set out in s.229 ERA 1996. For continuity of the period of employment, regard needs to be had to s.218 ERA 1996.

13. The basic award may be subject to reduction. Section 122(1) and (2) ERA 1996 provide that the basic award may be reduced by such sum as is just and equitable having regard to a claimant's pre-dismissal conduct.

14. Compensatory award. Unlike the basic award, which is based on a formula, the compensatory award is designed to compensate the employee for the loss that he has suffered. By s.123(1) ERA 1996, the compensatory award consists of 'such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer'. A tribunal must, in deciding whether to make a compensatory award (see *Saunders v OCS Group* (UKEAT/0051/09)), (a) identify what loss the employee has suffered at the date of dismissal; and then (b) decide whether the employer's action (in dismissing the employee) caused the loss. Losses flowing from the dismissal, such as costs of retraining or travelling to interviews for new jobs may be included for the purposes of s.123 ERA 1996.

15. The compensatory award is subject to a maximum, (£80,541 for cases where the effective date of termination fell on or after 6 April 2017, or 52 weeks' gross pay (whichever is the lower) (Unfair Dismissal (Variation of the Limit of Compensatory Award) Order 2013 (SI 2013/1949)). This maximum is applied after any reductions have been made. In the context of calculating the compensatory element of an award, a week's pay is not subject to any limit (as it is for calculating the basic award), but the net figure is used to calculate the actual loss.

16. Compensation will usually be assessed under the following main heads: (a) immediate loss of net earnings to which the employee was entitled, from the date of dismissal to the date of the hearing or until the employee finds a new job, if earlier (provided that job is higher-paid); (b) future loss of net earnings to which the employee was entitled from the date of hearing either until the employee obtains new employment or for such further period as the tribunal finds appropriate. Compensation for future loss of earnings is not limited to the employee's contractual notice period. The tribunal will consider local employment conditions, the skills of the employee, his age and general employability; (c) loss of pension rights and net fringe benefits from the date of dismissal to the date at (b) above; (d) loss of statutory rights such as the right to bring an unfair dismissal claim for two years; (e) expenses in looking for work.

17. By virtue of s.207A(2) Trade Union and Labour Relations (Consolidation) Act 1992, where there has been an unreasonable failure by the employer to comply with the Acas Code, the tribunal has power to increase compensation by up to 25%. Section 207A sets out the relevant statutory principles. This makes clear that it is only where a Tribunal finds that a failure to comply with the Code is unreasonable, that a Tribunal may, if it considers it just and equitable, to increase any award by no more than 25%. S.207 provides, so far as material, that

> *If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—*

> *(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*
> *(b) the employer has failed to comply with that Code in relation to that matter, and*
> *(c) that failure was unreasonable,*
> *the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.*

18. This adjustment option does not apply to the basic award. In *Lawless v Print Plus* (UKEAT/0333/09), a case decided under the old statutory minimum procedures, the EAT said the factors to be taken into account when considering the size of the uplift include: (a) whether the procedures were ignored altogether or applied to some extent; (b) whether the failure to apply the procedures was deliberate or inadvertent; (c) whether there are circumstances which might mitigate the blameworthiness of the failure; (d) the size and resources of the employer which may aggravate or mitigate the culpability and/or seriousness of the failure. In *Shifferaw v Hudson Music Co Ltd* (UKEAT/0294/15) the employment tribunal dealt with the uplift issue as follows:

> *65. … Whilst we rejected … some other complaints of failure to comply with the ACAS code, we found unreasonable failure to comply in relation to James De Wolfe having not been an independent person to deal with the Claimant's grievance. We considered that this was a serious failure because he was the person considering her whole grievance and she was not given a right of appeal. The just and equitable uplift was more than the 10% proposed by [the respondent]. However, there were some measures taken to address her concerns internally, and other complaints had not succeeded before us. Overall, within the statutory range of 0% to 25%, we considered a 20% uplift would be fair in this case.*

19. Reducing factors. There are a number of factors that may reduce an award. These include: (a) mitigation: (an employee is under a duty to mitigate his loss by taking reasonable steps to obtain alternative employment; compensation will not be awarded for any loss that should have been mitigated but was not (*Kyndall Spirits v Burns* (EAT/29/02)). There was no issue raised here about mitigation.

20. (b) what is known as a 'Polkey' deduction: One of the factors that a tribunal has to consider when assessing compensation where there have been procedural failings in the dismissal process, is whether the employee would still have been dismissed if a proper procedure had been followed. If the tribunal concludes that even if a fair procedure had been followed, dismissal would still have occurred, then that can sound in the compensation that is awarded. Such a conclusion can have two main effects: (i) on the period of time over which compensation is awarded; and (ii) on the actual amount, in that a percentage reduction (up to 100%) may be made by the tribunal to take account of the tribunal's assessment of the likelihood that dismissal would still have occurred. An employment tribunal's task, when deciding what compensation is just and equitable for future loss of earnings in these circumstances, will almost inevitably involve a consideration of uncertainties. What the tribunal has to do is to 'construct, from evidence not speculation, a framework

which is a working hypothesis about what would have happened had the [employer] behaved differently and fairly' (*Gover and Others v Property Care Ltd* [2006] EWCA Civ 286). In *Polkey v AE Dayton Services Ltd* [1988] ICR 142, the House of Lords ended what was known as the 'no difference' rule, which had allowed procedurally irregular dismissals to be ruled as fair where it could be shown that carrying out a proper procedure would have made no difference to the outcome. Their Lordships said this was not relevant to fairness, but it would sound in the assessment of damages because s.123 of the ERA 1996 refers to 'such amount as the tribunal considers just and equitable in all the circumstances'. In *Sillifant v Powell Duffryn Timber Ltd* [1983] IRLR 91, at 92: Lord Bridge also approved the remarks of Browne-Wilkinson J in *Polkey*, at 96: 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.

21. In *Andrews v Software 2000 Ltd* [2007] IRLR 568, the then President of the EAT, Mr. Justice Elias, summarised the principles emerging from the caselaw:

> *(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. (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.)

22. The EAT confirmed in *Zebrowski v Concentric Birmingham Ltd* (UKEAT/0245/16) that, in summary, tribunals have three alternative options when assessing how long a period to make an award for: (1) to find that it is certain that the employee would have been dismissed by the end of a particular period and so limit compensation to that period; (2) to find that the employment relationship would have continued unaffected for a certain period but thereafter there was a percentage chance that the employee would have ceased to be employed; (3) to assess the percentage likelihood of the employment terminating in any event. *Polkey* deductions may be made whether the dismissal is substantively unfair or procedurally unfair, although it will be easier to assess if the failure is procedural (*King v Eaton Ltd (No 2)* [1998] IRLR 686).

23. (c) Contributory fault: There are two different tests to be applied when looking at the tests for whether to make a deduction for contributory fault to the basic (s.122(2) ERA) and compensatory (s.123(6) ERA) awards, but there is an element of overlap. The amount by which the awards are to be reduced is at the discretion of the tribunal and the tribunal does not necessarily need to reduce the basic and compensatory awards by the same percentage, although it often does so in practice. In *RSPCA v Cruden* [1986] IRLR 83, the EAT said: *"plainly both subsections involve the exercise of a discretion, and the wording of each, whilst sufficiently different to admit of differentiation in cases where the Tribunal finds on the facts that it is justified, is sufficiently similar to lead us to conclude that it is only exceptionally that such a differentiation will be justified …*" As set out in full below, the difference in the wording of the two sections means that, as far as the basic award is concerned, where the tribunal considers that *any pre-dismissal conduct* of the claimant was such that it would be *just and equitable* to reduce the award, it *shall* do so, whereas as far as the compensatory award is concerned, where there is a finding that the

dismissal was *to any extent caused or contributed to by any action* of the claimant, it *shall* reduce the amount of the award *by such proportion as it considers just and equitable*. Where the same conduct is asserted in support of both awards, if different reductions are made, it will be necessary to explain why.

24. S.122(2) ERA 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.*

25. S.23(6) ERA provides:

> *Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*

26. In *Devis v Atkins* [1977] IRLR 314, Viscount Dilhorne said:

> "*Section [123(1)] does not … provide that regard should be had only to the loss resulting from the dismissal being unfair. Regard must be had to that but the award must be just and equitable in all the circumstances, and it cannot be just and equitable that a sum should be awarded in compensation when in fact the employee has suffered no injustice by being dismissed*."

27. The question for the tribunal is whether, in a misconduct case, the claimant was in fact guilty of the blameworthy or culpable conduct which to any extent caused or contributed to the dismissal. If the employee substantially contributed to his own dismissal, this will mean a substantial percentage reduction in the awards, even of 100%, potentially leaving the employee with a finding of unfair dismissal but no compensation. This is usually relevant only in misconduct dismissals. In *Steen v ASP Packaging Ltd* [2014] ICR 56, the Court said that a tribunal is not constrained on fault by the employer's view of how wrongful an act was. This is a matter of fact for the tribunal, but it must find that the employee was culpable or blameworthy.

28. In their recent decision in *Jagex Ltd v McCambridge*, the EAT (HHJ Stacey) held that contributory conduct in an unfair dismissal case does not have to be gross misconduct:

> "*By misdirecting itself that only gross misconduct would open the door to a contributory fault percentage reduction, having decided that there had been no gross misconduct, the Tribunal failed to consider the matter further. It should have gone on to consider if the Claimant's conduct was blameworthy or culpable, and if so, followed the statutory wording of s.122(2) and s.123(6) [ERA 1996] to determine whether any reduction should be made …"*

Order of compensatory award adjustments

29. The correct order of adjustments once the net loss is calculated is (see *Ministry of Defence v Wheeler* [1998] IRLR 23, CA, and *Digital Equipment Co Ltd v Clements (No 2)* [1998] IRLR 134, CA): (a) deduct payments in lieu/ex gratia payments made by the employer; (b) deduct sums earned by the employee from new employment, or make deductions (notional earnings) by reason of a failure to mitigate; (c) deduct benefits other than jobseeker's allowance and income support (see also 5.6.2.4 below); (d) make any *Polkey* deduction; (e) reduce the award or increase by up to 25% for a failure to comply with the Acas Code; (f) make any contributory fault deduction/deduction for misconduct discovered after dismissal (ERA 1996, s.123(6)); (g) deduct contractual redundancy payment made by the employer which is in excess of basic award; (h) add in any award for sums awarded for failure to provide written particulars of employment (EA 2002, ss.31 and 38) (s.31(5)); (i) apply statutory cap of £80,541 (from 6 April 2017) (if appropriate); (j) gross up (if appropriate).

Conclusions

What were the appropriate net and gross figures to use in any calculation?

30. Although there was initially some disagreement over appropriate figures, in the event, it was agreed at the hearing that the following figures were appropriate:
    a. The appropriate gross weekly wage (calculated over an average of 12 weeks) was £1,0411
    b. The appropriate net weekly wage was £703.36
    c. The maximum appropriate cap for the weekly wage for the purposes of calculating the basic award was £489.

31. The Claimant had completed 16 years of service at the date of his dismissal, but one of these was when he was aged under 21, so the appropriate multiplier for the purposes of the calculation of the basic award was 15.5.

Basic award

32. Although the Claimant had used a figure of £525 and a multiplier of 16, after discussion and explanation, it was agreed that the appropriate formula to use was 15.5 weeks x £489, which produced a figure of £7,579.50.

Compensatory award

33. The Claimant used a figure of £750 as his weekly wage, which was, he explained, calculated as an average over 12 months; the Respondent used a figure of £703.36, which Mr Huggett explained was an average over 12 weeks. After considering the wording of s.221 ERA on calculating a week's wage, it was agreed that the appropriate figure to use was the Respondent's, namely £703.36.

What was an appropriate period for the Claimant's future losses claim?

34. The Claimant submitted that, in addition to his losses up to the date of the Tribunal liability hearing, (24 May), the Respondent should be responsible for his continuing

losses at least up until October 2019, when he finally started to achieve approximate financial parity in his new job, compared to his earnings with the Respondent. The Respondent submitted that its liability should end at 31 March 2019, when the redundancy exercise took effect; further or in the alternative, if the Tribunal is against them on that, then the date of the hearing should be used; or, further or alternatively, at the latest the beginning of October 2019.

35. In regard to this, Mr. Huggett submits that it is plainly material for the Tribunal to consider what would have happened if the Claimant has not been dismissed (*James Cook and Co (Wivenhoe) Ltd v Tipper* [1990] ICR 716). He says on the facts here, relying on the evidence from Ms. Mort, the Claimant would have been dismissed by reason of redundancy at the end of March 2019, as the section where the Claimant worked (Isoflourane) closed on 31 March 2019. He says therefore all claimable losses must cease from this date (*Credit Agricole Corporate and Investment Bank v Wardle* [2011] IRLR 604).

36. In her statement, which was not challenged, Ms. Mort said, at paragraph 9, that if the Claimant had still been employed and had been made redundant on 31 March, he would have received £8,382 by way of a statutory redundancy payment and £6,199.36 by way of enhanced redundancy payment (which is calculated as agreed in the collective bargaining process with trade unions and employee representatives [78-9]). That document also makes clear that any outstanding leave would be paid up to date, and that there would additionally be pay in lieu of notice [79, 88].

37. The EAT in *Zebrowski* pointed to three alternatives open to tribunals when assessing how long a period to make an award for. In this case, there is no doubt in my mind that Mr. Markham, had he not been dismissed when he was, would have been dismissed at the end of March, albeit that I believe he would also have been paid in lieu of notice for a maximum of 12 weeks from that date. This scenario seems to me to fit squarely within the first of the three alternatives envisaged in *Zebrowski,* namely that it is certain that the employee would have been dismissed by the end of a particular period and so compensation should be limited to that period. I therefore find that the Claimant's compensation should be limited to the period which is 12 weeks from the date when the redundancies took effect, (31 March 2019), i.e 30 June 2019, being a total of 70 weeks from the date of dismissal.

Figures and calculations

38. The Claimant agreed the Respondent's basic figures on calculating pension loss namely 7% of (1) basic salary of £2279.95; (2) shift pay £774.48; and (3) YEG monthly of £190.90, which gave a weekly loss of £52.43.

39. The Respondent suggested a figure of £250 for loss of statutory rights. The Claimant suggested £500. I believe a figure of £350 is appropriate for this.

40. The following additional financial claims were also submitted by the Claimant:

    a. Forklift training: £400
    b. QVC course: £3,000

c. Expenses arising from job search and interview: £68.40
d. Expenses arising from attendance at the Tribunal hearing and car parking: £79.16
e. Share purchase scheme loss

41. Taking each of these in order:
    a. the forklift truck course: £400 - the Claimant said to get his first job, he had to complete a forklift truck training course, which he said lasted over two days and cost him £400. He said he had done an internal course when he was with the Respondent but this was not sufficient. Mr. Huggett says the Claimant has provided no evidence for the forklift truck course. He also says the sum claimed for this had gone up by £150 since the first Schedule of Loss was produced. The Claimant explained this was because he was unsure of the cost at that time. He accepted he did not have any written evidence to support this claim, but said in his oral evidence that he had had to do this course in order to get the job. On balance, I can see no reason why the Claimant would make this up, and I accept the Claimant's oral evidence on this. The new job, which he obtained with commendable speed, was entitled "forklift". I find this to be a validly made claim.
    b. QVC course. The Claimant confirmed during his oral evidence that he had not done this course and had not paid for it. He explained he had been part way through such a course with the Respondent when he had been dismissed, and had therefore lost the opportunity to complete it. As the Claimant had not expended any money on this, it was not something it was appropriate to include in his recoverable losses;
    c. Expenses arising from job search and interview: £68.40 - this was not disputed by the Respondent. It is a recoverable loss.
    d. Expenses arising from attendance at the Tribunal hearing: these are not recoverable losses, and so I did not allow them.
    e. Share purchase scheme: the Claimant explained that he has been a member of a share purchase scheme, and had paid £50 per month over the relevant period, equivalent to £1800. Because he had been dismissed, he had lost the chance to profit from the shares and had had his money returned. He says if he had still been employed, then if he had been made redundant on 31 March, – as happened with anyone else who was in the scheme at that time – he would have been able to sell the shares at a price of £12.30, which would have given him a profit over the option to buy price of £9.08. The Respondent had the opportunity but has not challenged the evidence put in by the Claimant as to the appropriate share price at the relevant time. did not challenge the figures put forward by the Claimant. This is, in my assessment, a recoverable loss arising from the dismissal. On this basis, I calculate that the Claimant's £1800 would have purchased at £9.08, 198 shares which, had he sold them at the price of £12.30, would have given him a profit of £635.40.

42. On this basis, <u>the Claimant's losses amount to</u>:

    a. Loss of basic salary to 30 June: £703.36 x 70 = £49,235.20
    b. Loss of statutory rights £350
    c. Loss of pension benefit to 30 June: £52.43 x 70 = £3,670.10

d. Loss of enhanced statutory redundancy pay: £6,199.36
e. Loss of additional statutory redundancy award: £802.50
f. Forklift truck course £400
g. Expenses looking for work: £68.40
h. Loss of benefit of share options £635.40
i. **Total in respect of losses accrued:** £61,360.96

43. In terms of reductions to be applied:

    a. In respect of earnings to date, through his various employments [see para 8 above], for which salary slips were provided, (Earl Street) £1,633.48, (Knauf) £6,579.93; and (GW Pharma) £22,576.57, to end 06/2019**: £30,789.98.**
    b. Pension contributions (agreed to be calculated on the basis as per the Respondent's Schedule of Loss, page 3) (Earl Street) £36.19, (Knauf) £162.26; and (GW Pharma) £1805.24, to end 06/2019: **£2,003.69**
    c. Total in respect of reductions to be applied: £32,793.67

44. Therefore the net loss (after deducting the total in paragraph 43 from that in paragraph 42) is: **£28,567.29**

Should there be any reduction made for *Polkey,* and if so what?

45. Mr. Huggett says that it is appropriate in this case to make a *Polkey* reduction. He says that the Tribunal concluded that the dismissal was procedurally unfair [#95] on a number of grounds. He relied upon the approach in *Sillifant:* if there is a doubt whether or not if a fair procedure had been followed, dismissal would still have occurred, this can be reflected by reducing the normal amount of the compensation by a percentage representing the chance that the employee would still have lost his employment. He also relies, in particular, on paragraphs (4) to (7) of Elias J's summary in *Andrews v Software 2000* (above).

46. On the facts, Mr. Huggett submitted that none of the four procedural failings identified in the Judgment were likely to have had a material effect on the decision to dismiss, such that there was a 50% chance that the Claimant would still have been dismissed. The Claimant refutes the Respondent's assessment. He points out that the Judgment found the dismissal was not only procedurally but also substantively unfair. He says that if the correct procedures had been followed he would have been exonerated.

47. In my assessment, it is not appropriate to make any *Polkey* deduction here. If a fair procedure had been followed, it was most unlikely that dismissal would still have occurred, not least because I found that this was also a substantively unfair dismissal, but also because, while I accept Mr Huggett's submissions that neither the suspension nor the graphic, were likely to have had a material effect on the decision to dismiss, I believe that had there been better clarity around the grounds for the dismissal and had the appeal had been heard by someone other than Mr Reid, there was a very good chance that the Claimant would not have been

dismissed. Therefore, I do not believe it is appropriate to make any *Polkey* deduction on the facts here.

What, if any, was an appropriate uplift in accordance with section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992?

48. Section 207A(2) makes clear that where a Tribunal finds that a failure to comply with a relevant Code is unreasonable, a Tribunal may, if it considers it just and equitable, increase any award by no more than 25%. If a failure is found to be unreasonable, then factors which can be taken into account when considering the size of any uplift include: (a) whether the procedures were ignored altogether or applied to some extent; (b) whether the failure to apply the procedures was deliberate or inadvertent; (c) whether there are circumstances which might mitigate the blameworthiness of the failure; (d) the size and resources of the employer which may aggravate or mitigate the culpability and/or seriousness of the failure.

49. The Claimant submitted there had been many failures to follow the Acas Code and the Respondent's own procedures. He relied upon the procedural failings identified in the Judgment**.** Mr Huggett submitted there should be no uplift. He referred to the arguments he had put forward on *Polkey* and said none of these matters was substantial enough for the tribunal to consider making any uplift.

50. In the Judgment, I found that the Respondent complied with the Acas Code and with its own policy in regard to most of the disciplinary process. I did however find, as set out in the Judgment, and above, a number of what I regarded as procedural irregularities relating to (i) the suspension, (ii) the graph, (iii) the basis relied upon for dismissal and (iv) the appeal. Of matters that might be said to relate to the Acas Code, suspension, the grounds that the Respondent relied upon for dismissal, and the appeal appear directly relevant.

51. The Acas Code, at paragraph 4, sets out the key elements of a fair disciplinary process, namely that employers should:

- raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.
- act consistently.
- carry out any necessary investigations, to establish the facts of the case.
- inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
- allow employees to be accompanied at any formal disciplinary … meeting.
- allow an employee to appeal against any formal decision made.

52. Looking at these in more detail, as far as suspension is concerned, the Acas code says at paragraph 8, that in cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action. I dealt with my conclusions on this at paragraph 81 of the

Judgment. In terms of the Acas Code, this could be said to relate to that part that says "it should be made clear that this suspension is not considered a disciplinary action". However, as was also noted in the Judgment, this was a very short suspension, literally over a weekend. I do not believe that this one issue per se can be said to amount to a breach of the Code, and I do not find, on the facts here, in any event, that even if there was a breach of the Code, that it was unreasonable.

53. As far as the grounds for dismissal relied upon by the Respondent are concerned, the Acas Code at paragraph 9, deals with notifying an employee of the disciplinary case they have to answer. In my Judgment, I found that the Respondent was confused as to which head of its policy it was relying on. Paragraph 9 states that the notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. In my assessment, the Claimant was well aware of what the underlying disciplinary issue related to and what the consequences of that might be. I do not believe that this one issue per se can be said to amount to a breach of the Code, and I do not find, on the facts here, in any event, that even if there was a breach of the Code, that it was unreasonable

54. As far as the appeal hearing was concerned, the Acas Code, at paragraph 27, states that an appeal should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case. In particular because of an email that the appeal officer had sent round after the Claimant's dismissal, I found that it was not reasonable in the circumstances for that individual to deal with the Claimant's appeal. I did not consider that it could be said that this person was either impartial or uninvolved. I made a finding that, on balance, it was contrary to good practice and unreasonable for this individual to have conducted the appeal, given the tone and content of his email**.** In this case, I do not doubt that given the Respondent's size and administrative resources that it could have found a different, uninvolved, manager other than Mr. Reid to hear the appeal. I find that this does amount to an unreasonable failure to comply with the Acas Code. Mr. Reid was not in my judgment independent or impartial.

55. In my assessment, looking at the factors which can be considered:

> (a) most of the Acas procedures were properly applied;
> (b) I do not believe that the decision to have Mr. Reid hear the appeal could be said to be inadvertent; to that extent, it must be considered to be a deliberate act;
> (c) I do not believe there were circumstances which might mitigate the blameworthiness of this particular failure; and
> (d) as far as the size and resources of the employer are concerned, I do believe they had the capacity to have found someone else to hear the appeal. Nothing to the contrary has been submitted.

Looked at in the round, I find this was a serious failure, because the person who conducted the appeal had the opportunity to step back and look at things as a whole. They had the opportunity to review and remedy any procedural breaches. Overall, taken in the round, I believe that it would be just and equitable in all the

circumstances to increase any award I make to the Claimant by 10% to take account of this failure.

Should there be any reduction made for contributory fault, and if so what?

56. Mr. Huggett emphasised that the test under s 123 ERA is a "just and equitable" one. He referred to the statement of Viscount Dilhorne in *Devis v Atkins:* "the award must be just and equitable in all the circumstances". He also reminded the tribunal of some key applicable principles when considering contributory fault, namely that:
    a. they are entitled to take a wide and common-sense view of the relevant circumstances (*Maris v Rotherham Corporation* [1974] IRLR 147; *Gibson v British Transport Docks Board* [1982] IRLR 228);
    b. the employee's conduct must be examined in order to determine the extent to which it has caused or contributed to the dismissal and not to its unfairness: the fact that the Tribunal has concluded it was unfair to dismiss for gross misconduct must not mean that the Tribunal does not consider the claimant's contribution to the circumstances which led to his dismissal (*Jagex Limited v McCambridge*, UKEAT/0041/10);
    c. the correct test is whether the Claimant's conduct was culpable, blameworthy, foolish or similar, which includes conduct that falls short of gross misconduct and need not necessarily amount to a breach of contract (*Nelson v BBC (No.2)* [1980] ICR 110.);
    d. the employee's conduct need not be the sole or principal cause, or even the main cause of the dismissal (*Carmelli Bakeries v Benali* (UKEAT/0616/12));
    e. it is difficult to envisage circumstances that would justify a finding of no reduction where blameworthy conduct causing or contributing to a dismissal has been found.
    f. there are four key matters that a tribunal must address (*Steen v ASP Packaging Ltd*):
        i. it must identify the conduct which is said to give rise to the possible contributory fault;
        ii. it must ask whether that conduct is blameworthy, which depends on what the tribunal finds the employee actually did or failed to do;
        iii. it must ask if that conduct caused or contributed to any extent to the dismissal;
        iv. if it finds it did, then it must consider to what extent the award should be reduced and to what extent it is just and equitable to reduce it

57. Mr. Huggett contends (referring to *Hutchinson v Enfield Rolling Mills Ltd* [1981] IRLR 318) that there is blameworthy conduct on the Claimant's part, which caused or contributed to his dismissal, and that the just and equitable reduction must be made having regard to that finding. He refers to the findings of fact in the Tribunal's judgment as to the circumstances in which the valve came to be left open and as to the Claimant's admissions in that regard (see pages 49-77, 78A-T; 83-11, 95-96, 149-155, 259-265 of the liability Bundle). He says that the Claimant was familiar with the system, knew it was old and not automated, knew how it operated and despite failing to close the valve, still signed to say that he had done so (see the findings at #73 of the Judgment). In all the circumstances, Mr. Huggett

contended that the just and equitable reduction to make on the facts here was one of 75%. Mr. Huggett also submitted that while the tribunal may make reductions in different amounts to the basic and compensatory awards, (*Parker Foundry Ltd v Slack* [1992] IRLR 11, *RSPCA v Cruden*) this should only be done in exceptional circumstances, which were not present, he submitted, in this case.

58. The Claimant disputes that his conduct contributed to his dismissal. He says he complied with every stage of the investigation and disciplinary procedure and conducted himself well throughout the process. He pointed out that the Judgment [101] had found insufficient attention was paid to his unblemished disciplinary record. It had also found that the internal investigation had found that the root cause of the incident was equipment and process failure, albeit that human error was a contributory factor [21,23,24]; and corrective action to the process was put in place subsequent to the Claimant's dismissal [35]. The Claimant also relied upon the fact that although his error could have had serious consequences, in fact it did not. Overall, the Claimant says that he should not have been dismissed for this, his breach was not a repudiatory one, and therefore any award for contributory fault is inappropriate.

59. Having considered the factual background here, it is beyond doubt in my judgment that the Claimant's error here contributed to his dismissal. If he had not forgotten to close the valve and had not signed for it, then the disciplinary process would not have been started. As pointed out by Mr. Huggett, the fact that the Tribunal has concluded it was unfair to dismiss for gross misconduct must not mean that the Tribunal does not consider the claimant's contribution to the circumstances which led to his dismissal (*Jagex Limited v McCambridge*). I do find that the Claimant's conduct here was culpable and blameworthy, and that this caused his dismissal. Having got to this stage, I must therefore consider to what extent any award should be reduced and to what extent it is just and equitable to reduce the award. Taking all the various matters into account, in my judgment, there should be a 50% reduction to both the basic and compensatory awards, to take account of the Claimant's contributory fault.

Final calculations and figures

60. Applying all the increasing and decreasing factors to the figures I have found, produces the following: (*Ministry of Defence v Wheeler* and *Digital Equipment Co Ltd v Clements*):
    Basic award: £7,579.50 less 50% contributory fault deduction: **£3,789.75**
    Compensatory award:
    a. Net loss = £28,567.29;
    b. increase by 10% for a failure to comply with the Acas Code: £2,856.73 + £28,567.29 = £31,424.02;
    c. 50% contributory fault deduction (ERA 1996, s 123(6)): £15,712.01
    d. TOTAL COMPENSATORY AWARD: **£15,712.01**
    e. TOTAL AWARD (basic + compensatory): **£19,501.76**

Preparation time costs

61. The Claimant [6] asked for £4,875 (based on 125 hours at £39 per hour) in respect of preparation time costs. He says he spent a lot of hours before the tribunal researching the law and talking to HR professionals, all of which took a lot of time. Rule 76 of the 2013 Employment Tribunal Rules provides:

> "*A tribunal may make a costs order or a preparation time order and shall consider whether to do so where it considers that:*
> *(a) a party or that party's representative have acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or part or the way that the proceedings or part have been conducted; or*
> *(b) any claim or response had no reasonable prospect of success*."

62. The making of a costs order therefore requires a two stage approach: has the threshold been passed and, if so, is a costs order appropriate. The lead authority in deciding whether to award costs in the employment tribunal is *Yerrakalva v Barnsley Metropolitan Borough Council* [2011] EWCA CIV 1255, in particular the judgment of Mummery LJ: the Tribunal should consider the whole picture of what had happened in the case and ask whether there had been unreasonable conduct by the relevant party in bringing or defending the case. If so, it should identify the conduct, what was unreasonable about it and the effect it had. The Tribunal should also consider any criticisms made of the other party's conduct and its effect on the costs incurred.

63. Having regard to the above, I am satisfied that the threshold for a preparation time order has not been met in this case. In my judgment, neither the Respondent nor its representative have behaved in any way that could be described as vexatious, abusive, disruptive or unreasonable.

Reference

64. The Claimant requested that the Respondent be asked to provide a reference and that an email be sent to all employees "in order to restore my good name and reputation". These are not matters that it is within the Tribunal's power to order.

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Employment Judge Phillips
18 December 2019