EMPLOYMENT TRIBUNALS

Claimant: **Ms C Hughes**

Respondent: **MacArthys Laboratories Limited T/a Martindale Pharma**

Heard at: **East London Hearing Centre**

On: **27 August 2020 (in chambers) with written representation from the Claimant**

Before: **Employment Judge Jones**

REMEDY JUDGMENT

The judgment of the Tribunal is that the total award due to the Claimant for her successful claim is as follows:

Basic Award -		**£764.31**
Compensatory Award -		**£3,896.97**
Protected Disclosures - Injury to feelings	**-**	**£7,000.00**
Total:		**£11,661.28**

The Claimant is entitled to a total remedy of £11,661.28 and the Respondent is ordered to pay this amount forthwith.

REASONS

1. The Claimant was successful in her complaint of unfair dismissal. The judgment was that her dismissal was procedurally unfair. She also succeeded in her claim that she had made a protected disclosure and that she was subjected to 2 detriments because she made that disclosure.

2. The Claimant is entitled to a remedy for her successful complaints.

3. The liability judgment and reasons were promulgated to the parties on 4 May 2020. In view of the restrictions on in person court hearings because of the need for social distancing during the Covid-19 pandemic, the parties were invited to make written submissions on the remedy due to the Claimant for her successful complaints. The parties made minimal submissions on *Polkey* at the liability hearing, so the Tribunal invited them to make further submissions, if so advised, in relation to the remedy.

4. The parties were to write to the Tribunal with their submissions on remedy by 1 June 2020. The Claimant's submissions were received within that date. To date there has been no communication from the Respondent.

Law

5. In a successful unfair dismissal claim where neither reinstatement nor re-engagement would be an appropriate remedy for the claimant, any award by the tribunal will be monetary. A remedy award in an unfair dismissal case is made up of two main elements: a basic award and a compensatory award.

Basic award

6. This is set out in ***Section 119 of the Employment Rights Act (ERA)*** and is calculated using a formula that relates to the age and length of service of the successful claimant. It is calculated in units of a week's pay up to a ceiling. If the amount of a claimant's week's pay exceeded that ceiling then the amount of the award is restricted to it.

7. Under section 122(2), the Tribunal can reduce the basic award in certain circumstances where it is expressly permitted by statute. This is where one or more of the following circumstances exist in the particular case: i.e. the claimant's conduct before dismissal makes a reduction just and equitable, the employee has unreasonably refused an offer of reinstatement, the employee has been dismissed for redundancy and already received a redundancy payment or the employee has been awarded an amount in respect of the dismissal under a designated dismissal procedures agreement.

8. Section 3 of the Employment Act 2008 contains provisions giving employment tribunals the discretion to vary awards for unreasonable failure to comply with any relevant Code of Practice relating to workplace dispute resolution. This is enshrined in section 207A and Schedule 2 to TULR(C)A 1992. The relevant code is the ACAS Code of Practice of Disciplinary and Grievance Procedures.

9. Section 207A(2) provides that an employment tribunal may, if it considers it just and equitable, increase any award to an employee by up to 25% if it appears to the tribunal that the employer has unreasonably failed to comply with the ACAS Code on Disciplinary and Grievance Procedures.

Compensatory award

10. This is set out in ***Section 123 and 124 of the ERA***. The amount of the compensatory award shall be such amount as the tribunal considers to be 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. It should not be used to punish the respondent. There are two questions to be answered by a tribunal considering what should form part of a successful employee's compensatory award: firstly, whether the dismissal was the cause of the employee's loss (a question of fact) and secondly, what compensatory award would be just and equitable (a question of discretion).

11. Such losses as can be compensated would include not just wages lost due to being unfairly dismissed but also any additional benefits attached to the employment that had been lost i.e. company car, health benefits, pension, travel allowances etc. In addition, the tribunal can compensate the claimant for any additional expenses occasioned by the loss of employment i.e. expenses incurred in seeking alternative employment. The compensatory award can take into account losses extending into the future. The Tribunal has to make findings of fact based on the evidence before it, in order to determine how much and for how long it would be just and equitable to award to the claimant compensation for such future losses.

12. The claimant is under a duty to mitigate his/her loss and the tribunal would need to consider whether this has been done. The employee is under a duty to make diligent searches for alternative employment following dismissal.

Polkey deduction

13. The tribunal can make reductions from the compensatory award. They can reduce it to reflect the fact that the claimant's conduct caused or contributed to her dismissal. The tribunal can also make a *Polkey* reduction (in reference to the case of *Polkey v A E Dayton Services Ltd 1988 ICR 142)* in certain circumstances. If the evidence shows that the employee may have been dismissed properly in any event, if a proper procedure had been carried out - the tribunal should normally make a percentage assessment of the likelihood of there being a fair dismissal and apply that when assessing the compensation due to the employee. In another case, it might be more appropriate for the tribunal to fix a date by which it is confident that on a balance of probabilities, the employee would have been dismissed anyway and to limit compensation to the period up to that date.

14. A *Polkey* deduction is not only applicable in cases of procedural unfairness and can also be made when the tribunal's judgment is that the dismissal was substantively unfair. The tribunal can also take into account the likelihood of the employee resigning to look for another job or the employer ceasing to trade and calculate the effect of that on the amount of compensation that should be awarded to the successful employee.

15. The Claimant in this case referred to the judgment of Elias P in the case of *Software 2000 Ltd v Andrews* [2007] IRLR 568 which was decided while the statutory procedures and section 98A ERA were still in existence. In that case, the court distilled some principles that should be followed in these cases and those are contained in the sub-paragraphs quoted to in the Claimant's submissions. In the more recent case of

Contract Bottling Ltd v Cave [2015] ICR 146, Langstaff P also gave general guidance on applying *Polkey*. The court stated that the percentage method was the normal practice. But that even if applying the dating method, it may be necessary to assess the percentage likelihood of the employment ending by the date in question. The court also stated that what the tribunal is aiming to do is to produce a figure which as accurately as possible represented the point of balance between the chance of employment continuing and the risk it would not. It was important for the tribunal to spell out what factors it took into account in determining why it adopted a particular percentage. In doing so, the tribunal is not looking to decide the probability of a past event having happened. It is seeking to determine the likelihood in percentage terms of a future event occurring.

16. The Tribunal made findings of fact and drew conclusions on those, which were set out in the reasons for the liability judgment. In that judgment, I invited them to make representations on the relevance of *Polkey* to this decision. The Claimant sent written representations and a revised schedule of loss, which were copied to the Respondent. To date, no representations were received from the Respondent and attempts to contact the Respondent by telephone have proved unsuccessful. The Tribunal does have the comments the Respondent made in submissions at the final hearing.

ACAS uplift

17. The Claimant sought an ACAS uplift to her remedy for unfair dismissal. In her revised schedule of loss, she asks for an uplift of 20% because of the Respondent's failure to follow a fair disciplinary procedure. The Tribunal considered the failures highlighted in paragraphs 83, 90, 91, 93, 94, 104 of the liability judgment refer.

18. Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 (TUL(C)RA) deals with this. Subsection (1) and (2)(a) to (b) give the tribunal the power, if it considers it just and equitable, to increase any award it makes to an employee by no more than 25% if the claim concerns a matter to which a relevant Code of Practice applies and the employer has failed to comply with that Code and the failure was unreasonable.

Compensation for the successful whistleblowing claims

19. The Claimant claims an award for injury to feelings as compensation for her successful complaint that she suffered detriments because she made a protected disclosure.

20. Section 49(1) of the Employment Rights Act 1996 states that where the Tribunal finds a complaint of detriment well-founded, it shall make a declaration to that effect and it may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates.

21. The amount of compensation shall be such as the Tribunal considers just and equitable in all the circumstances having regard to the infringement to which the complaint relates, and any loss which is attributable to the act or failure to act, which infringed the complainant's right. The loss will be taken to include any expenses incurred or loss of benefit by the complainant in consequence of the act of failure to act. There is no limit on the compensation that can be awarded under this heading although there are guidelines.

22. Section 49(6) of the same Act states that where it appears to the Tribunal that the protected disclosure was not made in good faith, the Tribunal may, if it considers it just and equitable in all of the circumstances to do so, reduce any award it makes to the whistle-blower by no more than 25%.

23. The Tribunal was aware of the case of *Virgo Fidelis Senior School v Boyle* [2004] IRLR 268 in which the EAT held that subjecting a whistle-blower to a detriment is a form of discrimination and that it was appropriate to apply the *Vento* guidelines in determining an appropriate award. The court stated that it was important that as far as possible, there is consistency in awards throughout all areas of discrimination and it could see no reason why a whistle-blower should be treated differently. Detriment suffered by whistle-blowers should be regarded by tribunals as a very serious breach of discrimination legislation which therefore entitles them to an award for injury to feelings, if appropriate.

Injury to Feelings

24. The Court of Appeal has given guidance on the assessment of compensation for injury to feelings. In the case of *Vento v Chief Constable of West Yorkshire police (No.2) [2002] EWCA Civ 1871* the Court set bands within which they held that most tribunals should be able to place their awards. Those bands have been amended through subsequent case law and more recently, they have been the subject of Presidential Guidance, after the consideration of the President of the Employment Tribunals. The 2017 Guidance was uprated in March 2018 so that awards for injury to feelings in exceptional cases can be over £42,900. In cases of the most serious kind, the injury to feelings award would normally lie between £25,700 – £42,900. In the middle band, in less serious cases the award would be between £8,600 - £25,270; while for less serious cases such as for one-off acts of discrimination or otherwise, the award would be between £900 -£8,600.

25. In the *Virgo Fidelis* case, the facts were that the disciplinary proceedings and the employee's dismissal were both direct results of his protected disclosures. The court held that the employer's reaction had resulted in grave consequences for him, her personal relationships, career, career prospects and health. He had also suffered psychiatric damage of which the tribunal had evidence. the award of £45,000 for injury to feelings was reduced to £25,000 on appeal plus aggravated damages.

26. Awards for injury to feelings are purely compensatory and should not be used as a means of punishing or deterring employers from particular courses of conduct. On the other hand, as stated in *Harvey*, discriminators must take their victims as they find them; once liability is established, compensation should not be reduced because (for example) the victim was particularly sensitive. The issue is whether the discriminatory conduct caused the injury, not whether the injury was necessarily a foreseeable result of that conduct. (*Essa v Laing* [2004] IRLR 313).

27. In making an award for injury to feelings a tribunal needs to be aware of the leading cases such as *Virgo Fidelis* referred to above. Much will depend on the particular facts of the case and whether what occurred formed part of a campaign or harassment over a long period, what actual loss is attributable to the discrimination suffered, the position and seniority of the actual perpetrators of the discrimination and the severity of the act/s that have been found to have occurred as well as the evidence of the hurt that was caused.

Findings

28. The Claimant has claimed loss of wages between the date of her dismissal and the date that she calculated her losses (1 June 2020) and has asked for a further 16 weeks (to 30 September 2020) losses to be added into this part of her remedy. At the time she created the schedule of loss at pages 51 – 53 of the bundle and in paragraph 122 of her witness statement, she stated that her expectation was that she would be able to secure alternative employment by January 2020.

29. Since the liability judgment was promulgated, the Respondent has not made any further representations or submissions on the opportunities for work in this field which should be available for the Claimant to mitigate her loss.

30. In her evidence at the final hearing the Claimant stated that since her dismissal she had been searching for employment with online job sites including Total Jobs, CV Library and Monster Jobs. She had registered with agencies like Adecco UK, Reed UK and TXM Recruit Ltd. The Claimant produced print outs from CV Library, Total Jobs and Adecco which confirmed her registration with them. She found temporary employment on 29 April 2019 at the Camden Town Brewery as a Production Operator through TMX Recruit Limited. She did not need a reference for that job, which lasted until 13 June 2019. She earned the total sum of £3144.00.

31. From March 2020, it is likely that the global Covid-19 pandemic had affected opportunities for work in the Claimant's field. Did that result in more or less opportunities for her? Although as an experienced laboratory assistant/Production Operative, it is likely that there is an increased demand for her skills as pharmaceutical companies try to use all available resources to assist the government in dealing with the virus. It is also likely that there is a general requirement for laboratories to continue to operate, even during a pandemic as people still need medicine.

32. Prior to being employed by the Respondent, the Claimant worked as a Production Operative at the Ford Motor Company. She therefore had experience as a production operative.

33. At the liability hearing, the Respondent brought information on jobs that should have been available to her. The Claimant's evidence was that she believed that most manufacturing places would need her to have a minimum of 5 consecutive years' experience before they would employ her. She assumed that a reference from the Respondent would be unfavourable to her because of the circumstances in which her employment came to an end but she had not yet asked for a reference. However, she also confirmed in evidence that she has worked in this industry since she migrated to the UK from Jamaica in 2000. The job details on page 146 of the bundle referred to the need to have previous employment contact details for the past 5 years. The Claimant has also applied to Warburtons which is a company making bread products and it was her evidence that they required her to have had 10 clear years in the business before they would consider her.

34. The Respondent's evidence was that it would not refuse to employ someone who had gaps in their employment history. If there were gaps in an applicant's work history they would expect them to be able to explain it, which could then be accepted, depending

on the explanation.

35. At the hearing the Respondent submitted that it is likely that if it had followed a fair procedure the Claimant would still have been dismissed because of her threatening behaviour and the way she made other members of staff feel. It submitted that it would be appropriate for the Tribunal to make a *Polkey* reduction in this case.

36. In the written submissions from the Claimant following the liability judgment, she referred to various points in the judgment in support of her contention that there should be no *Polkey* reduction of her remedy. She did not refer to paragraphs 237 – 239 of the judgment, where the Tribunal decided that had the Respondent followed a fair procedure it was highly likely that it would have come to the conclusion that the Claimant had committed serious misconduct warranting dismissal. The points the Claimant referred to are the numerous failures in procedure by the Respondent which led the Tribunal to judge that the dismissal was procedurally unfair. Those points do not directly address the issue to which *Polkey* refers, which is, what would have happened - with this Respondent and this Claimant - if the Respondent had followed a fair procedure with exactly the same conduct issues and the same managers assigned to address it.

Decision on Remedy

37. The Claimant was successful in the following complaints:

Unfair Dismissal
Protected Disclosure
She suffered 2 instances of detriment on the grounds that she had made protected disclosures.

38. The Claimant's other complaints were not successful.

Basic Award

39. The Claimant started her employment on 8 August 2016 and her employment terminated on 20 November 2018. She completed just over two years continuous service with this employer. The Tribunal hearing was on the 21 and 22 November 2019.

40. The Claimant's wages were £257.77 per week gross and £227.54 net. She was 48 years old at the date of her dismissal.

41. The Claimant's Basic Award is calculated as follows: 1.5 x 2 = 3 x 257.77 = **£773.31**.

42. The Tribunal does not make any deductions from the Basic Award on the basis of the Claimant's conduct before dismissal.

Compensatory Award

43. Had the Respondent followed a fair procedure – for example - notified the Claimant

that they were going to revisit the incident in the locker room as a result of the new complaints, told her who had made the decision to refer the matter for a disciplinary hearing and told her what allegations were considered to be allegations of gross misconduct and what were not; it is likely that the Respondent would have come to the same conclusion at the end of the process, which is that she had committed gross misconduct and that it was appropriate to dismiss her summarily on those grounds.

44. It is this Tribunal's judgment that if the Respondent had followed the ACAS guidelines and assessed the investigation conducted by Mr Rendell and Ms Watkins and told the Claimant why it considered this a disciplinary matter as opposed to a matter that could be dealt with informally; that would have added some more time to the procedure. The Tribunal has come to that conclusion as it would have required another manager to look at the investigation documents, speak to someone from HR and obtain some advice which that person would have considered before coming to their decision. The Claimant may have requested some time to get advice or to be accompanied to meetings and she may have had witnesses with her, which may have caused hearings to be adjourned or to need to be re-scheduled to take into account other people's timetables.

45. As stated in paragraph 237 of the liability hearing judgment, the Tribunal's conclusion from the totality of the evidence is that if the Respondent had adopted a fair procedure, given the Claimant all the relevant information, notified her clearly of the allegations against her - what was considered gross misconduct as opposed to what was considered misconduct - and given her an opportunity to obtain advice and get advice on the particular allegations that she was facing; it is this Tribunal's judgment that the managers who conducted the disciplinary process would have concluded that it was highly likely that the Claimant had made a statement similar to the one it is alleged by Ms Bagabo that she made and she would have been found to have committed gross misconduct. It is this Tribunal's judgment that the managers who conducted the disciplinary process genuinely believed that the Claimant had said that if this was America, she would be able to get a gun and shoot colleagues. They also concluded that she had been aggressive in the locker room and that she had sworn in a manager's earshot and shouted at colleagues in the car park/gatehouse and it is likely that they would have come to the same conclusions if a fair procedure had been followed.

46. The Claimant did not refer either in the liability hearing or in her written submissions to any defence to the allegations that she would have been able to mount if a fair procedure had been followed that could lead the Tribunal to conclude that there was a chance that the application of a fair procedure would have led to her retaining her employment. She denied making the statement about America and guns, but the Respondent's managers took that evidence into account at the time and chose to believe Ms Bagabo instead. That was a conclusion that were entitled to come to, if the Respondent had followed a fair procedure. It is likely that they would have done so even if a fair procedure was followed.

47. The contents of paragraphs 237, 238 and 239 of the liability judgment are repeated here.

48. It is this Tribunal's judgment that a fair process would have taken no more than a maximum of 12 weeks from the date when the Claimant was dismissed. It is also this Tribunal's judgment that the likelihood that the Respondent would have fairly dismissed

the Claimant at the end of a fair process is assessed at 100%.

49. It is therefore not appropriate to consider whether the Claimant should have found employment by now as the period for which she will be compensated does not extend to the present or even to the date of the hearing. The money she earned from Camden Brewery does not have to be deducted as the period covered by the compensatory award does not extend to April 2019.

50. In accordance with paragraph 234 – 236 of the liability judgment, the Respondent failed to follow a fair process and breached the ACAS Code of Practice on Disciplinary and Grievance procedures. The Claimant is entitled to an uplift between 10% - 25% (See TUL(C)RA) referred to above). The Respondent failed to follow a fair procedure. It made the many procedural errors listed in the liability judgment which caused the Claimant to feel unfairly treated. The Tribunal awards her 20% uplift on her compensatory award to reflect the Respondent's failure in this regard.

51. The Claimant's compensatory award is therefore calculated as follows:

Loss of earnings:	
21 November (12 weeks) – 13 February 2019 = 227.54 x 12 =	2,730.48
Loss of statutory rights =	400.00
Pension loss 12 weeks at £9.75 =	117.00
Subtotal	£3,247.48
ACAS uplift at 20% =	649.49
	£3,896.97

Detriment/Injury to feelings

52. The Claimant seeks £7,500 for the detriments she suffered on the ground of her protected disclosures

53. It is this Tribunal's judgment that the Claimant made a protected disclosure on 14 October when she told Ms Bowden that she thought her health and safety was likely to be endangered if she had to work on the machine that day, due to the confined space, the need to work above height and to stand on and off the stool to do the work.

54. It is also this Tribunal's judgment that on the grounds of that disclosure, the Respondent decided that the Claimant should not be allowed to work on the Brevetti machine. That was a detriment to her as working on the Brevetti machine gave her flexibility in the functions she could perform in the workplace and would have assisted her in her ambitions in the workplace. The other detriment was the decision to bring disciplinary proceedings against the Claimant.

55. As stated in paragraphs 197 – 199 of the liability judgment, as there was no evidence on who made the decision to bring disciplinary proceedings against the Claimant following the investigation, the Respondent failed to prove that the Claimant's protected disclosure had not materially influenced the decision to bring those proceedings. It was also the Tribunal's judgment that the Claimant's disclosure materially influenced Ms Bowden to send the email which triggered the investigation. It was Ms Bowden who advised the Claimant's colleagues - Ms Bagabo, Kasha and Mr Gittens to prepare written statements and send them to the Respondent with their complaints about the Claimant's conduct. This was what triggered the disciplinary proceedings.

56. It is therefore this Tribunal's judgment that the Respondent failed to prove that the Claimant's protected disclosure had not materially influenced its decision to bring disciplinary proceedings against the Claimant.

57. The Claimant is entitled to compensation at a level that is just and equitable for these 2 detriments that she suffered on the grounds that she made protected disclosures.

58. It is this Tribunal's judgment that the Claimant acted in good faith when she made that complaint to Ms Bowden about the danger that she felt/the potential for falling down or hurting herself if she were to work on the machine that day. it is this Tribunal's judgment that she had a genuine belief that there was a health and safety issue there. At the time, the Claimant was trying to get trained up on different machines so that there were more opportunities for her. There was no evidence that she was seeking to get anything by making this allegation.

59. It is not this Tribunal's judgment that the Respondent's failure to follow a fair procedure was done on the grounds of the protected disclosure nor the Claimant's unfair dismissal. The detriments to the Claimant were restricted to the start of the process and the restriction on the work she was able to do during the remainder of her employment.

1. In those circumstances and having regard to the case of *Virgo Fidelis* the Tribunal awards the Claimant £2,000 for the first detriment relating to the Brevetti machine as the Claimant did not remain in employment for a long time after Ms Bowden's decision to remove her from the machine and £5,000 injury to feelings for the second detriment as it had a serious, detrimental effect on the Claimant. The total award of injury to feelings for the detriments done to her on the ground of her protected disclosure is **£7,000.**

2. The total award due to the Claimant for her successful claim is as follows:

Basic Award =	£764.31
Compensatory Award =	£3,896.97
Protected Disclosures - Injury to feelings =	£7,000.00
Total remedy =	**£11,661.28**

3. The Claimant is entitled to a total remedy of £11,661.28 and the Respondent is ordered to pay this amount forthwith.

Employment Judge Jones
Date: 29 September 2020