Case Number
2303269/2018

EMPLOYMENT TRIBUNALS

IN THE LONDON SOUTH EMPLOYMENT TRIBUNAL

BETWEEN:

Claimant

MR JOEL ALAN GOLD

V

HOME OFFICE

Respondent

On: 21 and 22 October 2020

Before: Employment Judge T Russell (sitting alone) CVP Hearing

Representation
Claimant: Ms Sole (Counsel)

Respondent: Mr Molyneaux (Counsel)

Judgment and Reasons

Judgment

1. The Respondent dismissed the Claimant on the potentially fair ground of Conduct under section 98 (2)(b) ERA 1996 but the dismissal was unfair under s 98 (4) ERA 1996.

2. The Claimant is awarded compensation of £16,371.27 Basic and Compensatory Award reflecting his net loss and for his unfair dismissal by way of remedy and to be paid by the Respondent.

3. The Recoupment Regulations do not apply.

BACKGROUND AND NARRATIVE

1. The Claimant was summarily dismissed from his job as a Higher Officer Border Force for the Home Office on 4 June 2018 on the grounds of gross misconduct following alleged racist remarks. He claims Unfair Dismissal.

2. I accepted, through an unopposed Rule 50 application from the Respondent, the anonymisation of the names of those involved in the internal allegation so that (in particular) the witnesses to the events leading to the Claimant being disciplined were referred to by their initials only .

3. The Claimant's dismissal followed an investigation that was commenced after a Border Force Officer, AS, reported that she had witnessed the Claimant use racially offensive language (including a reference to Vietnamese nationals as "Gooks" and to a coworker as a "Paki") .These first two allegations were allegedly corroborated by another Officer in particular , MB.

4. During the investigation the Claimant stated that he had on another occasion referred to a black colleague as "King of the Jungle" (which became a third allegation) and referred to an incident (in a different context) where others had referred to a co - worker as "Taliban Tom" which also led to allegations of impropriety against the Claimant . And the final and fifth allegation made, following an allegation from AS, was that the Claimant stated he would not recruit any "fat women".

5. Only the first three allegations were pursued to a final disciplinary decision but led to the Claimant's dismissal and an unsuccessful appeal despite the Claimant's protestations of innocence.

6. There have been considerable delays in progressing the Tribunal claims , partly due to Covid, before the opportunity to hear his substantive complaints by way of a full hearing by CVP on 21 and 22 October with each of the parties represented (professionally) by Counsel .

Evidence

I heard oral sworn evidence from the Claimant and for the Respondent from Ms. Meers who determined the Claimant's dismissal and Mr Coram who heard the Claimant's appeal. I also heard helpful submissions from the parties' representatives.

Findings of Fact

General Findings

1. There were, at one time or other, 5 allegations of misconduct against the Claimant. I refer to these (with my own numbering not that of the Respondent) as follows. The 2 most serious were that he had referred to Vietnamese immigrants as Gooks (allegation one) and people of Pakistani Origin as Paki (allegation two). The other allegations reflected describing a Nigerian work colleague as " king of the Jungle" (allegation three) , a reference he made to not employing fat women (allegation four) , and a discussion when the term " Taliban Tom " was used and inappropriately

discussed (allegation five). Only the first 3 allegations led to disciplinary proceedings and sanction, however.

2. Both Respondent witnesses now say that each of the first 2 allegations (but not the third given the disciplining officer's own evidence on this point) would, on their own, have been enough to dismiss the Claimant. However, I find this is not what was said to the Claimant at any time including in the written outcome letters as to the dismissal or appeal. I find that that the decision to dismiss was made on the grounds that all the first 3 allegations had been substantiated (in that the Respondents were satisfied on a balance of probabilities that the Claimant had made all 3 comments) and there can be no certainty as to what the finding would have been if one or more of the first two allegations had been found unproven .

3. The dismissal was on the grounds of (mis)conduct and was effected after a full process involving an investigation, disciplinary hearing, and appeal. And the dismissing officer did feel justified in reaching her decision and was, in her mind, satisfied on a balance of probabilities that the Claimant had made all 3 comments. Although, as I find below, she should not have been.

4. As far as the first two allegations are concerned the word " Gook" is a derogatory term predominately and originally used by the US Military during wartime especially during the Korean and Vietnam War and is an offensive term and can certainly be a racial slur. "Paki" to mean a person from Pakistan or South Asia by birth or descent primarily used, when used, in English speaking countries is also offensive and can also be a racial slur. It is also essential that Border Force employees deal professionally and impartially with persons of all nationalities and have an even higher obligation to be sensitive to language used than many other employees.

5. So the Respondent was wholly justified in considering disciplinary action when a complaint was received that the Claimant had used these words even if the level of offence , if and when these words are used , will inevitably depend on the context and circumstances.

6. There was not, here, a race to find the Claimant guilty and dismiss him. Far from it. There was considerable delay in the process. But I accept that shift patterns and the work demand operationally to include staff availability genuinely accounted for this. And although the Claimant was not given the reasons that the process kept getting extended, he did know of the delay. And there was no hidden agenda or intended prejudice towards the Claimant in respect of that delay.

7. On the face of it the Respondent followed a full and fair process involving an investigation, disciplinary and appeal and in accordance with the Home Office

procedures. Over a significant period and involving several staff and significant managerial resources. And I accept the Claimant's guilt was not pre judged although my findings below confirm that his defence to the charges was not given the consideration that a fair hearing , given the obvious importance to the Claimant after a career with the Respondent spanning over 2 decades, warranted.

8. I do not criticise the fact Ms. Meers was chosen to undertake the disciplinary hearing, nor do I question her independence. Whilst it is common ground she knew the Claimant there is no evidence that she was ill disposed to the Claimant before being appointed to handle the disciplinary, or that she was inexperienced in her job or that she was intending to avoid a full process . But it was not a complete or fair process in practice, and I find there was an air of inevitability about the eventual determination from investigation through to the appeal outcome. I find all involved in that process were too ready to conclude the Claimant was guilty. And as a result, the dismissal officer was at the heart of an unfair process.

9. The Respondent criticises the Claimant for inconsistent evidence but this does not accord with my findings as to the evidence as the procedure evolved nor did I find his evidence in this Tribunal other than honestly given and frank. He admitted some fault. And with some tensions in his personal life and his job and indeed career at stake during the disciplinary process it is understandable if he was emotional during that time. Especially as he had to continue working as (rightly) he was not suspended.

10. The Claimant does rely just on Respondent witness collusion, nor does he suggest the witnesses wanted him dismissed. He does say the investigation and disciplinary gathered a momentum of its own and I agree. The sensitivities with language and given the Claimant's role and work with, in many cases, ethnic minority and or refugees, migrants and other vulnerable individuals are self-evident. But this made the Respondent not only determined to stamp out inappropriate conduct but also loathe to accept the alternative explanation offered by the Respondent.

11. The unfairness of the dismissal case against the Claimant is highlighted when one drills down to the detail and how the Respondent says it concluded, on a balance of probabilities, that the Claimant was guilty of gross misconduct. I make some general findings in this respect and then move onto the 3 allegations that led to the Respondent's decision to dismiss and highlight concerns as the reliability and fairness of that decision.

Examples of flaws in the Respondent's procedure

Investigation

1. Some 10 weeks passed between the first allegation being reported and the first witnesses being interviewed. There were no notes from the time of the incident

and memories had inevitably faded. Clearly the incidents then were not regarded by those involved as warranting immediate complaint.

2. Ms. Morgan drew conclusions that were unreliable in part and went beyond her mandate e.g. " if he did not say these things why would he feel the need to keep his mouth shut " when there are many innocent reasons for the Claimant saying this (to the extent he did) given the allegations against him for making statements which he denied making.

3. Moving from that report to a disciplinary hearing, where the evidence relied on based on interviews carried out by the same Investigating Manager, adds unfairness to the disciplinary procedure.

4. When MS, the main witness against the Claimant , said he was confused the defence of the Respondent is that they were not sure what he was confused about. But he was not asked.

5. Ms. Morgan as the investigation officer was ready, on all or at least most occasions, to believe the Claimant was at fault rather than give him the benefit of the doubt or at least highlight his version of events.

6. Witness summaries were drafted, rather than questions and answers, which appear to include leading questions asked of the witness. Yet the Claimant was constantly denied access to the existing handwritten notes despite the legitimately held belief that the witnesses had been pushed into observations that prejudiced him. In this respect I find the witness statements relied upon by the Respondent were in a different format to that prepared for the Claimant (a more transparent question and answer format).

7. Two of the allegations were dropped. The "fat women "allegation was not pursued as part of the disciplinary but could or should have been so why wasn't it? My limited finding on this is that the Respondent was preoccupied with the apparent racist language. Allegation five was different from the rest because it is not a remark alleged to have been made by the Claimant. The phrase Taliban Tom was and is an unacceptable one to use. But the fact the phrase was used at all was raised by the Claimant as a criticism of others. He did not say it. AS and MB who gave evidence to the Respondent criticising the Claimant were alleged to have used the phrase, but the relevance (for this case) is that this was then presented by the Respondent as the Claimant's misconduct. Because he allegedly said such remarks should be saved "for the back of the bus". Implying (they say) an acceptance of the remark if made more privately and so indicative of the Claimant's accepting attitude towards racist comments.

8. What was or might be acceptable use of language historically is often not so in the workplace today. The Taliban Tom example illustrates this. The alliteration and juxtaposition of colour and name (the coworker referred to as Taliban Tom

apparently had a tan and beard) cannot mask the inappropriate nature of this remark, one to be avoided anywhere, including the back of any bus. But this incident was initially investigated as a criticism of the Claimant not those who had made the remark who were not, seemingly, even asked to explain it. It illustrates a certain bias to the disciplinary process including the investigatory part of it.

Disciplinary

9. Obviously, this is the key stage when assessing the fairness of the Claimant's dismissal

10. Ms. Meers suggested in evidence that she had taken into consideration other matters which were not part of the investigation report and which were not put to the Claimant. And in particular AS's distress on informing her of the allegations. This was not a matter that was properly put to the Claimant during the disciplinary hearing and should not have been relied on. Once again there is a disparity of fairness here.

11. The fact that neither AS or MS got on well with the Claimant was not adequately considered. Having decided they would not have colluded to (as it turned out) ensure the Claimant's dismissal the Respondent looked no further than that. But the possibility they were both mistaken (which is what the Claimant constantly claimed) or that (given AS and MB were close friends) they had perhaps unwittingly given affirmation to each other , was given little or no weight by the Respondent. Once the Respondent had determined they were not lying there was an assumption that the Claimant was. And if this was not the Respondent's position they failed to explain otherwise.

12. Ms. Meers states in the disciplinary outcome letter and own evidence that the Claimant's evidence had either changed or did not support collusion. There is a particular reliance on the Claimant's reference to offending AS and MB. However, as is plain from reading the notes of the Claimant's interview with the instigating officer, any reference to causing offense is preceded by a denial. As a response to the allegation against him e.g. "I did not say that [but] f I had said it, and they were offended – as is being suggested, why did they not say something at the time?"

13. It is plain that Ms. Meers considered matters which included areas of dispute within the notes without highlighting the conflict in the evidence and justifying why she rejected (and she did reject it) the Claimant's explanation .

Appeal

14. Mr Coram as the Appeal's officer gave strong and credible evidence but at one time betrayed what I find may have been the underlying narrative when he said (when asked as to unblemished record of the Claimant) that Mr Gold may have escaped censure on previous instances of inappropriate conduct whilst

working in Dover . Ms. Meers makes a similar inference in her letter of dismissal.

15. Whatever instances he might have been referring to , or she might have pointed to , they were clearly not actioned before , nor documented or mentioned at any point until the late stages of Mr Coram's cross examination .And yet were apparently part of the Respondent's thoughts and so part of their agenda ,

16. And in supporting the decisions of the disciplining officer on all material points I found that the Respondent's appeals officer was unprepared to find the Claimant innocent or the charges where there was an opportunity not to do so.

17. Mr Coram asked Ms. Morgan for witness interview notes and made other queries of her on 9 July 2018. She offered to forward these to him on 15 July but by this time the appeal had been determined, He says he had spoken to her on 9 July in the end but the content of her email of 15 July does not support his and it is clear that there were or at least may have been outstanding matters to consider when the appeal decision was made.

18. As a more general point, perhaps none of these points taken alone make the process unfair. But taken together they do especially when one looks at the individual 3 allegations more closely.

Allegations

19. The Respondent accepts that 3 allegations eventually resulted in the Claimant's dismissal. So, in my findings I now focus on some of the flaws in the investigation into (and dealing with) each of these. There is inevitably some duplication with my more general findings above.

20. **Allegation one**

"In early February 2018 you used racist language to describe Vietnamese nationals who you came into contact with whilst you were working in Calais":

a. AS thought, she had heard "Gooks" some time in February 2018 (with no exact date given) but only had that view reinforced by MB's comment that the Claimant *"couldn't say things like that."*
b. MB did not originally recall having spoken to the Claimant at all after the incident. It was only when it was expressly suggested to him that he said *"couldn't say things like that"* in relation to allegation one (something he had thought he said in relation to allegation two) did he say *"he may well have said that"* .
c. It was many months after the alleged incident that the Claimant was asked to explain it .The investigation commenced some 3 months after the alleged incident and the disciplinary , all on fact sensitive issues, some 2 months after

that and then without giving him accurate information as to the time and place and context of the allegation.

d. Both AS and MB wrongly referred to the incident happening in the freight shed with additional description as to where the Vietnamese were within the shed. Ms. Meers subsequently accepted that the incident cannot have happened in the shed. The Claimant presents this as evidence of collusion. Whilst this may or may not be the case my finding is that it shows part of the evidence on which the Respondent, through Ms. Meers, reached her decision was unreliable. Perhaps the witnesses were simply mistaken as to the comment itself as they were clearly mistaken as to where and when the comment was made. But this inconsistency is relevant to whether the remark was said at all and it needed investigating further. A point which, on questioning by me, Ms. Meers either failed to grasp or chose not to do so. In her dismissal outcome letter of 4 June 2018 she actually said the fact there were Vietnamese nationals detected in Calais on the morning in question added weight to the witness evidence effectively ignoring the fact those same witnesses both stated the alleged comment was made in a location where the comment " could not have taken place " .
e. Ms. Meers stated "there is no evidence of collusion "but whether there was or was not it clearly erroneous to say there is no evidence at all given the point in d) above. And when Ms. Meers said the minor discrepancies in the accounts by MB and AS indicated they were being truthful , this repeats the pattern I have found of ignoring or at least giving scant weight to the Claimant's legitimate points of complaint and giving consistent (and not always justified) credence to the opposite view wherever possible .
f. There is inadequate evidence that the Claimant came into close contact with the Vietnamese nationals he is meant to have insulted.
g. When the Claimant apologised for giving possible offence, Ms. Meers suggested this was evidence of guilt even though the Claimant had preceded such statement with a denial that he had said anything which could or should cause offence. Yet that detail was not mentioned in the dismissal letter.
h. Ms. Meers brought into her dismissal letter (a theme echoed by the appeals officer) references to a history of behaviour "without here being any evidence whatsoever of unacceptable conduct when the Claimant was working in Dover / historically.

21. **Allegation two**

On 7th March 2018 you referred to a Home Office colleague as a "Paki".

a. The Claimant's position was that, during a conversation about SAG's nationality, he may have said "Pakistani" but denied using the word "Paki". If he had said Pakistani, there can be no legitimate criticism of him.
b. The notes of the Claimant's interview with Ms. Morgan were materially different to that which the Claimant, and his representative, recollected. One key difference was in relation to whether the word *"generally"* or *"genuinely"* was said in the context of using the word Paki rather than Pakistani. Both the Claimant and his representative Mr Harding categorically stated the Claimant

said “genuinely. “The handwritten notes of the note taker appear to have been altered when addressing this point. No explanation for the addition of words in the notetaker’s note has been provided. And although Ms. Morgan’s shorter form note states she thought the Claimant said he would not “ generally “ [use the word Paki] with the obvious inference that he might on occasion do so , she does not set out the difference of opinion in the investigation report with the self-evident consequence that the disciplinary officer may have the same impression as clearly formed by Ms. Morgan. And if Ms. Meers did not have this impression, and or did balance the conflicting evidence, why not say so and explain the fact she presumably did not believe the Claimant? In her dismissal letter the key conflict is not mentioned at all.

c. Whether there was or was not background noise (which the Claimant stated would have made it difficult for any remark to be accurately overheard) was not sufficient investigated. In fact it was not investigated at all and , given the fact background noise was likely on busy roads near the ports , I agree with the Claimant’s representative when she states that if the Respondent had no evidence on the point this should have prompted them to get some , not simply conclude there was none and so to the Claimant’s detriment.
d. This was not something discussed with the Claimant at the disciplinary hearing. This internal discrepancy plainly reflects the need for some investigation to have been done before determining that AS would not have misheard and relying on her recollection, which included the fact that it was not noisy.
e. In finding allegation 2 proven the disciplining officer relied in part on the Claimant failing to report racist language used by both witnesses testifying against him. Even where others might have been legitimately criticised Ms. Meers chose to turn this round against the Claimant.

22. **Allegation three:**

The Claimant described a colleague of an ethnic minority as being “King of the jungle”.

a. The Claimant had volunteered information about the third allegation but rather than being given credit for this he found this turned against him too.
b. This remark could amount to discriminatory language depending on the circumstances. The Claimant accepted this and is right to do so and I find his representative’s argument to the contrary unconvincing. It is partly about perception and partly about context. And, for instance, if accompanied by gestures and or aggression it could be very offensive. But it can also be totally incident of offence meant or given.
c. The evidence was, and is, inconclusive. On the one hand WB to whom the Claimant referred was a Black Nigerian man and might have taken offence. On the other hand, the Claimant was clear that no-one present had taken offence. Indeed no one had reported it, and such a remark (bearing in mind the king of the jungle is normally regarded as a lion after all) can be innocent of any offence if referring , for instance , to the king pin in a hierarchy , as the Claimant suggests. But in her findings Ms. Meers does not seem to countenance an innocent explanation for the remark made.

d. What she did do was say “it was clear from the reaction of others who winced that the comment was racist and as such caused offence “.But this is not supported by the evidence .Who winced? The Claimant had certainly denied this and neither the investigating officer Ms. Morgan nor Ms. Meers attempted to determine where the truth lay preferring instead to adopt the evidence that supported the charge without further investigation.
e. In any event the Respondent accepts that there had been a lack of investigation into the context of the remark being made.

23. Essentially, there appears to have been insufficient concern to make the procedure fair for this employee , The focus was , whilst attempting to follow Home office procedure, to find fault with the Claimant and either ignore or give no or little credence to his alternative explanation . There was no obvious attempt to step back and consider the overall fairness of procedure. The overall feeling one has , I have , is that the Claimant had no chance of establishing his innocence and the die was cast at an early stage even though I also accept the position was not pre judged in that the position was determined in advance . It was simply that the bar was set too high, unfairly so, for the Claimant to prove his innocence.

24. The distinction here I might draw is between someone who was falsely accused in the knowledge his defence would be denied (not the position here) and someone whose accusers were or may have been mistaken but where the employer were prepared to believe them even where there were disparities and concerns as to their evidence given (as was the case here). Once the allegations had been made the Respondent was reluctant to find any explanation for them other than a damning one showing the Claimant at fault and , most significantly , came to what it says was a decision to dismiss ,on a balance of probabilities as to the Claimant’s guilt ,without the balancing act one would expect to see in a considered and fair analysis of the evidence. Especially by a large well-resourced organisation. I appreciate this was an internal matter not a court room determination but the Claimant’s own explanation and or defence was brushed aside time and time again in favour of the witnesses who spoke against him. And unfairly so.

LEGAL FINDINDS of contract

The Issues

- What was the reason, of it more than one reason, the principal reason for dismissal?

- If the Claimant was dismissed for a potentially fair reason, did the Respondent act reasonably in treating the reason as sufficient for dismissing the Claimant?

- Did the Respondent have a genuine belief that the Claimant was guilty of misconduct?

- If so, did the Respondent have reasonable grounds for that belief (considering whether as much investigation as was reasonable in the circumstances had been undertaken)?

- Was a fair disciplinary procedure adopted?

- Was dismissal within the range of reasonable responses?

- Remedy if appropriate.

The Reason for the Dismissal

25. The reason for the dismissal was conduct and so a potentially fair reason under s 94 (2) (b) ERA 1996.

Dismissal Reasonable in all the Circumstances

26. The Respondent has however failed to show the dismissal was fair for the reasons highlighted above. In particular the willingness to believe the witnesses' versions of events without analysis and or a full enough investigation and or an unwillingness to believe the Claimant's version of events.

The Respondent's Counsel rightly states that :

"If the Home Office discharges that burden, the Tribunal must consider whether in the circumstances the Home Office acted reasonably or unreasonably in dismissing Mr Gold.

The relevant questions are whether Ms Meers in fact believed that Mr Gold was guilty of misconduct; whether she had reasonable grounds on which to sustain such belief; whether a reasonable investigation had been carried out; and whether dismissal was within the range of reasonable responses.

The question of whether the disciplinary process was fair requires consideration of the process as a whole. It is possible for any unfairness at the dismissal stage to be cured by an appeal."

27. However, I have found that although Ms Meers had a belief as to the Claimant's guilt, she did not have reasonable grounds , in view of the flaws identified in the disciplinary process in particular, to reach that conclusion. And the appeal was not a rehearing (as confirmed by Mr Coram) so could not cure these defects to the extent he recognised them as defects. And in any event, he did not. Indeed, he himself having sought further information from Ms Meers then failed to follow that through before making his decision . All those involved for the Respondent believed they had enough to show gross misconduct and make a summary dismissal . They did not judge from the position of a reasonable employer.

28. I remind myself that I am not to substitute my opinion for that of the Respondent. But I do not believe the Respondent acted within the range of reasonable responses open to it in this matter. I have found that the investigation had a momentum of its own and a certain inevitability of outcome. And although the disciplinary and appeals office believed that they acted in good faith they were, in particular Ms. Meers as the disciplining officer, too ready to believe the Claimant's guilt. In doing so his version of events and the possibility of him having told the truth was given insufficient weight and or insufficiently investigated. And this was unfair especially given the fact the Claimant's whole career was on the line after a 23 years unblemished record. The Respondent was too ready to give the witnesses against him the benefit of the doubt and too reluctant to do the same for the Claimant and although one cannot expect a perfect procedure for any dismissal a reasonable employer owes it to any employee , certainly a long service employee in a managerial position, to identify and examine closely any flaws in the accusations made .And I have found that they either did not do so or did so insufficiently. And so the Respondent has not discharged the burden of showing a fair dismissal even if it was a potentially fair one.

29. Moreover, in so far as it was considered, to the extent the Claimant failed to recognise the impact of his language, training could and should have been considered. This would have reflected the stated purpose of the disciplinary procedure and certainly the jump to dismissal was disproportionate on the evidence available and outside the range of reasonable responses open the Respondent and so was unfair.

Remedy

30. **Compensatory awards for unfair dismissal**

Section 123 ERA provides that the amount of a compensatory award for unfair dismissal 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.

s123(4) ERA provides that in ascertaining the loss referred to under subsection (1) the Tribunal should have regard to the action taken by the employer.

Section 123(4) ERA provides that in ascertaining the loss referred to under subsection (1) the Tribunal shall apply the same rule concerning the duty to mitigate loss as applies to damages recoverable under the common law of England and Wales.

The duty to mitigate is for a Claimant to take reasonable steps to mitigate their loss. This is an issue of fact for a Tribunal to determine, with the focus being on the individual's particular circumstances. The onus of showing a failure to

mitigate lies on the employer as the party who is alleging that the employee has failed to mitigate his losses.

If a Tribunal finds that an employee has failed to take reasonable steps to mitigate their losses it needs to consider what the likely outcome would have been if the Claimant had taken reasonable steps to mitigate their losses.

A loss of earning claim will be based on the net earnings of an employee.

31. **Adjustment of awards**

Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULCRA") provides that in any proceedings before an Employment Tribunal any code or practice issued by ACAS shall be admissible in evidence, and any provision of the code which appears to the Tribunal to be relevant to any question in the proceedings shall be taken into account in determining that question.

Section 207A(3) TULCRA provides that inter alia :

"(3) if, in the case of proceedings to which this section applies, it appears to the Employment Tribunal that – (a) the claim to which the proceedings relate concern a matter to which a relevant Code of Practice applies, (b) the employee has failed to comply with the Code in relation to that matter, and (c) that failure was unreasonable then the Employment Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by not more than 25 percent."

32. **Decisions on Remedy**

The position is made more straightforward by the fact that the Claimant's Schedule of Loss is largely agreed . He claims £ 28,015.12 reflecting the fact he obtained alternative employment on 1 September 2018 only a few months after being dismissed by the Respondent.

I heard submissions from both parties on remedy and make these findings

33. There is no justification for an adjustment under s207 TULCRA here. I have found the Respondent did not unfairly delay the disciplinary process and , to the extent they were at fault for not providing handwritten notes prepared by the investigating officer to allow the witness statements to be further analysed , my findings on this are related to the substance of the decision on liability by reference to S98(4) ERA 1996 rather than a suggestion that the Respondent failed to substantively comply with the ACAS Code of Practice. They did interview witnesses and did provide the Claimant with written statements as well as considering his own.

34. This is not a case where it is appropriate to make a deduction in the award by virtue of the Claimant's conduct on the context of contributory fault or through a *Polkey* deduction. How can it be said there was contributory fault if the Claimant may not have made either of the two most serious remarks attributed to him ? The comments that led to his dismissal according to the Respondent. The Claimant cooperated with the internal process despite (naturally) attesting his innocence and raised himself the incident which led to the third allegation . And my findings on liability are such that one cannot know the outcome of a more complete process and it cannot be said there would have been a dismissal at all if there had been .As opposed to , for instance and if there was to be any sanction , a formal warning and a request to undertake EOP or similar training . I cannot say there was a substantial chance that the Claimant would have been dismissed in any event and whilst I accept I must be prepared to speculate when deciding if a *Polkey* deduction should be made (*Scope v Thornett* [2006} EWCA Civ 1600) I cannot do so where , as here , I would need to reconstruct the disciplinary and appeal process . Notwithstanding the comment from the Respondents' witnesses that they now believe any one of the two most serious offences would have led to a dismissal . The flaws identified on the process are sufficient for me to determine that there should be no Polkey , or indeed contributory fault , deduction here .

35. Nor have any argument been raised as to mitigation perhaps reflecting the fact the Claimant got alternative employment soon after his dismissal . Mitigation is not a factor here.

36. The Claimant's Schedule of loss is agreed by the Respondent other than in respect of the ACAS uplift sought of £1,139 , the Basic Award calculation (£254 too high based on the Claimant's age) and the amount sought for Loss of Statutory Rights. I accept the accuracy of the former submission and determine £500 is the appropriate amount for a loss of statutory rights award and I have determined an ACAS uplift is not appropriate and so the £18,015.12 sum claimed is reduced to £16,371.27. Both parties accepted the maths, and this is therefore the sum ordered to be paid by the Respondent to the Claimant as compensation for his unfair dismissal .

Employment Judge Timothy Russell

25 October 2020