Case Numbers: 1501860/2012
1501097/2013
3400176/2014
(V- Face Time)

EMPLOYMENT TRIBUNALS

Claimant			**Respondent**
Dr C Fanutti		**v**	University of East Anglia
Heard at:	Cambridge	**On**: 16 & 17 January, 9,10 &11 March 2020	
		In chambers: 23 March & 2 April 2020 (by video conference)	

Before: Employment Judge Foxwell

Members: Mrs L Gaywood and Mr C Davie

Appearances:
For the Claimant: In person
For the Respondent: Mr R Moretto, Counsel

RESERVED REMEDY JUDGMENT

1. The Claimant's application for reinstatement or re-engagement orders is dismissed.

2. The Tribunal having found that the Claimant was unfairly dismissed, the Respondent shall pay compensation to her for unfair dismissal of **£55,610**, comprising a basic award of £6,750 and a compensatory award of £48,860.

3. The recoupment provisions do not apply.

4. For the avoidance of doubt, complaints of wrongful dismissal and for unpaid holiday pay are dismissed following their withdrawal by the Claimant at the Liability Hearing.

REASONS

Introduction

1. This Judgment concerns the remedy the Claimant, Dr Cristina Fanutti, should receive following a finding that she was unfairly dismissed from her employment with the Respondent, The University of East Anglia.

2. The Claimant was employed by the Respondent as a Lecturer in Immunology. Her employment began on 1 May 2003. She presented her first claim to the Employment Tribunal (case number: 1501860/2012) on 1 December 2012 and her second claim on 3 July 2013 (case number: 1501097/2013), alleging in each that she had been subjected to direct sex and race discrimination, sexual and racial harassment and victimisation. The Claimant is of Italian origin.

3. The Claimant presented a third claim to the Tribunal (case number 3400176/2014) on 8 December 2014 in which she made further allegations of race and sex discrimination. She made additional claims of unfair dismissal, breach of contract in that she had not received notice pay and that her employer had failed to pay her full entitlement to accrued holiday pay.

4. The three claims were heard in several tranches between November 2014 and August 2015 by a Tribunal comprising Employment Judge David Moore, Mrs Gaywood and Mr Davie. The hearing lasted 38 days in total. In a Judgment with Reasons sent to the parties on 10 December 2015 ("the Liability Judgment") the Tribunal dismissed the Claimant's claims under the Equality Act 2010 but upheld her complaint of unfair dismissal. Subsequent requests for reconsideration and an appeal did not change this result, but the remedy for the complaint of unfair dismissal remained to be decided.

5. At the outset of the liability hearing the Tribunal had clarified and agreed the issues in the claims and, by agreement, the claims for notice and holiday pay were not proceeded with (see paragraph 13 of the Liability Judgment). Accordingly, we have dismissed them on their withdrawal.

6. In January 2019, Regional Employment Judge Byrne appointed Employment Judge Foxwell to the Tribunal to decide the outstanding issue of remedy following Judge Moore's retirement. Mrs Gaywood and Mr Davie continued as before.

7. In March 2019, Employment Judge Ord held a Preliminary Hearing for Case Management with the parties to make orders for the determination of remedy at which he listed a four-day remedy hearing on 16, 17, 20 and 21 January 2020. The matter came before Judge Foxwell on 26 July 2019 for consideration of applications that had arisen and the dates for the remedy hearing were reconfirmed on that occasion.

8. It suffices to state that these claims have had a long and involved procedural history, much of which is set out in the orders and rulings issued by the Tribunal from time to time. One matter we should mention here, however, is that, shortly before the commencement of the remedy hearing in January 2020, the Claimant applied for a postponement on the basis that she intended to bring proceedings for Judicial Review against the Respondent and against the Employment Tribunal itself. The grounds for Judicial Review were said to be as follows:

8.1 that the Respondent had acted outside its powers (*"ultra vires"*) in purporting to dismiss the Claimant such that she, in fact, remained employed; and

8.2 that the Tribunal had failed to comply with its statutory duty by omitting to deal with a complaint of public interest disclosure dismissal or detriment ("whistleblowing").

9. The Tribunal refused the application for a postponement for reasons set out elsewhere and the Claimant's application for Judicial Review was dismissed by the High Court. We understand that this is presently the subject of an application for permission to appeal to the Court of Appeal.

10. We mention all of this simply to provide context to the fact that our jurisdiction to grant a remedy for unfair dismissal is predicated on there having been a dismissal. A finding of unfair dismissal appears to us to establish as a fact that there was a dismissal and the remainder of these Reasons proceed on that basis. If the proceedings for Judicial Review come to some other result (which appears unlikely to us in any event), matters may need to be reconsidered.

The issues relating to remedy

11. The matters this Tribunal has had to consider relating to remedy are as follows:

11.1 Did either party fail to follow a relevant ACAS Code of Practice?

11.2 What would have happened in the Claimant's employment but for her unfair dismissal? In particular, was she likely to have been dismissed in any event and if so, when (*Polkey*)?

11.3 Did the Claimant contribute to her dismissal by her own conduct (contributory fault)?

11.4 Should we order the Respondent to reinstate the Claimant and, if so, by when?

11.5 Should we order the Respondent to re-engage the Claimant and, if so, on what terms and by when?

11.6 If we make an order for reinstatement or re-engagement, what amount should the Respondent pay to the Claimant in respect of benefits she would have received but for her dismissal in the period up to her reinstatement or re-engagement?

11.7 If we decide not to order reinstatement or re-engagement, how much should we award as compensation for unfair dismissal having regard to any findings on *Polkey*, compliance with an ACAS Code of Practice, mitigation, contribution and if appropriate, the application of the statutory cap?

12. The legal concepts arising from these issues are described in more detail below but some of these issues are questions of fact which can be resolved on evidence as they relate to things which either did, or did not, happen; for example, compliance with an ACAS Code of Practice. Other issues require the Tribunal to reach an assessment of what is likely to have happened but for the unlawful conduct; for example, *Polkey*. In either circumstance, the Tribunal has reached a unanimous view based on an assessment of the evidence, its industrial experience and by exercising its judgment.

The Hearing

13. The Remedy Hearing began on 16 January 2020 as planned and continued on 17 January 2020 when, unfortunately, the Claimant was taken ill and the hearing had to be postponed (a fuller account of events is set out in the summary sent to the parties in January 2020). The hearing resumed on 9, 10 and 11 March 2020 and the Tribunal was able to receive the remaining evidence and submissions relating to remedy on these dates.

14. The Tribunal reserved its decision and had planned to meet on 23 and 24 March 2020 to consider this. These plans were affected by the measures taken in respect of the current public health emergency. The meeting on 23 March 2020 went ahead by video link (Apple Face Time) but the meeting on 24 March 2020 had to be postponed because of the “lock down” announced at that time. This was rescheduled for 2 April 2020 and, once again, was conducted using Face Time. Each member of the Tribunal had with them their bundles and notes during these discussions.

15. The Respondent called two witnesses at the remedy hearing, Dylan Edwards and David Crossman. Professor Edwards is the Pro-Vice-Chancellor of the Faculty of Medicine and Health Sciences at the Respondent. He has worked in the University since 1998, but did not have close dealings with the Claimant. He is a member of the University’s Executive Team. Professor Crossman has been Dean of Medicine at the University of St Andrew’s since 2014. Prior to that he was Dean of the Medical School at the Respondent between 2011 and 2014 and was in this post when the Claimant was dismissed. He was involved in the management of the Claimant at work.

16. Professor Crossman was present at the hearing in January 2020, but was unable to give evidence then because of the postponement necessitated by the Claimant's illness. He could not attend the resumed hearing in March 2020 in person, but gave evidence on affirmation over a Skype video link with voice by telephone. The computer used was placed so that everyone in the Hearing Room could see it and the Claimant had the opportunity to ask Professor Crossman questions.

17. The Claimant gave evidence in support of her case on remedy and relied on written witness statements from the following people:

17.1 Dr David Newman, a Consultant Radiologist and former student at the Respondent between 2003 to 2008;

17.2 Dr Luca Ferasin, a Veterinary Surgeon and a professional and personal friend of the Claimant;

17.3 Dr Martyn Symmons, a Research Scientist and Lecturer in the bio-medical field;

17.4 Dr Peter Coussons, who teaches bio-medical science at Anglia Ruskin University. Dr Coussons is the Claimant's partner;

17.5 Ing. Carina Van der Veen, a Research and Education Assistant at the University of Utrecht in the Institute of Marine and Atmospheric Research;

17.6 Mr Trevor Knowles, a member of the Employees United Trade Union and a personal and professional friend of the Claimant;

17.7 Mrs Martina Munzittu, a freelance PA/Secretary and personal friend of the Claimant.

18. Dr Coussons and Mr Knowles each accompanied the Claimant in the hearing before us; neither was present throughout the hearing but she was never alone. Neither was called to give oral evidence.

19. The weight we can attach to written evidence untested by cross examination is less, but we have noted two broad themes in the evidence of the Claimant's witnesses: firstly, support for the Claimant's wish to be reinstated having regard to her skills as a scientist and, secondly, concern about the toll these protracted proceedings have taken on her health.

20. In addition to the evidence of these witnesses, the Tribunal was provided with a bundle containing witness statements produced in the Liability Hearing. The Members recall the witnesses called previously in any event.

21. The parties had agreed a core remedy bundle in two volumes; the larger containing remedy information and agreed extracts from the liability bundles, the smaller containing claim forms, responses, Tribunal Orders and some additional documents from the liability bundles.

22. The bundles from the Liability Hearing were available at the Remedy Hearing as well and limited reference was made to documents in volumes 2 and 9 of these. We were also provided with bundles prepared for previous abortive remedy hearings, but these were not referred to during oral evidence.

23. We received oral submissions from both parties at the conclusion of the evidence. Mr Moretto had prepared written submissions in the form of a skeleton argument and he provided us with a bundle of authorities. He had also prepared a helpful chronology and reading list which he gave us at the beginning of the hearing.

24. The Claimant referred us to two cases during the hearing which we considered:

24.1 *Ridge v Baldwiin [1964] AC 40, HL*

24.2 *R ex p Sharon Shoesmith v OFSTED & Others [2011] EWCA Civ 642, CA*

25. Mr Moretto referred to the following cases which we considered:

25.1 *University of Sunderland v Drossou, 13 June 2017, EAT*

25.2 *Coleman v Magnet Joinery Ltd [1974] IRLR 343, CA*

25.3 *British Airways v Valencia [2014] IRLR 683, EAT*

25.4 *Timex Corporation v Thomson [1981] IRLR 522, EAT*

25.5 *Rao v Civil Aviation Authority [1992] ICR 503, EAT*

25.6 *Nothman v London Borough of Barnet (No 2) [1980] IRLR 65, CA*

25.7 *Wood Group Heavy Industrial Turbines v Crossan [1998] IRLR 680, EAT*

25.8 *United Lincolnshire Hospital Trust v Farren [2017] ICR 513, EAT*

25.9 *Cold Drawn Tubes v Middleton [1992] ICR 318, EAT*

25.10 *British Telecommunications PLC v Thompson, 29 July 1996, EAT*

25.11 *Central and North West London NHS Foundation Trust v Amimbola, 3 April 2009, EAT*

25.12 *GAB Robins (UK) Ltd v Triggs [2008] IRLR 317, CA*

26. In addition to these materials, we read and have reread the Liability Judgment sent to the parties in December 2015. The findings there are a primary source of information in this case. These Reasons supplement the Liability Judgment and should be read in conjunction with it.

Remedies following a finding of unfair dismissal - the legal framework

Reinstatement and re-engagement

27. Where a Tribunal has made a finding of unfair dismissal under section 111 of the Employment Rights Act 1996 (ERA), the remedies it can award are set out in section 112, which says as follows:

> ***112. The remedies: orders and compensation***
>
> *(1) This section applies where, on a complaint under section 111, an employment tribunal finds that the grounds of the complaint are well-founded.*
>
> *(2) The tribunal shall—*
>
> *(a) explain to the complainant what orders may be made under section 113 and in what circumstances they may be made, and*
>
> *(b) ask him whether he wishes the tribunal to make such an order.*
>
> *(3) If the complainant expresses such a wish, the tribunal may make an order under section 113.*
>
> *(4) If no order is made under section 113, the tribunal shall make an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 126) to be paid by the employer to the employee.*

28. "The orders" are defined in section 113 as orders for reinstatement or re-engagement and are further defined in sections 114 and 115 as follows:

> ***114. Order for reinstatement***
>
> *(1) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed.*
>
> *(2) On making an order for reinstatement the tribunal shall specify—*
>
> *(a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had*

but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement,

(b) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and

(c) the date by which the order must be complied with.

(3) If the complainant would have benefited from an improvement in his terms and conditions of employment had he not been dismissed, an order for reinstatement shall require him to be treated as if he had benefited from that improvement from the date on which he would have done so but for being dismissed.

(4) In calculating for the purposes of subsection (2)(a) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of reinstatement by way of—

(a) wages in lieu of notice or ex gratia payments paid by the employer, or

(b) remuneration paid in respect of employment with another employer,

and such other benefits as the tribunal thinks appropriate in the circumstances.

115. Order for re-engagement

(1) An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment.

(2) On making an order for re-engagement the tribunal shall specify the terms on which re-engagement is to take place, including—

(a) the identity of the employer,

(b) the nature of the employment,

(c) the remuneration for the employment,

> *(d) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of re-engagement,*
>
> *(e) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and*
>
> *(f) the date by which the order must be complied with.*
>
> *(3) In calculating for the purposes of subsection (2)(d) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of re-engagement by way of—*
>
> *(a) wages in lieu of notice or ex gratia payments paid by the employer, or*
>
> *(b) remuneration paid in respect of employment with another employer,*
>
> *and such other benefits as the tribunal thinks appropriate in the circumstances.*
>
> *(4) . . .*

29. The essential distinction between the two types of order is that an order for reinstatement requires the employer to reinstate the employee to the job from which she was dismissed whereas an order for re-engagement requires the employer (or an associated employer) to take the employee back into its employment to a post and on terms specified by the Tribunal. In addition to this the Tribunal has power to order payment of lost earnings and benefits in the period between dismissal and reinstatement or re-engagement. Critically, this element is not subject to the cap on compensation which applies to the compensatory award (see below) and can take account of increases the employee would have received had she remained employed.

30. Where back pay is ordered it will not be as a lump sum, rather it *"should specify amounts payable by reference to rates of pay or other formulae so that appropriate calculations can be made when the date of any reinstatement is known"* (per Lord Donaldson MR in *O'Laoire v Jackel International Ltd [1990] IRLR 70*, *CA*).

31. Sections 114(2) and 115(2) ERA set out matters which the Tribunal must specify in its order should it decide to order reinstatement or reengagement. In *British Telecommunications PLC v Thompson supra* an order for re-engagement

was set aside by the EAT where a Tribunal had failed to specify an actual date for compliance; the same principle applies to an order for reinstatement. Additionally, where a Tribunal decides to make an order for re-engagement that order is liable to be set aside if it does not specify the nature of the employment with sufficient precision (*Lincolnshire County Council v Lupton [2016] IRLR 576).*

32. An order for re-engagement must be *'on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement'* unless the employee has partly contributed to her own dismissal (ERA 1996 s 116(2)–(4)). This does not entitle a Tribunal to order re-engagement on specifically more favourable terms than would have applied if the employee had been reinstated to her original job (*Rank Xerox (UK) Ltd v Stryczek [1995] IRLR 568).*

33. The Tribunal has a wide discretion in deciding whether either order is appropriate but the legislation identifies three factors it must consider: the employee's wishes; whether it is practicable for the employer to comply with an order; and whether the employee has caused or contributed to her own dismissal (section 116).

34. When considering reinstatement or re-engagement, a Tribunal should not take into account any *Polkey* reduction as this concerns compensation and not reinstatement or re-engagement (*Arriva London Ltd v Eleftheriou [2012] UKEAT/0272*). The facts taken into account when making a *Polkey* deduction may nevertheless be relevant in deciding whether it is just to order reinstatement or re-engagement or in considering contributory fault.

<u>The practicability of making an order</u>

35. Consideration of practicability can arise at the first remedy hearing or at a further hearing if an order for reinstatement or re-engagement has not been complied with. We are concerned only with the first stage.

36. The issue of practicability is a question of fact for the Tribunal (*Port of London Authority v Payne CA [1994] IRLR 9*) and is to be judged at the date when the order would take effect (that is, at the time of or shortly after the remedy hearing) (*King v Royal Bank of Canada Europe Limited [2012] IRLR 280*).

37. In *Port of London* supra Neill LJ said as follows about the assessment by Tribunals of practicability:

> *"The standard must not be set too high. The employer cannot be expected to explore every possible avenue which ingenuity might suggest. The employer does not have to show that reinstatement or re-engagement was impossible. It is a matter of what is practicable in the circumstances of the employer's business at the relevant time."*

38. In *Lincolnshire County Council v Lupton [2016] IRLR 576*, the EAT observed that re-engagement is not to be used as a means of imposing a duty to search for and find a generally suitable place within the ranks for a dismissed

employee irrespective of actual vacancies. An employer does not necessarily have a duty to create a space for a dismissed employee to be re-engaged and there is no statutory presumption that an employer is required to displace or bump an existing employee. However, in order for the parties to be able to address the suitability of any vacancies, an employer should produce evidence as to what vacancies exist in its organisation at the time of the remedy hearing. In *Dafiaghor-Olomu v Community Integrated Care and Cornerstone Community Care [2018] ICR 585*, for example, the EAT allowed an appeal where the employer did not provide evidence of available vacancies. In the particular circumstances of that case, where the claimant sought re-employment without placing any express limitation on geographical location, the EAT held that it was incumbent on the Tribunal to explore whether the claimant would be willing to work outside the geographical location where she was previously employed. This should have been raised as a matter of course irrespective of the parties' failure to do so, rather than basing its decision on assumption or speculation.

39. Other factors which have been thought relevant in justifying a Tribunal refusing an order for reinstatement of re-engagement are: the fact that the atmosphere in the workplace is poisoned (*Meridian Ltd v Gomersall [1977] IRLR 425*, *EAT*, and see *Coleman v Toleman's Delivery Service Ltd [1973] IRLR 67*, and *Schembri v Scot Bowyers Ltd [1973] IRLR 110*); the fact that the employee has shown that she distrusts or lacks confidence in her employer and would not be a satisfactory employee if reinstated (*Nothman v London Borough of Barnet (No 2) [1980] IRLR 65, CA* (where the employee thought she had been the victim of a conspiracy by her employers)); where the employee has made allegations against the people with whom she would be working if reinstated or re-engaged which would make it impossible for them to work together, even though that was the inevitable result of fighting her case. In *Wood Group Heavy Industrial Turbines Ltd v Crossan [1998] IRLR 680*. the claimant was dismissed for misconduct arising out of allegations that he had used and dealt in drugs at the workplace and for timekeeping and clocking offences. The Tribunal found that the dismissal was unfair on the basis that, even though the employer had formed a genuine belief that the misconduct had taken place and that this belief was reasonable on the basis of the evidence before it, there had still been a failure to carry out a proper investigation and the claimant had not been given a fair procedure. The Tribunal then went on to order re-engagement on the basis that there appeared to be no animosity between the claimant and the individuals who had given evidence against him. The employers appealed to the EAT. In allowing the appeal Lord Johnston commented:

> *".. even if it be the case that the witnesses asserted, as a matter of generality including fellow employees, there was no animosity likely to be exhibited towards the [claimant]. We cannot lose sight of the fact that in addition to his general defence of conspiracy, in one of his interviews the [claimant] asserted positively that a number of other people had been "out to get him" by reason of incidents in another part of the factory. That does not seem to us to be merely a knee jerk reaction to specific allegations. All in all, it seems to us there are sufficient factors bearing on the issue of*

practicability in this case, such as we have rehearsed, to render it impracticable to order re-engagement."

40. However, the fact that an employee has made serious allegations against colleagues or managers at one workplace will not necessarily impact on the relationship which she will have with colleagues and managers at a different workplace: see *Oasis Community Learning v Wolff* UKEAT/0364/12 *(17 May 2013, unreported)* (Underhill J presiding) where the Employment Tribunal ordered re-engagement at a different workplace.

41. Another factor affecting practicability is whether the employee will be sufficiently employed (*Tayside Regional Council v McIntosh [1982] IRLR 272*). That said, under ERA sections 116(5) & (6) an employer may not argue that it cannot reinstate or re-engage the dismissed employee because it already has a permanent replacement unless it can show one of the following:

41.1 that it was not practicable for it to arrange for the dismissed employee's work to be done without engaging a permanent replacement; or

41.2 that it engaged the replacement after the lapse of a reasonable period, without having heard from the dismissed employee that he wished to be reinstated or re-engaged, and that when the employer engaged the replacement it was no longer reasonable for it to arrange for the dismissed employee's work to be done except by a permanent replacement.

42. In appropriate cases, a Tribunal may have to take into account the fact that, if the employee had not been dismissed, she may have been entitled to be offered different work because of a duty to make reasonable adjustments for a disabled person (*Great Ormond Street Hospital for Children NHS Trust v Patel [2007] UKEAT/0085*).

Contributory action by the employee

43. If the employee has caused or contributed to her dismissal, this factor must be taken into account by the Tribunal when considering reinstatement or re-engagement. The test for contributory fault is the same whether compensation is ordered or an order made for reinstatement or re-engagement (*Boots Co plc v Lees-Collier [1986] IRLR 485)* and we consider it in more detail in the context of compensation (below). A Tribunal will only order reinstatement of an employee who has contributed to the dismissal in a blameworthy sense in exceptional circumstances but an order for re-engagement may sometimes be appropriate, with the Tribunal reflecting the employee's fault in the terms on which re-engagement is ordered. However, a Tribunal cannot order re-instatement under the guise of a re-engagement order: in *British Airways PLC v Valencia supra* the EAT held that it was wrong in principle to order re-engagement of an employee

into his old job (reinstatement) without back pay under a re-engagement order where there was a finding of 80% contribution.

44. Enforcement of orders for reinstatement or re-engagement is dealt with in ERA section 117 but, as we are simply concerned with the appropriateness of either order in this hearing, we have not set out the law relating to enforcement.

Compensation

45. An award of compensation is the most common result in unfair dismissal cases. It is assessed under two heads; the basic award and the compensatory award (see ERA section 118).

The basic award

46. The provisions relating to the basic award are contained in ERA sections 119 to 122 and in section 126. Such an award is, save in the case of very young employees, calculated in the same way as a statutory redundancy payment. The formula provides for the payment of a tax-free sum based on the number of full years' service the employee has before dismissal. The employee receives half a week, a week's or a week and a half's gross pay for each full year of service dependent on their age in that year. The amount of reckonable service is limited to 20 years so the highest possible multiple (which would be age dependent) is 30 weeks' pay. A week's pay is subject to a statutory maximum which, at the time of the Claimant's dismissal stood at £450 (see ERA section 227).

47. The Tribunal has limited power to reduce a basic award. It can do so where an employee has unreasonably refused an offer of reinstatement but that does not apply in this case. It may also reduce a basic award if it considers that any conduct of the employee prior to dismissal (or the giving of notice of dismissal) was such that it would be just and equitable to reduce the basic award (ERA section 122(2)). A Tribunal is entitled to consider any conduct of the employee in this context and not simply matters known at the time of dismissal but the employee must in some sense be culpable or blameworthy in respect of the conduct to justify a deduction (see *Langston v Department for Business Enterprise and Regulatory Reform* [2009] *UKEAT/0534).*

The compensatory award

48. The provisions relating to the compensatory award are contained in ERA sections 123, 124, 124A and 126. The basic principles underlying the calculation of compensation are described in section 123(1) & (2) as follows:

> ***123.*** *Compensatory award*
>
> *(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard*

to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

Calculating loss

49. A compensatory award is intended to compensate for loss actually suffered and not to penalise the employer for its actions (see *Optimum Group Services plc v Muir [2013] IRLR 339*). The relevant questions are: whether the loss was occasioned or caused by the dismissal; whether it is attributable to the conduct of the employer; and whether it is just and equitable to award compensation. This final requirement is an overriding one imposed by the statute, so in some cases, despite proof of substantial losses, there may be no or a reduced award of compensation because it is not just and equitable to award more (see *W Devis & Sons Limited v Atkins [1977] IRLR 314*). An example might be where dishonest conduct by a dismissed employee during employment is only discovered after his or her dismissal.

50. In *Dunnachie v Kingston Upon Hull City Council [2004] IRLR 727* the House of Lords confirmed that an award for injury to feelings was not available under ERA 1996 s 123(1) which does not permit the recovery of non-economic losses (such as general damages for personal injury). Permissible heads of loss include: past and future loss of earnings, loss of pension and fringe benefits, expenses incurred in looking for other work, and compensation for loss of statutory rights and accrued statutory notice. This last head of loss reflects the fact that the dismissed employee will have to work for 2 years in new employment to reacquire the right not to be unfairly dismissed and will have to "re-earn" their minimum statutory notice period; the award is generally for a conventional amount somewhere in the region of £500.

51. In determining the amount of an employee's loss, the Tribunal must decide what would have happened but for the unfair dismissal. The probable consequence in some cases would have been no dismissal but for the unfairness and in others the probability is that the employee would have been dismissed in any event. In the former case losses will be open-ended (subject to it being just and equitable to award them and the statutory cap discussed below); in the latter losses will be limited to the period in which a fair process would have been completed and, in some instances, may be nothing at all (see *Credit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604*). Inevitably, as the assessment is of events which did not occur, it requires the Tribunal to exercise

its judgment based on the inferences it is reasonable to draw from the primary facts. We consider this in more detail in the following paragraphs.

Polkey

52. It is difficult in some cases to be certain whether the dismissal would have occurred had the employer acted fairly. Classically this problem arises in circumstances where the employer has failed to act fairly because it has failed to apply certain procedural safeguards which might, had they been applied, have led to the employee retaining her job. Prior to the decision in *Polkey v AE Dayton Services Ltd [1987] IRLR 503 HL*, the courts took the view that, if on the balance of possibilities the dismissal would have occurred, then the dismissal should be held to be fair; the House of Lords in *Polkey* held that this was not good law. Lord Bridge indicated, however, that the chances of whether or not the employee would have been retained must be taken into account when calculating the compensation to be paid to the employee. Accordingly, if the prospects of the employee having kept his job had proper procedures been complied with were slender, then there would be a significant reduction in compensation: this is sometimes referred to as "the *Polkey* reduction" or simply as *"Polkey"*.

53. Tribunals are required to take a common-sense approach when assessing whether a *Polkey* reduction is appropriate and the amount of any such reduction (*Software 2000 Limited v Andrews [2007] IRLR 568)*; the nature of the exercise is necessarily "broad brush" (*Croydon Health care Services v Beatt [2017] IRLR 274*); and the assessment is of what the actual employer would have done had matters been dealt with fairly not how a hypothetical fair employer would have acted (*Hill v Governing Body of Great Tey Primary School [2013] IRLR 274*).

54. The *Polkey* reduction does not apply to the basic award for unfair dismissal, where the test is whether the employee's conduct makes is just and equitable to reduce or extinguish the award. These questions may turn on the same evidence as *Polkey* though.

Mitigation

55. An employee who has been unfairly dismissed is under the same duty to mitigate her losses as all claimants in any civil proceedings. The duty to mitigate only arises after the dismissal and it requires the employee to take reasonable (and not all possible) steps to reduce her losses to the lowest reasonable amount. The burden of proving a failure by a claimant to mitigate lies on the respondent (see *Wilding v British Telecommunications plc [2002] ICR 79* and *Cooper Contracting Limited v Lindsey [2015] UKEAT/0184*). In *Singh v Glass Express Midlands Limited [2018] UKEAT/0071*, HHJ Eady QC (as she then was) gave the following guidance on the correct approach to the question of mitigation:

55.1 The burden of proof is on the wrongdoer; a claimant does not have to prove they have mitigated their loss.

55.2 It is not some broad assessment on which the burden of proof is neutral; if evidence as to mitigation is not put before the ET by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works; providing information is the task of the employer.

55.3 What has to be proved is that the claimant acted unreasonably; the claimant does not have to show that what they did was reasonable.

55.4 There is a difference between acting reasonably and not acting unreasonably.

55.5 What is reasonable or unreasonable is a matter of fact.

55.6 That question is to be determined taking into account the views and wishes of the claimant as one of the circumstances, but it is the Tribunal's assessment of reasonableness – and not the claimant's – that counts.

55.7 The Tribunal is not to apply too demanding a standard to the victim; after all, they are the victim of a wrong and are not to be put on trial as if the losses were their fault; the central cause is the act of the wrongdoer.

55.8 The test may be summarised by saying that it is for the wrongdoer to show that the claimant acted unreasonably in failing to mitigate.

55.9 In cases in which it might be perfectly reasonable for a claimant to have taken on a better paid job, that fact does not necessarily satisfy the test; it would be important evidence that may assist the Tribunal to conclude that the employee has acted unreasonably, but is not, in itself, sufficient.

Contributory fault

56. ERA Section 123(6) says as follows:

123(6) 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.

57. This section requires the Tribunal to decide whether the employee contributed to her own dismissal, not simply to its unfairness (for example where an employer fails to establish a potentially fair reason for dismissal or adopts an unfair procedure). The employee's conduct need not be the sole, principal or even the main cause of her dismissal as the words *"to any extent"* are deliberately broad (see *Carmelli Bakeries Limited v Benali [2012] UKEAT/0616*). That said, the conduct must be *"culpable or blameworthy"* and not simply some

matter of personality or disposition or unhelpfulness on the part of the employee in dealing with the disciplinary process in which she has become involved (see *Bell v The Governing Body of Grampian Primary School [2007] All ER (D) 148).* The Tribunal may take a very broad view of the relevant circumstances when determining the extent of contributory fault (see *Gibson v British Transport Docks Board [1982] IRLR 228*). The Tribunal cannot take into account an employee's conduct of which the employer was unaware at the time of dismissal (although this may be relevant to the "just and equitable" condition); the employer's own conduct or that of a third party (unless an agent of the employee); or conduct not contributing to the dismissal. It is open to a Tribunal to make a finding of 100% contributory fault, although recent authority suggests that this would be unusual (*Steen v ASP Packaging Limited [2014] ICR 56*).

The relevance of Codes of Practice

58. Under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 an award of compensation for unfair dismissal can be increased by up to 25% if the employer has unreasonably failed to comply with a relevant Code of Practice issued by ACAS or the Secretary of State (there is a corresponding power to reduce awards by up to 25% where an employee unreasonably failed to comply with a relevant Code). This power to increase or reduce applies only to the Compensatory Award for unfair dismissal and not to the Basic Award (see ERA sections 118 and 124A).

The statutory cap

59. ERA section 124 places a cap on the compensatory award which, at the date of the Claimant's dismissal, was the lower of £74,200 or 52 weeks' pay. In this case a week's pay is not subject to the statutory maximum in ERA section 227 but reflects actual gross pay to which must be added the value of any benefits including employer's pension contributions. In this case it is agreed that 52 weeks' pay for the Claimant at the date of her dismissal, inclusive of benefits, was £52,261.74 (and we find this as a fact on the evidence), so this is the maximum award of compensation we can make in this case irrespective of the true total of the Claimant's losses.

60. The order of deductions (and uplifts) can affect calculations in such a way that the statutory cap is not reached. In *Digital Equipment Co Limited v Clements (No 2) [1997] IRLR 140* the Court of Appeal held that a *Polkey* reduction must be applied before any credit is given for sums paid by the employer to the employee on account of the dismissal (such as notice pay). Deduction for contributory fault only occurs after the initial loss (including any *Polkey* reduction) has been calculated (*Rao v Civil Aviation Authority [1994] IRLR 240*). By virtue of ERA section 124A any uplift (or reduction) in compensation for non-compliance with a Code of Practice must be applied before any reduction for contributory fault. The final figure is itself subject to the statutory cap which is applied last of all.

The basic and largely uncontentious facts

61. The Claimant was born on 14 January 1961 and is presently aged 59. Her employment with the Respondent began on 1 May 2003 when she was aged 42 and she was dismissed summarily on 28 November 2013 when she was aged 52. The Claimant had ten full years of service at the date of her dismissal. The Claimant's salary on dismissal was £45,053 per annum, plus employers' pension contributions of 16% (a further £7,208.24). Her net salary at dismissal, inclusive of her pension contribution of 7.5%, was £34,704. Her annual employee's pension contribution was £3,379.

62. Having regard to the statutory limit on a week's pay then in force (£450) and the Claimant's age, the mathematics of a basic award for unfair dismissal is agreed at £6,750 and the maximum compensatory award ("the statutory cap") at £52,261.74 (£45,053 plus £7,208.24). These restrictions do not apply to the amount the Tribunal can order in respect of lost benefits were it to make an order for reinstatement or re-engagement.

63. The Respondent operates a defined benefits pension scheme under which employees earn pension at the rate of one eightieth for each year of service. Calculation of loss of pension benefits can be complex and we explained to the parties at the hearing that we may require further evidence to calculate this. Whether this is necessary or proportionate, depends on our findings on other issues.

Compliance with the ACAS Code of Practice

64. We look at the following questions in this section of our Reasons:

64.1 Does a relevant Code apply?

64.2 Did the employer fail to comply with it?

64.3 Was that failure unreasonable?

64.4 If the answer to the foregoing questions is yes, is it just and equitable to increase any award to the Claimant?

64.5 How much should any increase be, up to a maximum of 25%, of compensation?

65. The Respondent has not argued that there should be a reduction in any award because the Claimant failed to comply with a relevant Code.

66. We find that the relevant Code of Practice in this case is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009. ACAS also issued a Guide to this in 2011. A failure to follow guidance does not lead to an increase or reduction under Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

67. Relevant findings of fact are contained in paragraphs 66 to 77 of the Liability Judgment where breaches of paragraphs 5 and 9 of the 2009 Code of Practice are identified. Indeed, the breach of paragraph 9 is described there as *"woeful"*. It is clear that in some respects the breaches arose out of an incompatibility between the Respondent's statutes and the ACAS Code of Practice itself, but others were matters of choice; see, for example paragraphs 72 and 73 of the Liability Judgment. These breaches were unreasonable in our judgment. Particularly, as it appears that the Respondent's HR Officers were aware of the incompatibility of the Respondent's statutes with the Code.

68. Having regard to these factors, we find it just and equitable to increase any compensatory award by the maximum permissible, namely 25%.

What would have happened but for the Claimant's dismissal (*Polkey*)?

69. This issue requires the Tribunal to assess what would probably have happened had the Claimant not been dismissed unfairly and, if there is a range of possible outcomes, apportion the chances between them.

70. The Respondent's case is that the Claimant is likely to have been fairly dismissed by 28 November 2013, or within a short while of then in any event and the Claimant's case is that she would not have been dismissed at all: in our judgment the answer to this issue does not lie at either of these extremes. We find that there was a chance that the Claimant would have been dismissed in any event, but that this is unlikely to have happened in the short, or even medium term and that there was an equal chance that the Claimant would not have been dismissed at all. Our finding is that there was a 50% chance of dismissal, but not before December 2015 in any event (two years after actual dismissal). Our reasons are as follows.

70.1 We find that the Claimant was a difficult employee to manage. Professor Crossman described her as the most difficult individual he had ever had to deal with in his working life. There are findings at paragraphs 37 and 38 of the Liability Judgment which illustrate this, although they also point to failings on the part of the Respondent. We observe, too, that the Claimant described herself as *"feisty"* in her evidence and submissions to us. We understood this to mean that she was not afraid to speak out when she disagreed with something or someone.

70.2 We find that the Claimant is someone who characterises treatment she disagrees with as "unreasonable", "oppressive", "bullying", "harassment" or "victimisation" with little regard to its context or the fact that an employee is under an obligation to follow reasonable management instructions. Examples are given in the Liability Judgment at paragraphs 26, 31 and 32, 34, 35, 44, 55 and 56.

70.3 Having transferred to an AST (teaching rather than research) role, the Claimant's stance in relation to her duties was obstructive and inconsistent. For example, at paragraph 49 of the Liability Judgment, the Tribunal found that the Claimant had been told that by taking an AST role she would be leaving a research career behind. She still chose to apply for the AST post but subsequently criticised her managers for restricting her ability to do research (see paragraph 4 of the Claimant's letter of 21 February 2013 in Liability Bundle 2, page 1198 and her letter of 11 March 2013 in Liability Bundle 2, page 1263). Similarly, while there may have been a difference of understanding about the role she had been asked to take on (Deputy Leader of Year 3) at a meeting on 19 November 2012, reflected in emails exchanged in the days following, there was no doubt about the work she was being instructed to do when Professor Crossman sent his email to her of 27 November 2012 (Liability Bundle 2, page 1082). Although couched in polite and conciliatory terms, no reasonable reading could arrive at any conclusion other than that this email was an instruction. The Claimant did not follow it; for example, she did not attend a timetabling meeting and did not contribute substantially to the Year 3 exam paper. In a letter dated 25 February 2013 (Liability Bundle 2, pages 1202 – 1203), the Claimant asked her managers to stop sending her *"written communications containing misleading and / or factually wrong information"*. She described this treatment as *"intimidating and offensive"*. The Respondent's correspondence was neither and any reasonable room for doubt about what was expected of the Claimant and what she had been instructed to do, had ended with Professor Crossman's email of 27 November 2012. Similarly, in a meeting in April 2013, the Claimant described her treatment as *"uncomfortable"* but it seems to us that she was simply being asked to get on with work as she had been instructed to do.

70.4 We find that some of the Claimant's managers and colleagues felt bullied by her and that this was with cause. Professor Crossman cited a number who found relations with her difficult at paragraph 12 of his statement for the Remedy Hearing. The Claimant disputed this in evidence, but when pressed on which managers she had a good relationship with, she struggled to answer convincingly. She could only give two examples and could not remember the name of one of them.

70.5 The ATS role, which the Claimant had applied for and been appointed to, was a teaching one and the Claimant was likely to require continuing management as part of a teaching programme and there is every indication that the Claimant would have remained resistant to this.

71. In our judgment these five factors support the Respondent's case that the Claimant would have been dismissed in any event either on grounds of misconduct or because of an irretrievable breakdown in workplace relationships. On the other hand, the Claimant had been employed for 10 years without facing any disciplinary proceedings or performance management. We do not think that the Claimant's manner in the work place, *"feisty"* from her perspective unmanageable from the Respondent's, had changed overnight (so to speak), she had always been this way and that had been tolerated and accommodated. Furthermore, there were times when her suspicion of management had been justified (see for example paragraph 29 of the Liability Judgment). It is notable too that disciplinary proceedings only materialised when Professor Ward raised a complaint in the course of investigating her grievance.

72. Our best assessment, therefore, is that there was an even chance (50%) that the Claimant's employment would have been ended fairly on disciplinary grounds, or for some other substantial reason based on a breakdown of working relationships within the faculty. In our judgment, any such process would have been slow having regard to the weight attached in academic institutions to concepts such as academic freedom and tenure. Again, doing the best we can, we assess the likely period before a fair dismissal on these grounds at two years from the date of actual dismissal.

73. It follows from our finding under this head that there was a 50% chance that the Claimant would not have been dismissed at all, but accommodated in some way within the Faculty.

Contributory Fault

74. The facts relevant to our assessment under this head are the same, or similar, to those relating to the *Polkey* chance dealt with above. But the assessment itself is different. Here we must decide whether the Claimant's conduct contributed to her dismissal and whether that conduct was culpable or blameworthy.

75. We find that the Claimant did contribute to her dismissal by culpable or blameworthy conduct and assess the level of contribution at 50%. The facts which underlie this conclusion are those described at sub-paragraphs 70.1, 70.2 and 70.3 in respect of the *Polkey* chance but, in summary:

75.1 The Claimant made herself unmanageable by her actions in circumstances where it was necessary to manage her;

75.2 She made gratuitous and unreasonable allegations, in particular against Professors Holland and Crossman;

75.3 She adopted an inconsistent and uncooperative approach to discussions concerning her role and duties as an AST.

76. In simple terms, her actions brought about her dismissal as much as the unfairness of the Respondent's own processes. Those actions were culpable as the Claimant, who is evidently an educated and intelligent woman, knew or ought to have known that she must follow her employer's reasonable instructions (instructions which we find were reasonable as far as her duties were concerned).

Reinstatement/Re-engagement

77. We have decided that it is inappropriate to make an Order for reinstatement or re-engagement. In reaching this conclusion we have had regard to the Claimant's wishes, but do not find that it is practicable for the Respondent to comply with an order for reinstatement or re-engagement. Moreover, having regard to our finding in respect to contributory fault, we do not find it just and equitable to make either type of order.

78. Additionally, we find that there are practical difficulties in making such orders arising from the particulars which must be specified under the ERA. We explain each of these conclusions in more detail below.

The Claimant's wishes

79. The Claimant has been consistent in expressing a wish to be reinstated in the hearing before us. She did not focus on re-engagement and did not identify in her evidence or submissions other roles which might be suitable to re-engage her to.

80. The Claimant's evidence to us about how reinstatement might work was not consistent: at times she suggested that she would be willing to resign on agreed terms upon reinstatement, but at others she envisaged resuming work when she was fit enough to do so and with appropriate adjustments. She was unable to say when she might be fit enough to resume work and did not identify what adjustments were required, or the medical or legal basis for making them.

81. When the Claimant presented her claim for unfair dismissal in February 2014, she only sought compensation. In a Schedule of Loss dated 27 January 2017 the Claimant expressed a wish to retire with a full pension on 1 April 2017 and she said as follows in paragraph 1:

> *"1. The schedule of loss enclosed with this document includes the request for my immediate reinstatement, which is required in order to recover the past losses of earnings and pension (under the USS final salary scheme) and to ensure continuation of service up to the termination date of my employment. This means that reinstatement will only be pursued in order to put me back in the same financial position as I would have been had I not been unfairly dismissed by the Respondent and to ensure that the subsequent termination of my employment is enacted in accordance to current legislation."*

82. In a Schedule of Loss dated 1 March 2017, she began paragraph 3 under the heading *"Redundancy"* as follows:

> *"As mentioned in schedule 2 of this document, my immediate reinstatement is pursued with the intention to secure a mutually agreed departure from the University*

83. She repeated this point in a written submission in relation to remedy dated 7 June 2017.

84. In our judgment, these express statements evidence the Claimant's true intention which is to secure an order for reinstatement as a means of recovering uncapped past losses and as a platform from which to negotiate an agreed exit from the Respondent. We do not find that this amounts to a genuine wish to be reinstated or re-engaged. Rather, it is an impermissible attempt to circumvent the cap on compensatory awards for unfair dismissal imposed by Parliament and to which the Employment Tribunals is expected to give effect.

85. This is a sufficient basis upon which to dismiss the application for reinstatement or re-engagement but we have nevertheless gone on to consider the remaining issues of practicability, the relevance of contributory fault and the terms of any potential order.

Practicability

86. In our judgment it is not practicable to make an order for reinstatement or re-engagement on the following grounds:

86.1 There has been a breakdown in trust and confidence between the parties; and

86.2 There is no evidence of duties remaining to be carried out by the Claimant which have not been absorbed by other members of staff.

Trust and confidence

87. The issue of trust and confidence must be assessed by how things stand now and not simply as they were at the time of dismissal. That said, we start with the position as it was at dismissal. The Claimant was plainly mistrustful of the Respondent; she had asserted that she had been the subject of discrimination, harassment, victimisation and bullying by various managers and that this treatment had culminated in summary dismissal. She had raised 6 formal grievances between 2005 and 2013 and had made further complaints about a number of individuals. For its part, the Respondent had spent an inordinate amount of time seeking to establish agreed duties. Professor Ward pursued disciplinary charges because he formed the view that the Claimant had been bullying her superiors.

88. The Claimant asserted in her first claim form that she had been the subject of *"fabricated evidence"*, *"lies"* and *"character assassination"*. In her second, that there had been a *"catastrophic breakdown in the relationship"* and that she had been *"set up for failure"*. As the proceedings have progressed, she has accused the Respondent and its advisors of manipulation and dishonesty and has asserted that she is the victim of a conspiracy. It is also part of the Claimant's case that she has been caused a severe psychiatric injury by the Respondent and that because of this she has been unfit to work since her dismissal.

89. We have considered the Claimant's argument that many of the people about whom she had complained have now left the Respondent (it is over 6 years since she last worked there) but it is notable that she continues to seek to reopen her claims, most recently by an application for Judicial Review. We note too, that some of the individuals about whom the Claimant has expressly complained remain employed by the Respondent (Professors Hunter, Wileman and Ward). It is clear to us that there is no trust and confidence between these parties of the sort necessary to sustain reinstated or re-engaged employment into the future.

The availability of work

90. The evidence shows that the Claimant was not replaced. Rather, her duties were redistributed to existing members of staff: Dr Sexton and then Dr Schuller took over most of the Claimant's work.

91. Had ERA section 116(5) been engaged (which we do not find on the facts), we would nevertheless have concluded that it was reasonable to have replaced the Claimant given the time that has elapsed since her dismissal (see section 116(6)(b)). We also find that the Respondent is presently attempting to reduce its work force because of financial pressures and that this too affects the practicability of an order for reinstatement or re-engagement.

The relevance of contributory fault

92. Having regard to our conclusion on contributory fault and the facts underlying it, we do not find that it would be just to order reinstatement or re-engagement.

The particulars of any order

93. Leaving to one side our assessment of the foregoing matters, there would still have been a fundamental impediment to the making of orders under ERA sections 114 and 115: it is a mandatory requirement of both that the order specifies the date by which it must be complied with. The Claimant could not say when she will be fit to return to work and there was no medical evidence to address this either. Nevertheless, her evidence was that she is currently unfit for work and this was supported by medical certificates produced following the postponement of the remedy hearing, part-heard in January 2020. Her case

goes further than that, however, in that she claims that she has been unfit for work since her dismissal.

94. In these circumstances the Tribunal cannot identify a relevant date for compliance with an order for reinstatement or re-engagement as required by the Statute.

95. Neither party advanced evidence of alternative suitable roles to which the Claimant could have been assigned under an order for re-engagement (the Respondent's case being that there are no such roles presently). Additionally therefore, in respect of this type of order, the Tribunal cannot specify the nature of the employment or the remuneration for it contrary to the requirements of the Statute.

96. For these reasons, the Claimant's application for reinstatement or re-engagement is dismissed.

Compensation

97. It follows from the above that we find that the appropriate remedy in this case is compensation calculated in accordance with ERA sections 118 to 124A and 126.

The Basic Award

98. The only issue which arises in respect of the basic award is whether it is just and equitable to reduce it because of any conduct of the Claimant before dismissal.

99. We do not find that it is just and equitable to make such a reduction in this case, notwithstanding our finding of contributory fault. Unfairness in this case flowed from the circumstances in which disciplinary charges arose (investigation of the Claimant's grievance) and the flaws in the Respondent's own procedure of which it was the master. While the Claimant may have contributed to the reasons underlying the decision to dismiss, she did not contribute to these factors. We find, therefore, that she is entitled to a full basic award for unfair dismissal of £6,750.

The Compensatory Award

100. Under ERA section 123(4), the Tribunal must apply the common law rules relating to mitigation when assessing compensation and we begin with our findings in respect of this.

Mitigation

101. While every litigant is under a duty to take reasonable steps to reduce their losses to their lowest reasonable level, it is for a party asserting a failure to

mitigate (in this case the Respondent) to prove it. We have had regard to the guidance given by HHJ Eady QC (as she then was) in *Singh v Glass Express Midlands Limited (supra)* when considering this.

102. Professor Edwards gave evidence about other roles open to the Claimant at paragraphs 68 to 93 of his witness statement. He identified lecturer vacancies available in 2014, 2015, 2016 and 2017. He also referred to potential commercial roles at paragraphs 92 and 93 of his statement.

103. The Claimant maintained that she could not work after her dismissal. Her reasons appear to be both medical and alleged disadvantage in the market place for academic jobs because of the manner and circumstances of her dismissal.

104. As noted above, there is no relevant medical evidence supporting the Claimant's absence from work for the past six years. We found her evidence about disadvantage in the workplace unconvincing: it amounted to no more than an assertion that she needs a reference and is unlikely to be given one (or a good one) by the Respondent. Despite the passing of the years, the Claimant has not tested this by going into the market place for new roles, asking the Respondent for a reference or identifying it as a referee. Furthermore, we prefer Professor Crossman's evidence that it is open to academics to obtain alternative references from their peers: it is notable that in this case the Claimant has been able to produce and rely on supportive witness statements from several such colleagues.

105. The Claimant's witnesses identify the Claimant's strengths as a scientist, so there is every reason to believe that the Claimant would have found a suitable post had she re-entered the job market.

106. For these reasons we find that the Respondent has discharged the burden of proof and conclude that the Claimant has not taken reasonable steps to mitigate her losses.

107. We find on the balance of probabilities and having regard to the evidence given by Professor Edwards that, had the Claimant complied with her duty to mitigate, she would have secured an alternative lectureship by the commencement of the academic year in 2015. We did not find that it was reasonable to have expected her to have found alternative employment by the beginning of the 2014 academic year as the Tribunal's industrial experience is that recruitment processes, particularly for large institutions, begin some months ahead of a start date and during the early and middle part of 2014 the Claimant was still involved in her appeal against dismissal and was reasonably focussed on reinstatement through that process.

108. We find that, as academic salaries are negotiated and fixed centrally (see page 105 of the Core Remedy Bundle), the Claimant's loss of earnings and pension would have ended at the beginning of the 2015 academic year too.

109. We find, therefore, that the period of loss to be compensated for ends on 28 September 2015, the beginning of the 2015 academic year (approximately); that is 21 months post dismissal.

The calculation of loss

Relevant pay rates

110. At the date of her dismissal, the Claimant's gross pay was £45,053 per annum. This would have increased to £45,954 per annum with effect from 1 August 2014 and risen again to £46,414 per annum with effect from 1 August 2015. In addition, the Claimant would have received an employer's pension contribution equivalent to 16% of gross pay.

111. For simplicity of calculation, we have apportioned loss of earnings as follows:

111.1 Period 1 - 8 months at £45,053 gross per annum;

111.2 Period 2 - 12 months at £45,954 gross per annum;

111.3 Period 3 - 2 months at £46,414 gross per annum;

112. Net pay in Period 1 is agreed at £2,892 per calendar month inclusive of employee's pension contribution.

113. We calculate net pay in period 2 at £2,913 per calendar month to April 2015 (8 months - Period 2a) and £2,925 per calendar month from then, the beginning of the new financial year (4 months - Period 2b).

114. In Period 3, net pay would have been £2,970 per calendar month.

115. We find that the employer's pension contribution (16% of gross pay) in Period 1 would have been £600.71 per calendar month, in Period 2 £612.72 and in Period 3 £618.85 per calendar month.

Calculation

116. Loss of earnings:

Period 1	8 months x £2,892	=	£ 23,136
Period 2a	8 months x £2,913	=	£ 23,304
Period 2b	4 months x £2,925	=	£ 11,700
Period 3	2 months x £4,970	=	£ 1,940
	Total	=	**£ 60,080**

117. Loss of pension contributions:

117.1 As the relevant period of pension loss is short (21 months) we find it proportionate to calculate losses by reference to the amount of the employer's contributions rather than the loss of pension benefits. Furthermore, neither party presented detailed evidence on pension loss of the sort necessary to enable the calculation of losses in a defined benefit scheme. Additionally, the employee's contribution is already incorporated in our figures for loss of earnings and this would have to be deducted if a detailed calculation were to be made.

117.2 Accordingly, the employer's contributions would have been as follows:

Period 1	8 months x £671	=	£ 4,805.68
Period 2	12 months x £612.72	=	£ 7,352.64
Period 3	2 months x £618.85	=	£ 1,237.70
	Total	=	**£13,396.02**

118. Loss of statutory rights:

118.1 We award **£500** under this head which is a conventional figure reflecting the fact that the Claimant would have had to reacquire the right not to be unfairly dismissed and the right to statutory minimum notice in any new employment

119. Total of awards prior to application of uplifts and deductions:

119.1 The total of the above calculations is £73,976.02 which we round to **£73,980**.

120. Uplifts and reductions:

120.1 While we have made findings in respect of *Polkey*, it does not affect our calculations as, by the date we found the Claimant might have been fairly dismissed, two years post dismissal, the Claimant was already unreasonably failing to mitigate, so there was no relevant loss at this time.

120.2 It is necessary to apply the uplift for failure to comply with an ACAS Code of Practice next (ERA section124A). The amount of the uplift is **£18,495** giving a total at this stage of **£92,475**.

120.3 We have then applied a deduction for contributory fault of 50% which results in a compensatory award of **£46,237.50**. This falls below the statutory cap and can therefore be awarded in full.

121. Taxation:

121.1 The total of the basic award and compensatory award as calculated so far, is **£52,987.50**.

121.2 These awards are subject to tax under Part 6 of Chapter 3 of the Income Tax (Earnings & Pensions) Act 2003. This provides that the first £30,000 of the Tribunal's award is tax free (we had no evidence that the Claimant had used any portion of this allowance previously) but the remainder is subject to Income Tax. It is not liable to National Insurance. Accordingly, it is necessary to gross up our award to ensure that the Claimant receives the full amount of compensation (as assessed by us) after taxation.

121.3 Using the Government on-line tax calculator, we calculate that the amount likely to be subject to tax is £22,987.50 and that an additional **£2,622.50** needs to be added to the compensatory award to take account of this. In making this calculation, we have applied the full tax free personal allowance given the Claimant's evidence that she has not been in paid employment since her dismissal.

121.4 Accordingly, the total compensatory award rises to **£48,860**. This also falls below the statutory cap and can therefore be awarded in full.

Total financial award

122. The total of our awards, that is the basic and compensatory awards added together, is: **£55,610**.

Recoupment

123. There was no evidence that the Claimant claimed state benefits following her dismissal. She said that she had relied on savings and the help of others. Accordingly, the recoupment provisions do not apply.

_____
Employment Judge Foxwell

Date: …27.04.2020…….

Sent to the parties on: ..27.04.2020...

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For the Tribunal Office