EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105000/2018 (V)

Remedy Hearing held in Glasgow on 3 December 2020 (conducted remotely by Cloud Video Platform); and 2 February 2021 (Deliberation at Members' Meeting held in chambers conducted remotely by Microsoft Teams)

Employment Judge Ian McPherson
Tribunal Member Mrs Margaret Fisher
Tribunal Member Mr Robin Taggart

Mr Mahdi Saki	**Claimant** **Represented by:** **Ms Karen Yuill and** **Ms Eilidh Withers-** **Student Advisors** **Strathclyde University** **Law Clinic**
Odyssey Enterprises Ltd	**Respondents** **Not Present and** **Not Represented**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The **unanimous** judgment of the Employment Tribunal is that: -

(1) Having heard from the claimant's lead representative at this Remedy Hearing, the respondents not being present, nor represented, despite Notice of Remedy Hearing having been issued to them, and a postponement application by their representative having been refused by the Tribunal on 26 November 2020, the Tribunal, in exercise of its powers under **Rule 47 of the**

Employment Tribunals Rules of Procedure 2013, decided to proceed with the listed Remedy Hearing in the absence of the respondents, having considered the information available to the Tribunal about the reasons for the respondents' failure to appear or be represented, and it being in the interests of justice to proceed, the claimant, his witness and his representatives being present, ready and able to proceed, as also the full panel of the Tribunal assembled for that purpose, and any further delay would be contrary to the overriding objective under **Rule 2** to deal with the case fairly and justly, including avoiding unnecessary further delay.

(2) Having heard the evidence of the claimant, his witness, and thereafter closing submissions from his representative, the previous case management orders made by the Judge on 23 June 2020 being varied for that purpose, of consent of the claimant's representative, and so as to allow her to address the Tribunal without any further, undue delay, the respondents not having appeared, and the Tribunal having reserved judgment to be given later, after receipt of further written submissions on behalf of the claimant, and time for private deliberation in chambers, and the full Tribunal, having resumed consideration of the case at a Members' Meeting held by Microsoft Teams, including consideration of further written submissions for the claimant intimated on 4 December 2020, in respect of a financial penalty being awarded against the respondents, the Tribunal, after private deliberation in chambers, now gives its remedy judgment as follows:

(a) in respect of the claimant's unfair dismissal by the respondents, contrary to **Sections 94 and 98 of the Employment Rights Act 1996**, as found in the Tribunal's original liability judgment dated 11 February 2020, as sent to parties on 13 February 2020, the Tribunal **orders** as follows:-

(i) The Tribunal awards the claimant a monetary award of compensation for unfair dismissal in the total sum of **TWO THOUSAND, FOUR HUNDRED AND TWENTY POUNDS (£2,420),** comprising a basic award of **£320**, and a

compensatory award of **£2,100,** and orders the respondents to pay that monetary award to the claimant;

(ii) In respect that the claimant was not in receipt of State benefits after his employment with the respondents ended, on 17 September 2018, the **Employment Protection (Recoupment of Benefit) Regulations 1996** do not apply to this monetary award, and so there is no recoupment applicable.

(iii) In respect of the respondents' unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures, the Tribunal awards the claimant a **15%** uplift on the compensatory award element of his monetary award for unfair dismissal, being a further sum of **THREE HUNDRED AND FIFTEEN POUNDS** (**£315)**, which further amount the respondents are ordered to pay to him, in terms of **Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992**;

(b) in respect of the claimant's victimisation by the respondents, contrary to **Section 27 of the Equality Act 2010,** as found in the Tribunal's original liability judgment dated 11 February 2020, as sent to parties on 13 February 2020, the Tribunal awards compensation to the claimant, in terms of **Section 124 of the Equality Act 2010**, in respect of injury to his feelings, in the amount of **FOUR THOUSAND, FIVE HUNDRED POUNDS** (**£4,500.00)**, plus interest of **EIGHT HUNDRED AND EIGHTY FIVE POUNDS, SEVENTY PENCE** (**£885.70)**, calculated in accordance with the **Employment Tribunal (Interest of Awards in Discrimination Cases) Regulations 1996.**

(c) in respect of the claimant's application for the Tribunal to make a financial penalty order against the respondents, in terms of **Section 12A of the Employment Tribunals Act 1996**, having carefully

considered that application, the Tribunal **refuses** the application, and it makes no such order in favour of the Secretary of State, considering it to be in the interests of justice to make only the monetary award of compensation for unfair dismissal, with uplift, and separate award for injury to feelings for the discriminatory act of victimisation, with interest, both payable to the claimant, as set forth at sub-paragraphs (a) and (b) above.

(d) In summary, the Tribunal therefore orders that the respondents shall pay to the claimant , in terms of this Remedy Judgment, the total amount of **EIGHT THOUSAND, ONE HUNDRED AND TWENTY POUNDS, SEVENTY PENCE (£8,120.70).**

REASONS

Introduction

1. This case called before us again as a full Tribunal on the morning of Thursday, 3 December 2020, at 10.00am, for a 3 hour Remedy Hearing, previously intimated to both parties by the Tribunal, by email on 3 November 2020, advising parties that the Hearing would take place by video call using Cloud Video Platform ("CVP"), on account of the ongoing Covid-19 pandemic, rather than an in-person Hearing.

2. The case has a long history before this Tribunal but, for present purposes, it is not necessary to rehearse it all again. The background history is recorded in our 118-page, written Judgment and Reasons dated 11 February 2020, as sent to parties on 13 February 2020. As detailed there, after a contested Final Hearing, where the respondents appeared and they were then represented by a consultant from Croner Group Ltd, and the claimant then, as now, was represented by the Strathclyde University Law Clinic, we unanimously found that the claimant had been unfairly dismissed by the respondents, on 17 September 2018, contrary to **Sections 94 and 98 of the Employment Rights Act 1996**, and that his dismissal was an act of

victimisation by the respondents, contrary to **Section 27 of the Equality Act 2010**.

3. We also found that the claimant had been subjected to a series of unlawful deductions from his wages, contrary to **Section 13 of the Employment Rights Act 1996**, and we ordered the respondents to pay to him the sum of **£7,399.19**. That sum had not, as at the date of the Remedy Hearing before us, been paid by the respondents to the claimant, despite the claimant instructing Sheriff Officers to attempt to recover it by civil diligence and enforcement against the respondents.

Background

4. While, in that Judgment, we found that the claimant was entitled to financial compensation for unfair dismissal, as also a separate award of compensation for injury to feelings in respect of the unlawful act of victimisation, for the reasons detailed at paragraphs 131 to 143 of our then Judgment, we assigned the case to a one-day Remedy Hearing before the same Tribunal on a date to be thereafter assigned, if parties were unable to mutually agree the *quantum* of compensation payable to the claimant, within 28 days of issue of our Judgment, and unable to agree matters extra-judicially between themselves, through ACAS, or application to the Tribunal, under **Rule 64 of the Employment Tribunal Rules of Procedure 2013**, for a Consent Judgment to be made by the Tribunal.

5. In our previous Judgment, we also ordered that, in the event of a Remedy Hearing, the Tribunal would allow further evidence from both parties on the matter of remedy only, to take account of the respondents' arguments that any financial compensation for unfair dismissal due to the claimant should be reduced on account of his contributory conduct, and / or the ***Polkey*** principle, and that any compensation for injury to feelings should likewise be reduced on account of contributory conduct.

6. On 13 March 2020, the claimant's representatives at the Law Clinic wrote to the Tribunal, with copy to Amanda Beattie at Croners, confirming that they

had entered into negotiations with the respondents' representative at Croners to try and agree *quantum* of compensation payable to the claimant, and seeking a 14-day extension to the 28-day period allowed by the Tribunal. There being no comment or objection made by the respondents, on 23 March 2020, Employment Judge McPherson granted the extension requested until 3 April 2020, asking both parties to update the Tribunal then as to any further procedure required by the Tribunal, which failing the case would be listed for a Remedy Hearing.

7. On 2 April 2020, the Law Clinic, acting for the claimant, advised the Tribunal, that the claimant had not received any payment from the respondents, for the sum awarded in the Judgment, and, as such, in order for the claimant to enforce that judgment by way of Sheriff Officers, they asked the Tribunal to provide the claimant with an extract of that judgment. Further, on 9 April 2020, the Law Clinic advised the Tribunal, with copy to Ms Beattie for the respondents, that while they had tried to reach settlement of quantum with the respondents, unfortunately they had not been able to achieve that and therefore they asked the Tribunal to assign a Remedy Hearing.

8. Thereafter, on 1 May 2020, on Employment Judge McPherson's instructions, the Tribunal wrote to both parties' representatives, stating that as parties had failed to resolve matters extra-judicially, the case would be listed for a Remedy Hearing in due course but, prior to that, the Judge had directed that a telephone conference call Case Management Preliminary Hearing take place with both parties' representatives to discuss arrangements for that, in light of the ongoing Covid-19 pandemic.

9. In reply, by email to the Tribunal on 11 May 2020, Amanda Beattie, litigation field manager with Croner, confirmed her understanding that Croner continued to be instructed for the respondents, however they had been unable to make contact with the respondents, perhaps caused by the unprecedented circumstances of the pandemic. On 27 May 2020, the Law Clinic, replying on

behalf of the claimant, stated that the extract judgment requested was still awaited, the claimant was concerned that he awaited payment of the £7,399.19 awarded by the Tribunal, and while fully understanding of the current circumstances surrounding Covid-19, and its impact on the normal operations of the Tribunal, requesting action to issue the extract.

10. On 1 June 2020, the Secretary of the Tribunals issued an extract judgment to the claimant, allowing him to instruct Sheriff Officers in respect of the judgment in his favour for **£7,399.19**. Thereafter, on 12 June 2020, the Law Clinic and Croners were advised by email, from the Tribunal, that a telephone conference call Hearing was set up for 10am on 23 June 2020 to discuss how to progress the case in accordance with the ***ET Presidential Guidance and Direction in connection with the Conduct of Employment Tribunal proceedings during the Covid-19 Pandemic.***

11. That Case Management Preliminary Hearing took place, as listed, on Tuesday, 23 June 2020. The claimant was represented by the Law Clinic, and the respondents by Ms Beattie from Croners. Having heard from both parties' representatives, and of their consent, Employment Judge McPherson decided to list the case for a half-day (3 hours) public Remedy Hearing before the same Tribunal on a date to be assigned in **August / October 2020**, and to be conducted remotely as a CVP Remedy Hearing, as mutually agreed by both parties' representatives. It was intimated that evidence would be led from the claimant and his wife, by way of written witness statements, while the respondents were not, as far as Ms Beattie was aware, intending to lead any witness, but merely to cross-examine Mr & Mrs Saki in their evidence on remedy.

12. It was also provided, as agreed with both representatives, and of consent, that they would each have 7 days, after the close of evidence at the Remedy Hearing, to submit their written closing submissions, with a further 7 days thereafter for each party to comment on the other party's written submissions,

with the Tribunal thereafter, on the papers, and in chambers, and so without an oral Hearing, to determine the claimant's remedy, based on the evidence led at the Remedy Hearing, and the full Tribunal's, in chambers, consideration of parties' written closing submissions, and replies.

13. Case Management Orders were made in that regard, and included in the Judge's written Note & Orders dated 23 June 2020, as issued to both parties under cover of a letter from the Tribunal emailed to the Law Clinic and Ms Beattie at Croners on 24 June 2020. Date listing stencils were issued on the same day, for completion and return by 22 July 2020. On 1 July 2020, Ms Beattie, from Croners, wrote to the Tribunal, with copy to the Law Clinic for the claimant, stating that they were no longer representing the respondents, and that Dr Karen Wilson, the respondents' director, should be placed on the Tribunal's records as their representative.

14. The Law Clinic returned their date listing stencil on 15 July 2020, but none was returned on behalf of the respondents. They submitted an updated Schedule of Loss, seeking **£27,623.56**, and mitigation evidence for the claimant, on 7 July 2020. It did not appear, to Employment Judge Mary Kearns, that the Law Clinic had complied with **Rule 92**, and copied this to the respondents or their representatives at the time, and, by email from the Tribunal, sent on 27 July 2020, a response was requested from the Law Clinic by 3 August 2020. On 29 July 2020, the Law Clinic confirmed to the Tribunal that the respondents had been copied in on 7 July 2020, and that email was copied to Dr Wilson for the respondents.

15. Further, on 15 July 2020, the Law Clinic had written to the Tribunal, requesting an extension of time of 14 days, until 5 August 2020, to submit witness statements from the claimant and his wife, which were otherwise due by 22 July 2020. By letter to the Law Clinic, copied to Dr Wilson for the respondents, sent by email on 27 July 2020, the extension of time to 5 August 2020 was granted by Employment Judge McPherson, who instructed that the

respondents, per Dr Wilson, submit a date listing response by 3 August 2020, and a copy of the Preliminary Hearing note of 24 June 2020 was provided for her attention. On 5 August 2020, the Law Clinic applied for a further short extension until 7 August 2020 to finalise the witness statements.

16. Thereafter, by email to the Tribunal sent on 7 August 2020, the Law Clinic provided witness statements for Mr & Mrs Saki, with copy sent to Dr Wilson for the respondents, explaining that the witness statements were not yet signed, complicated by current circumstances of Covid-19 and the Law Clinic working remotely, and furthermore, they were in the process of preparing Bundle of documentary evidence to be relied upon, which would be cross-referenced throughout each witness statement.

17. No date listing stencil was returned by the respondents, by 3 August 2020, or at all. On 11 August 2020, the Tribunal wrote to both the Law Clinic, and Dr Wilson for the respondents, stating that the Judge had directed that the case now be listed for the previously ordered 3 hour Remedy hearing by CVP, and that Notice of Remedy Hearing would follow under separate cover. In that same letter of 11 August 2020 from the Tribunal, parties were advised that the witness statements had been placed on casefile, and if signed witness statements could not be obtained, given the ongoing Covid-19 situation, then, at the CVP Hearing, the Judge would ask each of the claimant and his wife to confirm, on oath, their witness statements as being their evidence in chief, before their evidence would be open to cross-examination by Dr Wilson, as the respondents' representative, and any questions from the full Tribunal panel.

Respondents' Postponement Application refused by the Tribunal

18. As previously noted above, Notice of Remedy Hearing by CVP was issued to both parties on 3 November 2020. When the CVP Team asked both parties' representatives, on 18 and 24 November 2020, to provide CVP test

availability and contact details for the Remedy Hearing on 3 December 2020, Dr Wilson made email contact , on 24 November 2020, to the CVP clerk, but not copied to the Law Clinic, as per **Rule 92**, stating that, further to her telephone call that day to Luke Murphy, CVP Team, she was writing to advise "***that as I do not have access to a fixed internet line for the test you wish to perform due to the office being closed as a consequence of lockdown, I would therefore request that this is adjourned until the lockdown has been lifted and normal access to facilities is restored."***

19. Dr Wilson's email of 24 November 2020 was referred to Employment Judge McPherson, on 26 November 2020, when the Judge, without seeking comments from the Law Clinic, given that they were working remotely, and so they would not be immediately available to respond, but instructing that they be copied in to Dr Wilson's email of 24 November 2020, and the Judge's ruling refusing postponement of the listed Remedy Hearing, refused Dr Wilson's application for postponement, for the detailed reasons given in the 3-page letter from the Tribunal dated 26 November 2020, emailed to both parties by the Tribunal clerk at 12:40.

20. The Judge's refusal of the postponement application, made on the respondents' behalf by Dr Wilson, was that the Judge considered that it was in the interests of justice that the listed Remedy Hearing proceed, as there had already been delay since Judgment against the respondents was issued, in February 2020, and any further delay was not in accordance with the overriding objective under **Rule 2**, and avoiding unnecessary delay, when to postpone and relist would mean the case would not be relisted until well into February / March 2021.

21. While various technical solutions to assist the respondents to participate in the listed Remedy Hearing were suggested, including attending at the Glasgow Tribunal Centre, and joining the CVP Hearing remotely using the Tribunal's Wi-Fi, and Dr Wilson was ordered to clarify her position, as soon

as possible, and by no later than 4pm on Friday, 27 November 2020, there was no further communication or contact from her to the Tribunal, by that deadline, or at all, nor from anybody else on behalf of the respondents.

Remedy Hearing before this Tribunal

22. This Remedy Hearing took place remotely given the implications of the ongoing COVID-19 pandemic. The presiding Judge and CVP clerk were both present in the Glasgow Tribunal Centre, and it was a fully video (V) hearing held entirely by videoconferencing, and parties did not object to that format. The two lay Members of the Tribunal dialed in to the Hearing remotely from separate locations. It was listed on the publicly available CourtServe website as a public Hearing that any interested party could join by contacting the Glasgow ET office. In the event, there was no public or Press attendance at this remote Hearing. The respondents were not present, nor represented.

23. The claimants' representatives from Strathclyde University Law Clinic dialed in to the Hearing remotely from separate locations, while the claimant, and his wife as his witness, dialed in from their flat in Glasgow. As at the Final Hearing, Ms Yuill acted as the lead representative, and she spoke on behalf of the claimant, with Ms Withers very much in attendance as a silent partner, and support.

24. At the start of this Remedy Hearing, having heard from Ms Yuill, the claimant's lead representative, the respondents not being present, nor represented, despite Notice of Remedy Hearing having been issued to them, and a postponement application by their representative having been refused by the Tribunal on 26 November 2020, the Tribunal decided, in exercise of its powers under **Rule 47 of the Employment Tribunals Rules of Procedure 2013,** to proceed with the listed Remedy Hearing in the absence of the respondents.

25. We considered the whole information available to the Tribunal about the reasons for the respondents' failure to appear or be represented, being the background to the case known to us from the Final Hearing and our previous judgment, the recent communications from and to the Tribunal, as recorded above under "background", and the recently refused postponement application made by Dr Wilson on behalf of the respondents.

26. Having done so, we decided that it was in the interests of justice to proceed, the claimant, his witness and his representatives being present, ready and able to proceed, as also the full panel of the Tribunal assembled for that purpose, and any further delay would be contrary to the overriding objective under **Rule 2** to deal with the case fairly and justly, including avoiding unnecessary further delay.

27. The claimant and his wife had each previously submitted to the Tribunal a written witness statement, and these, together with their documentary productions, had been intimated to the Tribunal, with copy sent to Dr Wilson for the respondents, by email from the Law Clinic sent on 7 August 2020, although, at that time, the witness statements were not signed by the claimant or his wife, due to Covid-19 restrictions preventing them meeting with the Law Clinic, and, anyway, they were not then cross-referenced to relevant documents in the Joint Bundle being prepared for use at this Remedy Hearing.

28. The claimant, his wife as his only witness, and his Law Clinic representatives, were all able to, and did, actively participate and engage in this remote Hearing, as did the full panel of the Tribunal. We could all see and hear each other, although joining from separate locations. We all had available to us the substituted witness statement for the claimant (now cross-referenced to Bundle documents, and with a small amount of additional information not included in his original statement of 7 August 2020), and the two Bundles, as intimated to the Tribunal, with copy sent to Dr Wilson for the respondents, by email from the Law Clinic sent on 26 November 2020. Paragraph 22 of his

substituted witness statement, cross referred to his Schedule of Loss, at page 33 of the Supplementary Bundle, and set out his assessment of his losses, quantified at **£27,623.56.**

29. We note and record here that we had before us Mr Saki's substituted witness statement, Mrs Saki's witness statement, and a Joint Bundle of Productions, with 7 documents, extending to 32 pages, together with Supplementary Bundle, with 4 further documents, sequentially numbered from pages 33 to 47. Document 1 in the Joint Bundle, at pages 1 and 2, included the claimant's medical records (from his GP surgery), while document 8, at pages 33 and 34 of the supplementary Bundle, included the claimant's Schedule of Loss dated 7 July 2020 seeking **£27,623.56**.

30. Dr Wilson was asked by the Law Clinic on 26 November 2020 to provide any documentary productions that she wished to rely upon, but no such documentation was intimated by her, or anybody else on behalf of the respondents. The Law Clinic received no correspondence from her in the lead up to this Remedy Hearing. She did not copy her postponement request to them, and it only came to their attention, when it was refused by the Judge on 26 November 2020, as detailed earlier in these Reasons.

31. As we were conscious that, of necessity, the claimant and his wife were dialing in from the same location, we took her evidence first, so as to ensure that her evidence, taken in chief by witness statement, taken as read, was not influenced by anything done or said by the claimant in his own evidence to the Tribunal.

32. Mrs Lyndsey Saki confirmed, once sworn, that it was her witness statement, she understood it represented her evidence in chief to the Tribunal, and that having recently re-read it, there was nothing in its written terms that she wished to change. Due to Covid restrictions, she explained that she had been unable to date or sign it, but she was happy to have it accepted as her

evidence to the Tribunal. We took her statement, as read. There were no questions of clarification arising from the Tribunal and, as the respondents were not in attendance, Mrs Saki was not cross-examined on her witness statement

33. We did likewise with the claimant. Mr Saki confirmed, once sworn, that it was his substituted witness statement, he understood it represented his evidence in chief to the Tribunal, and that having recently re-read it, there was nothing in its written terms that he wished to change. We took his statement, as read. There were some questions of clarification arising for the claimant from each of the 3 members of the Tribunal and, as the respondents were not in attendance, Mr Saki was not cross-examined on his witness statement. Ms Yuill had no re-examination of the claimant, arising from the Tribunal members' questions.

34. While, for a very short part of this Remedy Hearing, less than 5 minutes, we lost connection with Mr Taggart, a member of the Tribunal, who was calling in from a remote site, he returned without difficulty, and the evidence given by the claimant in reply to a question to him from Ms Fisher, the other Tribunal member, was reprised, and other than that, and some distracting barking noises coming, from time to time, from a dog trainer facility next to Ms Yuill's flat, all involved in this Hearing remained in contact throughout, and there were no other technical issues with use of the CVP platform.

35. Having heard the evidence of the claimant's wife as his only witness, and then the claimant himself, and after questions of clarification from members of the Tribunal, the evidence led closed, and we adjourned proceedings, at 11.05 am, to allow Ms Yuill to consider making her closing submissions at this Remedy Hearing, and that without any further, undue delay, the respondents not having appeared. She agreed to do so, having advised us that she had prepared a draft in contemplation of this Hearing anyway, and we agreed to reconvene the Remedy Hearing for that purpose after one hour.

36. With consent of Ms Yuill, as the claimant's lead representative, we varied the previous case management orders made by the Judge on 23 June 2020 for that purpose, so as to allow her to address the Tribunal on this sitting day, rather than having to adjourn part-heard to another date, only for that purpose, which did not seem to us, nor her and the claimant, to be in the interests of justice, or consistent with the Tribunal's overriding objective.

37. The previous order was made by the Judge, on 23 June 2020, at the Case Management Preliminary Hearing, against a situation where the respondents, then professionally represented by a consultant from Croner, were intending to attend the Remedy Hearing, and cross-examine the claimant and his witness, and a 7 day period for written closing submissions was agreed as being appropriate against that scenario but, as subsequent events had shown, the situation at this Remedy Hearing is that the respondents had not appeared and they were not represented, and so there had been a material change in circumstances since that order was made by the Judge, which merited it being revisited and varied by the Tribunal.

Findings in Fact

38. We have not sought to set out every detail of the evidence which we heard at this Remedy Hearing, nor to resolve every difference between the parties, but only those which appear to us to be material to the task of determining an appropriate remedy for the claimant. Our material findings, relevant to the issues before us for judicial determination, based on the balance of probability, are set out below, in a way that is proportionate to the complexity and importance of the relevant issues before the Tribunal.

39. We have also borne in mind, in dealing with remedy, certain of our findings in fact, from paragraph 62 in the Reasons section from the original Judgment issued on 13 February 2020, relevant to the claimant's dismissal by the respondents, on 17 September 2018, in particular at paragraphs 62 (43) to

(50), where we found that, as a result of his unfair dismissal, and victimisation by Dr Wilson, the claimant was entitled to financial compensation, including compensation for any injury to feelings, and related to the claimant's new employment, post-termination by the respondents, in particular at paragraph 62 (161) to (173), as they remain valid for present purposes, not having been the subject of any application for reconsideration, or appeal, by either party.

40. On the basis of the vouching documents produced by the claimant at the Final Hearing, the Tribunal was then satisfied that the claimant had made job applications, and took reasonable steps to mitigate his losses following his dismissal by the respondents on 17 September 2018, and prior to securing new employment with the Refugee Survival Trust from 26 November 2018. We also found that he had received no State benefits following his dismissal by the respondents on 17 September 2018.

41. On the basis of the evidence led before us, from the claimant and his wife, both of whom gave sworn evidence on oath, based on their previously disclosed written witness statements, and associated documentary productions, and after considering the further information included in the various emails intimated to the Tribunal, on 3 December 2020, from the claimant's lead representative, Ms Yuill, the claimant, and the Sheriff Officer instructed by the claimant, we have found the following essential facts established:-

(a) The claimant's wife spoke to the terms of her witness statement, in particular, stating, so far as relevant for present purposes, that:

2. On 17 September 2018, my husband came home from his work quite upset. At the time, he worked for Odyssey Enterprises Ltd. He said he had been fired that morning. He told me that he had been told by his manager, Karen Wilson, that there was no work for him there because he had raised a claim with the tribunal. He

told me he had not been at work all day because he had been asked to leave in the morning. Although he was fired in the morning, I think he didn't come home until the evening because he did not know how to tell me he lost his job. I don't think he knew what to do with himself that day and he felt incredibly guilty. He was visibly upset and shaken when he told me what happened. I think he felt the way it had been done was particularly to humiliate him. He was upset that she'd let him come in to work and get set up at his desk ready for the day and then she had just told him to leave and that no-one would ever employ him. I asked him to explain to me exactly what happened, and I told him she had been very silly as it was constructive dismissal and we sent an email to his lawyer as a record.

3. *He seemed shocked, like he hadn't expected it to go that far. I don't think he expected to lose his job.*

4. *Mahdi was clear that he was sacked because of the case. Karen Wilson had said to him 'there's no work for you here, you took me to the tribunal', and he'd never had a disciplinary or anything before. I think she said something about him suggesting she was racist, because the case was on race discrimination, and he explained that he had never said that. She also said no-one else would ever employ him which he was really upset about because that was a real fear.*

7. *Before what happened on the 17 September I had seen my husband coming home from work distressed for some time. It was a stressful environment to be working in after he raised the issue regarding his wages with ACAS and mediation to resolve the issue hadn't worked. He initially thought that the issue would easily be resolved through ACAS.*

8. I know he was very concerned about being out of work. We had a young baby. Also, I think it is different when you are a refugee. It is harder to find work. This is something that Mahdi has struggled with since he has been in Scotland. He was so happy to have that job with Odyssey Enterprises Ltd. He had worked really hard. He couldn't have imagined that he would be in a position to be fired.

9. Mahdi's dismissal was a big thing on both of our minds. Because I was at home on maternity leave, we would discuss it every day. In the lead up to the dismissal, he would often come home from work saying his manager, Karen Wilson, had told him she was going to pay him or that he had to wait until a specific day. He hadn't been expecting to be dismissed.

10. I told him that it is really upsetting and a sad thing to have happened but also that it was a very silly thing for Dr Wilson to have done. I pointed out that it was probably constructive dismissal.

11. From my point of view, I thought Mahdi should have stopped working for Odyssey Enterprises prior to this because it wasn't good for him to be working there. It was within his rights to have left. I thought that him leaving would have been constructive dismissal given everything that had been happening. But Mahdi thought that if he left, he would never get the money owed to him as unpaid salary. That's why he had decided to reduce his hours to part time. He thought that was the best option. It didn't make sense to keep working full time when he wasn't getting paid.

12. When he was dismissed, I was very concerned because there was a lot of pressure and stress on him as he felt he should be

providing for his family. I felt that he wasn't always telling me everything because he didn't want to cause me stress, given that I was on maternity leave.

13. *We were worrying about paying bills when he had been dismissed. I went back to work from maternity leave 4 months earlier than planned due to Mahdi not being paid his full salary and then being sacked. I had to apply for a job on maternity leave and consequently had less time at home with our son.*

14. *I feel like Mahdi didn't enjoy the time with the baby as much as he would have done because of the stress he was under. We were still able to cover our core bills, like the mortgage, but of course at the time we didn't know the end point. We had just had a baby so worrying about providing is at the height of your mind.*

15. *Mahdi still continued to get phone calls and mail from Dr Wilson after he was sacked. I believe the letters were to suggest there had been a process, after the dismissal, but the phone calls were especially upsetting. Once when we were together as a family she called to say that Mahdi was faking being stressed because she knew we were going to our friends' wedding. She had also previously accused him of calling in sick and saying his father died one day when he took half a day of annual leave to go to an interview. His father died years ago and so I think the unpredictability of what he might be faced with or accused of was also stressful. For me it was upsetting that it intruded into our family life, even once he had been fired. I felt at times the phone calls bordered on harassment, Mahdi stopped answering calls from Dr Wilson and she began to use withheld numbers. As he was applying for jobs he had to answer calls with numbers he didn't recognise.*

17. *When Mahdi gained employment with the Refugee Survival Trust in November 2018, he was delighted to be offered a new job. Also, being a refugee himself, he felt that this job was a positive thing. He had been really concerned that he wouldn't get new employment. It was very difficult to have to explain in interviews why his last employment had ended. Him getting this job was a huge relief. My maternity pay was our only income at that point.*

18. *I think that the unfair dismissal has had an impact on Mahdi's confidence and his trust. He was very loyal to that job and worked very hard. When you are a refugee you have to prove yourself that bit more. I don't think he would trust an employer in the same way again. I think he would be less likely to raise an issue or complain about something with an employer because of what happened.*

19. *It's still on our minds because the issue hasn't been resolved. I don't think Mahdi is as stressed as he was every day, but it is definitely still lingering on. The outcome of the hearing helped him feel that he had been listened to. He was concerned that the respondent is a doctor and is Scottish and in a position of power. He didn't know how he would be perceived. But knowing that he is owed money but hasn't received it means that he can't draw a line under this. I'm also aware that there might be wider consequences, for example we don't know if his credit rating has been affected. Now that we are both working, it is a different type of stress than when it first happened, but it is still lingering.*

(b) The claimant is currently employed as Participation Manager at the Glasgow Night Shelter for Destitute Asylum Seekers. He started there on 1 July 2020. He spoke to the terms of his witness statement, in particular, stating, so far as relevant for present purposes, that :

2. *My employment with the respondent, Odyssey Enterprises Ltd ended on 17 September 2018. My manager Karen Wilson approached my desk and told me that I there was no work here for me and that I had to leave because I had taken her to the Employment Tribunal. I was shocked and disappointed. She said I had to leave the office and told me that no one will give me a job, not even Marks and Spencer's because I had taken her to the Employment Tribunal and accused her of racism.*

3. *The fact that she dismissed me because I had taken her to the tribunal felt so unfair. She hadn't been paying me my salary and I had asked for it so many times. I eventually had to do something about it which is why I went to the Tribunal. This was my right. She was dismissing me for seeking justice and for trying to get my salary which was owed to me. I tried to do the right thing and it just got worse. I already had the hardship and misery of not being paid properly and then for her to decide to dismiss me instead of doing the right thing was so unfair and very sad. For her to do this, I knew that she didn't respect me as a person.*

4. *I felt like she had so much power and wanted to ruin my life. She was saying that I would be unemployed with no salary. She was so angry that I had taken her to the employment tribunal. I felt that she wanted rid of me and hated me. It's hard to explain how miserable this made me. It felt like she didn't even treat me like a human.*

11. *My employment with Refugee Survival Trust started on 26 November 2018 (contract at page 19 of Joint Bundle of Productions). I signed the contract on 28 November 2018 (page 30 of Joint Bundle of Productions). My wages were more than I had been earning at Odyssey Enterprises Ltd (page 20 of Joint*

Bundle of Productions). I was so happy when I started this new job.

12. *After I had been dismissed, I felt very panicky for a few weeks. The way that Karen Wilson had spoken to me was really sad. I couldn't sleep for a few days. I was panicking about everything – my career, having no salary, no income, no future. I was thinking how can I support myself and my family? How can I get a new job? What can I do now? The way that she had told me I won't get another job made me feel very alone and helpless. I felt like I was worth nothing as a consequence of the way she had treated me. She already hadn't been paying me properly and when she said leave here and no one will give you a job, she had so much power. She made me feel like I am a guilty person even though I didn't do anything wrong. She treated me like I was a guilty person.*

13. *When Karen Wilson contacted me over text message on 20 September 2018 (page 3 of Joint Bundle of Productions), she wanted me to come to the office, but I was feeling very low. I desperately wanted my salary. I told her that I couldn't cope with the situation (page 4 of Joint Bundle of Productions). I thought that maybe she had realised that she had made a mistake in dismissing me so wanted me to come back. Or maybe she thought I would come back and keep working even though she wasn't paying me. I was vulnerable, maybe she thought she could take advantage of me. I felt like she thought it didn't matter how she treated me. I agreed to meet Karen Wilson because I wanted to get my salary that was owed to me and I also wanted my payslips (page 5 of Joint Bundle of Productions). I felt scared about seeing her again after what she had said to me on 17 September 2018 and felt uncomfortable about going into the office. I didn't want to be there after everything that had*

happened. This is why I suggested meeting at Patisserie Valerie (page 5 of Joint Bundle of Productions).

14. *I spoke to my GP, Dr Gillian MacArthur at Govanhill Health Centre, on the telephone on 21 September 2018 because of how stressed I was feeling as a consequence of how I had been treated by Karen Wilson (page 2 of Joint Bundle of Productions). I was feeling so anxious I felt I had to talk to my GP. I spoke to my GP again on 26 September 2018, again to discuss how I was feeling because of what had been going on with work and how I had been treated (page 2 of Joint Bundle of Productions). I spoke about the fact that I felt I had been racially discriminated against because another employee at Odyssey Enterprises, who was white and Scottish, was being paid properly and I was not. I felt that it was unfair that I was not being treated equally. I am sure that I mentioned the dismissal to her, so I am not sure why this has not been mentioned in her notes of these consultations. She gave me a FitNote noting that I was not fit for work because of stress.*

15. *My GP then referred me to a Community Link Practitioner (page 2 of Joint Bundle of Productions). Community Link Practitioners are people who work at GP surgeries and offer different support and advice. I think my GP referred me to a Community Link Practitioner because my situation was so critical it was important that I got some more support.*

16. *The Community Link Practitioner I spoke to was Mr Neil Girvan. I met with him on 4 October 2018 (page 2 of Joint Bundle of Productions). We discussed what had happened at Odyssey Enterprises including not being paid my salary and the dismissal. We also discussed how I was feeling about the Employment Tribunal. Even after this I was still feeling down, and I thought*

that this would not work for me. I was still having flashbacks and was still stressed. All I could keep thinking about was the time I worked for Karen Wilson and how badly I was treated. I was also trying to sort an application for Employment and Support Allowance at that time and discussed this with Mr Girvan. He gave me some advice and help with this. He helped to get my FitNote backdated to the date of my dismissal, 17 September 2018.

17. *On 26 September 2018 I went to the office to get a copy of my payslips. When I was there, I showed my sicknote to Karen Wilson because I wanted her to know how much the way she had treated me affected me. She said that I showed no signs of sickness or stress. Karen Wilson did not believe that I had been to see my GP. At this point I was not well enough to work for anyone.*

18. *Looking at my medical records, I can see that Karen Wilson contacted my GP because she thought that the sicknote that said I was unfit for work because of stress was fraudulent (page 2 of Joint Bundle of Productions). I think I remember her saying that she thought the sicknote was fraudulent but I can't remember when. To know that after everything that she had done to me, she accused me of lying about the impact it had on me is so upsetting. It is unbelievable. It upsets me even more that she said that the stress she caused me is a lie.*

19. *I spoke to another GP, Dr Maria Fazzi, on 2 March 2020 (page 1 of Joint Bundle of Productions). I told her that I still felt so miserable after the way that I had been treated by Karen Wilson. We discussed that I thought about how she treated me every day and that I felt I was owed an apology.*

20. I think that day has affected my life. I still think about it often because we haven't sorted out the problem yet. I feel like she is dangerous because of what she has done to me. The way she treated me hasn't left me. Even after I was dismissed, she continued to treat me badly.

21. I still think about it all the time. I have flashbacks. I still talk to my wife about it sometimes, but I feel hopeless. I don't know who can make it better, it is very difficult.

22. An assessment of my loss has been set out in a Schedule of Loss (page 33 of Supplementary Bundle to Joint Bundle of Productions). My representatives from the University of Strathclyde Law Clinic advised me that as I was unfairly dismissed, I am entitled to a basic award. My representatives explained that this is calculated based on my age, the number of years that I worked for Odyssey Enterprises Ltd and my weekly pay. I was thirty nine years old on the date of dismissal and had worked for Odyssey Enterprises Ltd for two years. My weekly salary at the date of dismissal was £160.00. As such, my basic award comes to £320.00. My representatives explained that I am entitled to compensation for the loss I suffered from the date of dismissal until I gained new employment with Refugee Survival Trust. I gained new employment ten weeks after I was unfairly dismissed therefore I am entitled to £1,600.00 in respect of this loss. I understand that I am also entitled to compensation for loss of statutory rights which has been set at £500.00. I have described above the impact that the victimisation has had on me. My representatives have explained the Vento guidelines which provide a guide for the amount of compensation to be awarded for injury to feelings in such cases. On this basis we have assessed my loss as the middle of the middle Vento band, at £17,150.00. My representatives explained that as the

Employment Tribunal found that I had been summarily dismissed, I am entitled to an uplift of 25% as a result of Dr Karen Wilson's failure to follow proper procedure when she dismissed me. My representatives also explained that judicial interest is available at 8 per cent per annum on the injury to feelings compensation and loss of statutory rights compensation and as such this has been included in my claim. The total amount claimed is £27,623.56.

(c) The claimant's GP records, produced as document 1 in the Joint Bundle, at pages 1 and 2, are a 2 page print out from the claimant's GP surgery, downloaded at the Law Clinic on 18 August 2020, as per the footer on the printed document. It contains printed entries, by the claimant's GP, of consultations between 14 November 2013 and 15 June 2020. In particular, the GP records show the following material entries :

<u>26/09/2018</u>	*<u>Dr Gillian MacArthur at Govanhill Health Centre</u>*
Problem	*Stress at work. Not being paid his full salary. Has been in touch with ACAS. Works for a small recruitment firm. Had a tribuneral (*sic*) to state his case. He thinks he was a victim of racial discrimination…Will discuss with CLP. Appt given.*
Additional	*eMED3(2010) new statement issued, not fit for work FitNote.pdf, (diagnosis : stress ; Duration : 26/09/2018 – 12/10/2018)*
<u>04/10/2018</u>	*<u>Mr Neil Girvan at Govanhill Health Centre</u>*

Comment *Explained CLP role. Pt discussed issues re employment tribunal and effect this has had on confidence and self esteem. Pt described feeling anxious and scared, pt upset. Described feelings of self doubt and guilt. Advised to make appointment with newly appointed solicitor Ms Neil. Requires sick line to be back dated to when he was "unfairly dismissed" on 17/09/2018 as would like to claim for ESA. Appt made with welfare rights advisor on 8/10/19* (sic) *at 3.30pm. Discussed talking therapies -pt would like to think about this.*

02/03/2020 *Dr Maria Fazzi at Govanhill Health Centre*

History *tribunal found in favour for him but says needs another medical report. Has found this experience very stressful thinks about it everyday. Still wonders why he was treated this badly by his boss. Feels she should apologise to him, and feels she never treat anyone like that again… Been physically unwell for a month with recurrent coryzal sx, cough, headache, sneezing and feeling lethargic. Taking otc cold and flu remedies*

Examination *reasonably bright. Dry cough heard. T37.0 sats 985. Rt drum red, throat sl inflamed. chest clear.*

Comment *chat re findings. …suggest lawyer contact us to request report formally.*

Medication *Ibuprofen tablets*

15/06/2020 *Dr Anna Fields at Phone Encounter*

History *telecons due to covid…low mood seemed to be main issue wishing to talk about. Still thinks a lot about the tribunal which was very stressful. won case but still awaiting money. took friends sertraline which helped, would like to be on this regularly. agreed 1/12 px and review.*

(d) In light of questions of clarification asked by the Tribunal, we have made the following further findings, as follows:

(i) the claimant explained that , when he met his GP, in September 2018, it was found that he needed extra support and help, including emotional support as he was stressed and had trauma, and his mental health was affected by Dr Karen Wilson's dismissal of him.

(ii) the claimant stated that he had 4 sessions with the Community Link Practitioner from October 2018, but he could not recall the period over which these sessions with Neil Girvan took place, describing it, from recollection, as some months after his dismissal, and "***a few times"***.

(iii) with reference to his GP records produced to the Tribunal, the claimant accepted that he had had a history of depression in 2009 to 2011, which he described as for "***personal reasons***", but he described that as "***very minor compared to what happened with Dr Karen.***"

(iv) the claimant explained that the recorded history of depression in September 2015 was when his mother was sick, and he stated that anxiety in January 2018 was over university exams, and that as he had got a new job with the Refugee Survival Trust he did not need to make any application for Employment Support Allowance.

(v) further, the claimant stated that his GP records were accurate, showing that he was not at his GP very often, between 2015 and 2018, and that he had had stress symptoms from 2009, and he spoke of "***flashbacks"*** to Dr Karen Wilson's behaviour towards him, and that, in June 2020, he had used a friend's medication for anxiety / depression.

(vi) asked about the effect of the victimisation upon him, assessed at this date, the claimant described it as being the stress of being hopeless, asking why she (Dr Wilson) had done that to him, and never paid him, even after the Tribunal's judgment in his favour in February 2020. He described things as being just hopeless, and asking why had this happened to him ?

(vii) when asked about his new job with the Refugee Survival Trust, from November 2018, the claimant stated that he was feeling better after that, and that getting that job helped him. However, the Tribunal was ongoing, and he was waiting for a judgment in his favour. He described his feelings as being about Dr Wilson's decision, and her attitude towards him, more than the waiting for the Tribunal's judgment.

(viii) when he received the Tribunal's judgment, and read it, the claimant stated that he was really happy, and he felt it was fair, and he was pleased that the Tribunal had listened to him, and she (Dr Wilson) had faced judgment. While that had helped his feelings, the claimant added that she had not yet paid him what he had been awarded by the Tribunal, and he was stressed about that, as things were becoming complex.

(ix) the claimant confirmed that 15 June 2020 was the last time he had consulted his GP, on the phone, that he had finished his sertraline medication in August 2020, and he is not currently on any medications.

(x) being paid his Tribunal award would help him, he stated, but he had ongoing financial difficulties, and while they had planned to buy a house, Dr Wilson had not yet paid up, and so he still had bills to pay, and needed to fix things in their flat.

(xi) further, added the claimant, despite getting a Tribunal extract judgment, and instructing Sheriff Officers, who served papers on the respondents at their Gordon Street, Glasgow, business address, the Sheriff Officer had reported no funds received.

(e) On 10 August 2020, Roderick Macpherson, Sheriff Officer, reported to the claimant that an arrestment had been served on the Royal Bank of Scotland, as the respondents' bankers, after a charge for payment had been served that day at the respondents' place of business at 30 Gordon Street, Glasgow. To date, the claimant advised us in his evidence at this Remedy Hearing that the sum of **£7,399.19** awarded to him by the Tribunal, in respect of unlawful deduction from wages, as per the Tribunal's original judgment issued on 13 February 2020, remains unpaid by the respondents.

(f) After the claimant received his Extract Judgment from the Tribunal, he submitted a completed Penalty Enforcement form to the relevant UK Government department BEIS (Department for Business, Energy and Industrial Strategy) in respect of the judgment in his favour for **£7,399.19**, as set forth in the Tribunal's judgment issued on 13 February 2020, and the respondents' failure to pay him that sum. While that application was acknowledged by BEIS on 14 August 2020, by letter to the claimant c/o the Law Clinic, the claimant advised us, in his evidence to this Remedy Hearing, that that sum remained unpaid, and BEIS had not yet "***named and shamed"*** the respondents.

(g) In the Schedule of Loss for the claimant, dated 7 July 2020, as reproduced as document 8, at pages 33 and 34 of the Supplementary Bundle of Productions, the following details were provided : gross and net weekly pay @ £160 ; age at dismissal : 39, and 2 years' completed service, giving a basic award of **£320**, plus **£1,600** for 10 weeks' loss of net pay from employment end date with respondents on 17 September 2018 to start of new employment with the Refugee Survival Trust. The claimant did not seek any past or future wage loss past that date of new employment, but he did seek **£500** for loss of statutory rights.

(h) In that same Schedule of Loss, the claimant sought an award of **£17,150** for injury to feelings, being non-financial loss, claimed at "***mid level of mid-level Vento band on the basis of distress and uncertainty caused by treatment",*** plus a **25% uplift** on the compensatory award for failure to comply with ACAS Code.

(i) The total award sought, at **£27,623.56**, was shown calculated as follows:

Basic Award	£320.00
Compensatory Award:	
Past Wage Loss	£1,600.00
Future Wage Loss	£0.00
Loss of Statutory Rights	£500.00
Judicial interest @ 8% pa on past financial loss	£115.73
Non-financial loss:	
Injury to Feelings	£17,150.00

Judicial interest @8%pa	£2,477.12
	£19,627.12
Compensatory award sub-total	£21,842.85
% uplift for failure to comply with ACAS Code	25%
Compensatory award	£27,303.56

Tribunal's Assessment of the Evidence before this Remedy Hearing

42. In considering the evidence led before the Tribunal, and the various documents produced to us, both before, and after this Remedy Hearing, we have had to carefully assess the whole evidence heard from the claimant and his wife, and assess it. They were not cross-examined, as the respondents were not in attendance, nor represented, and so they could not do so at this Remedy Hearing.

43. Equally, we note and observe that the respondents took no steps to intimate any written representations to this Tribunal about the witness statements produced by the claimant and his wife, although they were intimated to the respondents, per Dr Wilson, well in advance of the Remedy Hearing, nor to lead any evidence, or make any submissions, that any financial compensation for unfair dismissal due to the claimant should be reduced on account of his contributory conduct, and / or the ***Polkey*** principle, or that any compensation for injury to feelings should likewise be reduced on account of contributory conduct.

44. **Rule 42 of the Employment Tribunals Rules of Procedure 2013** provides that the Tribunal "***shall consider any written representations from a party, including a party who does not propose to attend the hearing, if they are delivered to the Tribunal and to all other parties not less than 7 days before the hearing."*** Here, however, the respondents provided no such

written representations. That was so, despite the clear and unequivocal terms of paragraph 133 of the Reasons to our Judgment, issued on 13 February 2020, stating that, in the interests of justice and fairness to both parties, we might require further evidence to take account of the respondents' arguments, in their closing submissions from their then representative, Ms R Mohammed from Croner.

45. At this Remedy Hearing, we found both the claimant and his wife to be credible and reliable witnesses, as to the essential facts spoken to in their evidence , and we were satisfied that they did not embellish, or exaggerate, any of the matters about which they gave evidence to this Tribunal. The claimant was able and willing to answer questions of clarification asked by members of the full Tribunal panel, arising from what was in his witness statement, and he did not avoid or seek to evade probing questions from the panel.

46. While Mrs Saki did not give evidence at the Final Hearing, nor was any medical report, or GP witness led on the claimant's behalf, having referred back to our notes of the claimant's evidence, given on Tuesday, 19 February 2019, at the close of his examination in chief by Ms Yuill, the claimant was asked about the amounts shown in his then Schedule of Loss, seeking £10,000 for injury to feelings. His reply was short and succinct – he had suffered injury to feelings, he was treated unfairly, and deep stress, and he felt that he had not been treated equally, and he was so sad for days and nights, and that affected him mentally, very much. It was very unfair he should beg, again and again, for his salary.

47. Under cross-examination by Ms Mohammed, the respondents' then representative, on 20 February 2019, the claimant stated that he was definitely, 100% sure he was dismissed on 17 September 2018, but he does not seem to have been cross-examined on the nature and extent of his alleged injured feelings.

48. When, on 20 February 2019, Dr Karen Wilson was examined in chief, about the claimant's alleged dismissal on 17 September 2018, she stated that she did not have any knowledge that the claimant believed he had been dismissed that day, and she still believed that he was her employee after that date, until she dismissed him on 12 December 2018. The first she was aware that he was alleging he had been dismissed was on 15 October 2018, when the claimant copied Livingstone Brown, solicitors, into his email to Dr Wilson.

49. Under cross-examination by Ms Yuill for the claimant, Dr Wilson gave evidence that she did not say the words attributed to her, and that she did not dismiss the claimant, and that it was ***"nonsense***" that she had ended his employment. She does not seem to have been cross-examined on the nature and extent of the claimant's alleged injured feelings.

50. In closing submissions, on 19 July 2019, Ms Mohammed referred to her written response to the Schedule of Loss, and stated that "(***3) in the event the claimant is successful in his claim of victimisation the Tribunal is asked to consider any compensation be reduced as a result of the Claimant's own conduct throughout this whole process"***, and ***"(4) The (Tribunal) is also asked to consider the Polkey principle in the event they consider that there has been an unfair dismissal."***

51. When asked by the presiding Judge, at the Final Hearing, whether she was running an argument that there should be a reduction in compensation for the claimant's conduct, which was not further specified, Ms Mohammed's oral response was that it related to a breakdown in trust and relationship with the employer, and had correct procedure been followed, then the claimant would have been dismissed anyway, for going AWOL as misconduct, and he did not communicate with the respondents during that disciplinary process leading to his dismissal by Dr Wilson on 12 December 2018. She also accepted, however, that she had not raised that point in evidence with the claimant at the Final Hearing in February 2019, as her focus there was on disputing a dismissal on 17 September 2018.

Closing Submissions for the Claimant

52. At just after 12.05pm, when the Remedy Hearing resumed, after the one hour's adjournment to allow Ms Yuill to prepare, we invited Ms Yuill to make her closing submissions to the Tribunal. She did so by reading from a script which she had pre-prepared for the purpose, initially designed as a draft of what she had prepared to review after close of evidence, and cross-examination by the respondents, which, of course, did not occur, as they neither attended, nor were they represented. She reviewed it during the adjournment we allowed her, after close of evidence, and before start of her delivery of her oral closing submissions to us that afternoon.

53. By email to our CVP clerk, at 11:41am, on 3 December 2020, Ms Yuill helpfully intimated a copy of an Employment Appeal Tribunal judgment that she wished to rely upon in her closing submissions for the claimant. It was **Base Childrenswear Ltd v Miss N Lomana Otshudi**, a judgment by Her Honour Judge Eady QC, as she then was(now Mrs Justice Eady, a High Court judge), as reported at **[2019] UKEAT/0267/18**.

54. At the Judge's specific request, and as her oral delivery speed was far in excess of his best manuscript notetaking ability, despite his requests for her to moderate her delivery speed, so he could note everything said fully, Ms Yuill emailed that closing submission to the Tribunal, so that we had its full terms available to us, for our private deliberation.

55. As the respondents were not present at this Remedy Hearing, it is important that they understand the full submissions made to us. Exceptionally, we have decided it is appropriate to reproduce them here, in full, in this our Remedy Judgment, rather than merely summarise the salient points. In her written closing submissions, as intimated to the Tribunal, by email from Ms Yuill to the CVP clerk on 3 December 2020, at 13:34, she submitted as follows:-

"*In terms of the Schedule of Loss, the basic award is based on the finding of the Employment Tribunal of the claimant's salary, his years of service and his age.*

The current loss is based on the claimant's loss of income between the date of dismissal and the start of new employment with the Refugee Survival Trust. The claimant's income in new employment exceeded that of his part time earnings with the respondent and therefore no net loss is calculated on an ongoing basis beyond the date he commenced his new employment. The net loss is calculated based on the net salary with the respondent multiplied by the number of weeks between the date of dismissal and his new employment, it is submitted that the tribunal found in the initial judgment that the claimant has mitigated his loss and this has been confirmed in his evidence today, his efforts to immediately find alternative employment. The claimant was asked about the severity of the impact of the act of victimisation – it is submitted that the claimant had no option but to secure alternative employment in order to secure financial security of his family but submit that this does not contradict his evidence that he was nonetheless at that time continuing to manage the impact of the act of victimisation on his mental health.

There is a claim for loss of statutory rights which we have assessed at £500 but recognise this is within tribunal's discretion

Understand that the Vento bands suggest that the lower band may be applicable where it is a one off incident however the case of Base Childrenswear Ltd v Miss N Lomana Otshundi, Appeal No UKEAT/0267/18/JOJ affirms that a one off incident need not necessarily fall in the lower band, the focus must be on impact on the claimant...

Base Childrenswear found an unfair dismissal which amounted to an act of racial harassment - EAT upheld the ET's decision to make an award in the middle of the middle band.

> *"36. Moving on to the ET's assessment of injury to feelings in this case, it is right to say that, in deciding whether the case should fall within the low or middle Vento bands, an ET might think it relevant to have regard to whether the discrimination in question formed part of a continuing course of conduct (perhaps a campaign of harassment over a long period) or whether it was only a one-off act. That said, each such assessment must be fact and case specific. It is, after all, not hard to think of cases involving one-off acts of discrimination that might well justify an award falling within the middle or higher Vento brackets, or other cases involving a continuing course of conduct that are properly to be assessed as falling within the lower band. Simply describing discrimination as an isolated or one-off act may not provide the complete picture and I do not read the Vento guidance as placing a straightjacket on the ET such that it must only assess such cases as falling within the lower band. The question for the ET must always be, what was the particular effect on this individual complainant?"*

then discuss the impact to claimant...

As in Base Childrenswear Ltd (at para 34), it is submitted that the discrimination found by the Tribunal in this case was serious. The Claimant had been employed by the Respondent for over two years. He had worked hard despite suffering unlawful deductions... he had made a number of attempts to rectify the issue with the payment of his salary with the Respondent's director... it was only when he felt he had no alternative did he make a claim in the Employment Tribunal... He was seeking payment of the sum to which he was entitled... The Respondent's Director treated the Claimant with a complete lack of respect or acknowledgment of the difficult situation that he was in as a result of the unlawful deductions... The dismissal came out of the blue... no proper process followed... The Respondent's Director was explicit in her reason for dismissal... was cruel and threatening in her statement that "no one will give you a job in Glasgow..."

it is submitted that as the act of victimisation was the dismissal of the claimant, it is submitted that this is a significant act and should be compensated accordingly. Whilst it is a one off act, it is sufficiently serious as to have resulted in the termination of the claimant's employment

we submit that the tribunal found in initial judgment that there was no potentially fair reason for dismissal given, and the Claimant was dismissed without notice or due process and that, as such, his dismissal was substantively and procedurally unfair. The tribunal found that it was not reasonable, in all the circumstances, to have dismissed the Claimant at that stage. Has repeatedly failed to make good on payment of sums due – including payment of final salary following the termination of his contract, leaving the claimant in an extremely vulnerable position financially in addition to the stress and anxiety that he has given evidence about suffering. As such, submit 25% uplift is appropriate

Submit that the tribunal take into account Dr Wilson's behaviour following the act of victimisation and the impact this had - not paying the salary owed, the approach adopted at the initial hearing where she challenged his integrity and accused him of inflating his claims in order to claim more money, not paying the award made against her despite repeated attempts to enforce the decree following efforts to secure payment of the award in a professional manner through her legal representative, the lack of regard for the process of the Employment Tribunal in the lead up to the remedies hearing and failure to comply with relevant order... all indicative of the lack of respect that Dr Wilson has shown the claimant and supports the claimant's evidence about the impact of her act of victimisation upon him.

Submit that the Tribunal ought to have regard to the impact of the act of victimisation on the Claimant and that the fact it was a one-off act of victimisation does not necessarily mean that an award for injury to feelings must fall within the lower Vento band. Submit that when the Tribunal has

regard to the factors outlined above, it ought to conclude that the impact on the Claimant was severe as to justify an award in the middle of the middle band...

We are seeking judicial interest on any amount awarded from the date of victimisation being the date of dismissal to date of calculation which we assume will be today. (17 Sept)

We also submit that judicial interest should be applied to the injury to feelings award. The rate in Scotland for all discrimination cases is 8%. Regulation 3(2)provides that the interest accrues at the rate prescribed from time to time by the Act of Sederunt (Interest in Sheriff Court Decrees or Extracts) 1975, which sets the rate applicable to judgments of the Sheriff Courts under section 9 of the Sheriff Courts (Scotland) Extracts Act 1892. The current figure of 8% under section 9 was set by the Act of Sederunt (Interest on Sheriff Court Decrees or Extracts) 1993.

The tribunal may refuse to award interest, or may apply a different calculation, if it believes that serious injustice would otherwise result.

In terms of the tribunal discretion to make judicial interest an award on the compensatory sum then it should be calculated from 26 Oct 2019 which we calculate to be the mid point from date of dismissal to the date of calculation which we assume is today."

Further Submission for the Claimant : Section 12A Financial Penalty

56. In the claimant's evidence to us, he referred to the fact that he had not, as yet, obtained any payment from the respondents for the amount of **£7,399.19** awarded to him by the Tribunal's original judgment issued on 13 February 2020, where the Tribunal had awarded that sum to him in respect of unlawful deductions from wages made by the respondents. That was so, he said,

despite obtaining an Extract of that judgment from the Tribunal, and instructing Sheriff Officers to execute diligence against the respondents.

57. After close of the evidence at this Remedy Hearing, the claimant's representative, Ms Yuill, emailed to the CVP clerk, at 12:41 on 3 December 2020, an email forwarded by the claimant to her, forwarding an email he had received, on 10 August 2020, from Roderick Macpherson, Sheriff Officer, reporting to the claimant that an arrestment had been served on the Royal Bank of Scotland, as the respondents' bankers, after a charge for payment had been served that day at the respondents' place of business at 30 Gordon Street, Glasgow. We have treated that email as additional information from the claimant, and included its terms in our findings in fact earlier in these Reasons.

58. In discussion with Ms Yuill, after she came to the end of her closing submissions, it became clear that she had perhaps confused the role of the relevant UK Government department, BEIS, and the Employment Tribunal, as regards matters taken into account by her in preparing her submissions to the Tribunal about remedies from the Tribunal open to the claimant, as she stated she was unaware of the Employment Tribunal's powers under **Section 12A of the Employment Tribunals Act 1996**. In those circumstances, we allowed her 7 days to consider matters, and intimate to the Tribunal clerk any further written submissions on financial penalty that she felt might be appropriate to the circumstances of the claimant's case, and the Tribunal's powers.

59. After close of this Remedy Hearing, the claimant's representative, Ms Yuill, emailed to the CVP clerk, at 13:34 on 3 December 2020, two additional documents for the claimant, being (1) a completed Penalty Enforcement form to the relevant UK Government department BEIS (Department for Business, Energy and Industrial Strategy) in respect of the judgment in his favour for **£7,399.19**, as set forth in the Tribunal's judgment issued on 13 February 2020, and the respondents' failure to pay him that sum, and (2) a letter of

acknowledgement from BEIS on 14 August 2020, to the claimant c/o the Law Clinic. We have treated that email with those 2 documents as additional information from the claimant, and included its terms in our findings in fact earlier in these Reasons.

60. In her further written submissions intimated to the Tribunal, by email from Ms Yuill to the CVP clerk on 4 December 2020, at 14:44, Ms Yuill made submissions, as regards financial penalty. We have reproduced them in full here, as they were not copied to the respondents, as they were not in attendance, but it is appropriate that they be sighted on them here, as follows:-

1. Further to the Remedy Hearing held on 3 December 2020 and on the oral instruction of Employment Judge McPherson, the Claimant makes the following submission.

2. S. 12A (1) of the Employment Tribunals Act 1996 provides the powers at the Employment Tribunal's disposal:

12A Financial penalties

(1) Where an employment tribunal determining a claim involving an employer and a worker—

(a) concludes that the employer has breached any of the worker's rights to which the claim relates, and

(b) is of the opinion that the breach has one or more aggravating features,

the tribunal may order the employer to pay a penalty to the Secretary of State (whether or not it also makes a financial award against the employer on the claim).

3. When will a financial penalty be ordered?

A losing employer may be ordered to pay a financial penalty in the following circumstances:

Where it is found to have breached any of the worker's rights to which the claim relates and that breach has "one or more aggravating features".

The Explanatory notes for this regulation provide a non-exhaustive list of factors that can give grounds to aggravation entitling the ET to order a financial penalty.

These are as follows: -

- *The size of the employer.*
- *The duration of the breach of the employment right.*
- *The behaviour of the employer and of the employee.*

The explanatory notes further state that an employment tribunal may be:

More likely to find that the employer's behaviour in breaching the law had aggravating features where:

- *the action was deliberate or committed with malice;*
- *the employer was an organisation with a dedicated human resources team; and/or*
- *the employer had repeatedly breached the employment right concerned.*

Less likely to find that the employer's behaviour in breaching the law had aggravating features where the employer:

- *has only been in operation for a short period of time;*
- *is a micro business;*
- *has only a limited human resources function;*

• made a genuine mistake in committing the breach; and/or

• is in formal insolvency proceedings, if imposing a penalty would have the effect of reducing the monies available to satisfy creditors, or adversely affect the sale of the business as a going concern.

4. It is submitted that following the findings in the initial judgment of 13 February 2019, the Tribunal made a determination in a claim between an employer and a worker. This judgment found that the employer breached the worker's right to which the claim related. That being the case the Tribunal found that the Claimant was subjected to a series of unlawful deductions as well as being unfairly dismissed and that that dismissal was an act of victimisation by the Respondents. It found that the Claimant was victimised by the Respondents, by reason of his protected act, done in good faith in May 2018, when he presented his claim to the Employment Tribunal against the respondents complaining of alleged race discrimination.

5. It is submitted that the most fundamental term of an employment contract provides the right to be paid your salary. The employer is obligated to pay the employee for the work being carried out. As such by the Respondent not paying the Claimant his correct salary resulted in a breach of his rights. There is also a basic statutory right to an itemised statement of pay.

6. It is further submitted that there have one or more aggravating factors, these being:

• The Respondent has always acknowledged that sums were due to Claimant. Despite repeated assurances that these sums would be paid to Claimant they never materialised.

One of the considerations for the Employment Tribunal at the initial Hearing commencing on 18, 19, and 20 February 2019 and concluding 19 July 2019, was the sum of unlawful deductions due to the Claimant. At this hearing the

Respondent did not dispute that the Claimant had from time to time spoken to her about not receiving his full salary. Evidence was led at this hearing showing that the Respondent acknowledged these unlawful deductions. (para 41 Hi Mehdi. I'm working out a payment plan and start from next week).

Despite these assurances from the Respondent no payment plan was ever set up. The Claimant was forced to raise a grievance, a complaint within the ET, which resulted in his summary dismissal, and still further to attempt to negotiate and agree what he was due subsequent to his dismissal before the matter finally appeared before the ET. The Claimant was not given payslips that properly reflected the sums due and was then presented with a further set of payslips. In addition he was provided with two P45s. It is submitted that the findings of the ET in respect of merits of this claim support that the Respondent Director Karen Wilson obfuscated the Claimant's entitlement to pay and the calculation of his pay and any outstanding pay due at every turn.

• In addition to the above the Respondent director acted with malice towards the Claimant when he sought to protect his position in relation to the unpaid wages by raising a complaint in the ET and stating at the same time that he had a concern that the treatment he was receiving, and for which he could find no innocent explanation, was due to ethnic or national origin. She summarily dismissed him iterating that he would find no other job in Glasgow.

• An award for £7,399.19 was made in favour of the Claimant in respect of the unlawful deductions, but to date the Claimant has not received payment of this award from the Respondent. The Claimant representatives engaged in discussions with the Respondent's representative following the judgment to try and agree quantum on the compensatory awards. When this failed a remedy hearing was requested by the Claimant's representatives.

• Following the 42 day period for intimating any appeal, the Claimant's representatives contacted the Respondent's representative in respect of

payment of the award. The Claimant's representatives were informed by the Respondent's representative that they had been unable to take instruction from their client. The Claimant's representative then wrote directly to the Respondent on 3 June 2020 with a copy of the Extract of Decree. The Respondent still did not make payment, nor did they acknowledge the letter.

• Due to the ongoing COVID pandemic it was not until on or around 2 August 2020 that Sheriff Officers could be instructed by the Claimant. Despite visiting the Respondents Office in Gordon Street, Glasgow and serving an arrestment on a bank account, the Respondent has still not made payment to the Claimant.

• The above information has only come to light in view of the Respondent director belatedly engaging with the ET in respect of the remedy hearing and seeking to postpone same. This despite having failed to honour the original judgement issued by the ET in respect of the claim for wages.

We submit that this action outlined above continues a pattern of conduct that can be taken to be both deliberate and committed with malice and that the Respondent has repeatedly breached the employment rights of the worker concerned and continues to do so.

8. It is submitted that as this claim was raised prior to 2019 the maximum value of any penalty imposed by the tribunal would be £5000. That said the conduct complained of further to the award made took place after April 2019 and it may be that in those circumstances the increased penalties now possible are available to the ET.

9. It is on the basis of the above points that we invite the tribunal to impose a penalty under terms of S.12A of the Employment Tribunals Act 1996. Where an award is made the penalty must be half of the sum awarded and therefore

would amount to £3699.59. A penalty can also be issued on the further award about to be made.

Reserved Judgment and Issues for the Tribunal

61. At the close of this Remedy Hearing, the presiding Judge advised the claimant, and his representative, that we would await the further additional documents and submissions to be produced, as discussed with them during the course of this Hearing, and that, after private deliberation by the full panel, in chambers, in due course, the Judge would write up the Tribunal's reserved judgment and reasons, which would thereafter be issued to both parties.

62. Although the respondents did not participate in this Remedy Hearing, they are still a party to these Tribunal proceedings and, as such, they are entitled to a copy of this our further decision.

63. The issues for the Tribunal were to determine the appropriate remedy for the claimant, following the previous Judgment issued on 13 February 2020, for unfair dismissal, and victimisation, as well as to consider the further matter of **Section 12A** financial penalty raised by Ms Yuill in her further written submissions for the claimant. The unlawful deduction from wages element of the case had previously been dealt with in the Tribunal's previous award of **£7,399.19** to the claimant. It remains, unaffected by this further Remedy Judgment.

64. As we stated, in paragraph 131 of the Reasons to our Judgment, issued on 13 February 2020 :

> *It is also partly because, in the interests of justice and fairness to both parties, we may require further evidence to take account of the respondents' arguments, in their closing submissions, that any financial compensation for unfair dismissal due to the claimant should be reduced on account of his contributory conduct, and/or the **Polkey** principle, and that any compensation for injury to feelings*

should likewise be reduced on account of contributory conduct.

65. At this Remedy Hearing, however, we only heard from the claimant's side, and there was no evidence led by the respondents, nor any written representations lodged on their behalf, so we are without any arguments presented by the respondents. In the absence of their attendance, or representation, we are left with a clear and distinct view that they are failing to actively pursue their resistance to the outstanding remedy to be awarded for the successful claim, if not acting otherwise unreasonably.

Relevant Law

66. While we received closing submissions from Ms Yuill, on behalf of the claimant, we have required to give ourselves a self-direction, in the following terms, as regards the relevant law on remedy for each of the successful heads of claim left for our determination at this Remedy Hearing.

67. For the unfair dismissal head of claim, **Section 94 of the Employment Rights Act 1996** provides that an employee has the right not to be unfairly dismissed by his employer. In the present case, it is clear that the claimant was summarily dismissed by the respondents, on 17 September 2018, and we have already made that declaration, in our original Judgment, issued on 13 February 2020, that the claimant was unfairly dismissed by the respondents.

68. Remedies for unfair dismissal are set forth in **chapter II of part X of the Employment Rights Act 1996**, in particular at **Sections 112 to 126 of the Employment Rights Act 1996.** In the present case, the claimant confirmed that he was not seeking an order for reinstatement, or reengagement, by the respondents, and accordingly our focus has been on what sums to award to him by way of compensation for unfair dismissal, being both a basic award, and a compensatory award.

69. Finally, we turned to the relevant law on remedy for a successful discrimination complaint. Our original Judgment, issued on 13 February 2020, has already made a finding that the claimant was discriminated against by the respondents by reason of victimisation, contrary to **Section 27 of the Equality Act 2010** . **Section 124 of the Equality Act 2010** makes provision about remedy in a discrimination complaint.

70. In terms of **Section 124 (2)**, a Tribunal may (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate; (b) order the respondent to pay compensation to the complainant; and (c) make an appropriate recommendation, which is defined (at **Section 124 (3)**) as being a recommendation that within a specified period, the respondent shall take specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate. We have already made the appropriate declaration.

71. As the claimant is no longer in the respondents' employment, we were not invited to make any recommendation. Our focus was on compensation. Further, in terms of the Tribunal's powers, under **Section 124 (6) of the Equality Act 2010**, we note and record that the amount of compensation which may be awarded under **Section 124 (2) (b)** corresponds to the amount which could be awarded by the Sheriff Court under **Section 119. Section 119 (4)** provides that an award of damages may include compensation for injured feelings, whether or not it includes compensation on any other basis.

72. Further, and because it is also relevant to remedy, we have considered the specific terms of **Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.** which provides that if, in the case of proceedings to which the statutory provision applies, which includes an unfair dismissal complaint, and a discrimination complaint, it appears to the Tribunal that the claim concerns a matter to which a relevant Code of Practice applies, and the employer or employee has unreasonably failed to comply

with the Code in relation to that matter, then the Tribunal may, if it considers it just and equitable in all the circumstances, increase, or decrease as the case may be, the compensatory award it makes to the employee by no more than a 25% uplift, or downlift. The ACAS Code of Practice on Disciplinary and Grievance Procedures is a relevant Code of Practice.

73. Finally, as it was raised by Ms Yuill, in her further written submission for the claimant, we have had cause to reflect, in private deliberation, in writing up this reserved judgment, whether or not this is an appropriate case to consider making a financial penalty order against the respondents, in terms of **Section 12A of the Employment Tribunals Act 1996** as amended by the **Enterprise and Regulatory Reform Act 2013, Section 16**, in circumstances where, in determining a claim involving an employer and a worker, the Tribunal concludes that the employer has breached any of the worker's rights, and the Tribunal is of the opinion that the breach has one or more "***aggravating features".***

74. Whilst the legislation itself does not define what "***aggravating features***" are, the UK Government's explanatory notes suggest that some of the factors which a Tribunal may consider in deciding whether to impose a financial penalty could include the size of the employer, the duration of the breach of the employment right and the behaviour of the employer and the employee. Further, those explanatory notes also suggest that a Tribunal may be more likely to find an employer's behaviour in breaching the law had aggravating features where the action was deliberate or committed with malice, the employer was an organisation with a dedicated HR team, or the employer had repeatedly breached the employment right concerned. Also, again as per those explanatory notes, it is suggested that a Tribunal may be less likely to find an employer's behaviour in breaching the law had aggravating features where the organisation has only been in operation for a short period of time, it is a micro-business, it has only a limited HR function, or the breach was a genuine mistake.

Discussion and Deliberation

75. In carefully reviewing the evidence led in this case, and making our findings in fact, and then applying the relevant law to those facts, we have had to consider the appropriate remedy for each of the claimants' successful heads of claim against these respondents.

76. In terms of **Section 227 of the Employment Rights Act 1996**, the maximum amount of a week's gross pay, for the purpose of calculating the basic award of compensation for unfair dismissal, shall not exceed **£508 per week,** for dismissals after 6 April 2018, as per the **Employment Rights (Increase of Limits) Order 2018**. As the claimant's weekly gross pay was **£160** that provision is not applicable in the present case.

77. Further, **Section 124 of the Employment Rights Act 1996** makes provision for limits on the amount of a compensatory award, and, in particular, as per **Section 124 (1ZA),** the amount specified, for dismissals after 6 April 2018, is the lower of £83,682 or gross annual pay, 52 x a week's pay of the person concerned, whichever is the smaller. As, in the present case, loss of wages was for 10 weeks, post termination of employment with the respondents, and there has been no continuing future wage loss, these limits are not applicable in the present case.

78. Other than an award for loss of statutory rights, the claimant has not made any other claim for loss of any employment benefits, or pension loss, so taking all of the above matters into account, we have decided that it is appropriate that we order that the respondents shall pay a monetary award of **£2,420** to the claimant, comprising a basic award of **£320** (being 2 weeks @ £160), and a compensatory award of **£2,100**, comprising past wage loss of **£1,600** (bring 10 weeks @ £160), and loss of statutory rights at **£500**. These are the amounts set forth in the Schedule of Loss, and there was no challenge to those figures made by the respondents.

79. We have made no reductions, or deductions, from those sums awarded for basic and compensatory awards. There was no argument put to us, by the respondents, that there were grounds for a reduction of the basic award, under **Section 122 of the Employment Rights Act 1996**, nor for any reduction of the compensatory award under **Section 123**. As we noted earlier, at paragraph 43 above, the respondents took no steps to intimate any written representations to this Tribunal, nor to lead any evidence, or make any submissions, that any financial compensation for unfair dismissal due to the claimant should be reduced on account of his contributory conduct, and / or the ***Polkey*** principle, or that any compensation for injury to feelings should likewise be reduced on account of contributory conduct.

80. On the evidence available to the Tribunal, we are, however, satisfied that there was an unreasonable failure by the respondents to comply with the ACAS Code of Practice. In this regard, we have considered the Employment Appeal Tribunal's judgment in **Allma Construction Limited v Laing [2012] UKEATS/0041/11**, an unreported judgment by Lady Smith, the then Scottish EAT judge in the Employment Appeal Tribunal, on 25 January 2012, at paragraph 29, and the more recent judicial recognition of Lady Smith's guidance provided, at paragraphs 51 and 54 of Mr Justice Langstaff, President of the EAT's unreported judgment of 21 October 2015 in **Bethnal Green & Shoreditch Education Trust v Dippenaar [2015] UKEAT/0064/15**.

81. In **Allma,** Lady Smith stated that : "…***an employment tribunal requires to ask itself: does a relevant Code of Practice apply? Has the employer failed to comply with that Code in any respect? If so, in what respect? Do we consider that that failure was unreasonable? If so, why? Do we consider it just and equitable, in all the circumstances, to increase the claimant's award? Why is it just and equitable to do so? If we consider that the award ought to be increased, by how much ought it to be increased? Why do we consider that that increase is appropriate?"***

82. Having carefully considered the facts of the present case, the Tribunal has decided that it is just and equitable in all the circumstances to increase the compensatory award for the claimant, made under **Section 118 (b) of the Employment Rights Act 1996**, by **15%,** rather than the 25% sought by Ms Yuill on his behalf, and accordingly we have ordered the respondents to pay to the claimant the further sum of **£315**, being 15% of £2,420.

83. It is appropriate to do so, at that 15% level, rather than the maximum 25% uplift. While the failure to provide a proper disciplinary process before summarily dismissing the claimant is unreasonable, and a serious breach of the Code's provisions about what is expected of the reasonable employer, the Tribunal considers it appropriate to take into account that, while we have found the claimant was dismissed by Dr Wilson on 17 September 2018, she did not believe that she had dismissed him, as at that date.

84. Indeed, Dr Wilson took subsequent steps to invoke a disciplinary process, culminating in the claimant's dismissal by her by letter dated 12 December 2018, a process in which the claimant did not engage, and against which the claimant did not present any appeal. Our findings in fact, at paragraph 62 (82) to (93) of our original Judgment, issued on 13 February 2020, refer in this regard. We do not consider it just and equitable to award the claimant a full 25% uplift in these circumstances, and that is why we have assessed his uplift at 15%.

85. Finally, we turn to compensation for the claimant's successful complaint of victimisation. On his behalf, Ms Yuill has sought an award for injury to feelings. The principles to be determined when assessing awards for injury to feelings for unlawful discrimination are summarised in **Armitage & Others v Johnson [1997] IRLR 162.** Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the wrongdoer. Feelings of indignation at the wrongdoer's conduct should not be allowed to inflate the award.

86. Citing from **Vento v Chief Constable of West Yorkshire Police (No. 2) [2002] EWCA Civ 1871 / [2003] IRLR 102**, we remind ourselves that an award of injury to feelings is to compensate for "***subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, stress, depression."***

87. Lord Justice Mummery said (when giving guidance in **Vento**) that "***the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise…… tribunals have to do their best that they can on the available material to make a sensible assessment." In carrying out this exercise, they should have in mind the summary of general principles of compensation for non pecuniary loss by given by Smith J in Armitage v Johnson".***

88. In **Vento**, the Court of Appeal went on to observe there to be three broad bands of compensation for injury to feelings (as distinct from compensation for psychiatric or similar personal injury). The top band should be awarded in the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. Only in the most exceptional case should an award of compensation for injury to feelings exceed the normal range of awards appropriate in the top band. The middle band should be used for serious cases which do not merit an award in the highest band. The lowest band is appropriate for less serious cases such as where the act of discrimination is an isolated or one-off occurrence.

89. The appropriate sum for each band has been up rated in cases subsequent to **Vento** to take account of inflation, see **Da'Bell v NSPCC [2010] IRLR 19 (EAT)**, and also to take account of the 10 per cent uplift for personal injury awards based on the Court of Appeal decision in **Simmons v Castle [2012] EWCA Civ 1039**. Therefore, until ET Presidential Guidance was issued, the amount appropriate for the lower band was then £660 to £6,600 and the

amount appropriate to the middle band was then £6,600 to £19,800. The amount appropriate for the top band was then £19,800 to £33,000.

90. More recently, in **De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879**, the Court of Appeal in England & Wales ruled that the 10% uplift provided for in **Simmons v Castle** should also apply to ET awards of compensation for injury to feelings, but it expressly recognised that it was not for it to consider the position as regards Scotland. However, account has now been taken of the position in Scotland by Employment Judge Shona Simon, the Scottish ET President, when formulating Guidance published jointly with Judge Brian Doyle, then President of ET(England & Wales), issued on 5 September 2017, and updated by annual addenda, most recently by the third addendum issued on 27 March 2020.

91. For claims presented on or after 6 April 2018, and taking account of the 10% **Simmons** uplift, the first addendum to the ET Presidential Guidance, issued on 29 March 2018, provided that the **Vento** bands would be as follows: **a lower band of £900 to £8,600** (less serious cases); **a middle band of £8,600 to £25,700** (cases that do not merit an award in the upper band); and **an upper band of £25,700 to £42,900** (the most serious cases), with the most **exceptional cases capable of exceeding £42,900.** The second addendum increased the bands to £900 / £8,800; £8,800 / £26,300; and £26,300 / £44,000, for claims on and after 6 April 2019, while the bands are now, since the third addendum, for claims on and after 6 April 2020, £900 / £9,000 ; £9,000 / £27,000 ; and £27,000 / £45,000. For the present case, the relevant bandings are those in force, for claims on and after 6 April 2018, the claimant having lodged this claim, on 18 December 2018, alleging unfair dismissal on 17 September 2018.

92. In deciding upon an appropriate amount, we first of all have had to address the appropriate band as per **Vento.** It is our judgment this is a case that appropriately falls into the lower band, although Ms Yuill, for the claimant, submitted to us that she regards it as falling within the middle of the middle

band, and she has assessed injury to feelings @ **£17,150**, as per the Schedule of Loss intimated on 7 July 2020.

93. In our judgment this is a less serious case and it clearly falls within the lower **Vento** band. In this case, there was not any concerted campaign against the claimant, but equally it was not an isolated incident, as there were issues on the way he was treated throughout his employment with the respondents. However, we are here looking only at the established act of victimisation. As per the EAT judgment in **Base Childrenswear Ltd**, cited to us by Ms Yuill, we readily accept that our focus must be on the impact of the discriminatory act on the claimant. Equally, as the EAT observed, it is not uncommon for a victim of unlawful discrimination to suffer stress and anxiety.

94. We have heard evidence from the claimant, and from his wife. In considering this matter, we have reminded ourselves of the unreported EAT judgment of His Honour Judge David Richardson, in **Esporta Health Clubs & Anor v Roget [2013] UKEAT 0591/12,** which makes it clear that a Tribunal has to have some material evidence on the question of injury to feelings. Here, we had the claimant's own evidence, supported by his wife's witness statement, no GP's medical report, nor any evidence from any other person with knowledge of the precise nature and extent of the claimant's injured feelings, so it has been difficult for us to differentiate between any stressors caused by the respondents, any other stressors, such as the stress that any family will suffer due to a lack of regular money coming into the household, and any additional stressors caused by the claimant's decision to prosecute this claim before the Tribunal, a feature common to all litigants.

95. The GP records produced are the GP's record of what the claimant told the GP at the relevant time, and we note that while there was a suggestion of obtaining a medical report (as noted in the GP records as at 2 March 2020), no formal medical report has been produced, nor do we understand that it was commissioned from the GP. Further, the GP was not led as a witness before this Tribunal.

96. We have found as credible and reliable the claimant's account of the impact of the respondents' conduct towards him. As the claimant described it to us, and as recorded in our findings in fact above, to add insult to his hurt, whether by design or default, although the former seems more likely, the respondents never, at any later stage, sought to apologise for their treatment of him, or to pay up the sum we awarded him in respect of the unlawful deduction from wages.

97. What we considered significant, from Mrs Saki's evidence to us, is that she described the claimant, on 17 September 2018, being "***quite upset***". Her description does not tally with the level of injury to feelings suggested to us by Ms Yuill, and the GP entry for 26 September 2018 refers to stress at work, and not being paid his full salary, but there is no mention of any victimisation, only racial discrimination, which part of his claim he withdrew at the Tribunal. In the claimant's witness statement, which we have reproduced above, in his paragraph 12, he says "***I couldn't sleep for a few days"*** meaning after date of dismissal. The panicky feelings he referred to were, understandably, concerns about providing for his family and worries about finding another job.

98. In considering an appropriate level of compensation for injury to feelings, the record 4/10/2018 shows the claimant wanted to think about talking therapies - and we know he only had 4 sessions in October from his oral evidence - so not only did he not engage in longer term talking therapies having been referred by his GP, he was also never prescribed medication for stress/anxiety until June 2020, and that only after he had taken a friend's Sertraline and told his GP then when he was long gone from the respondents. From our own knowledge, we can recognise that there is often stress in a household, where a new baby has been born, and the mother is on maternity leave, and the lack of money coming in must be stressful for any family. It is also relevant, from the claimant's background, that there was a history of depression pre-employment with the respondents.

99. Further, we recognise that people can be externally calm in demeanour and appearance, when giving evidence, yet internally in turmoil, and so we recognise that witnesses may not show their true feelings in a public Hearing, and indeed not everybody has the personality to express their true feelings in front of a Tribunal. The claimant's statements, in his witness statement, written with time for reflection, were, we felt, at points a little melodramatic, but nonetheless genuinely expressed by him.

100. In deciding this matter, we have borne in mind the judicial guidance given by Her Honour Judge Stacey (as she then was, now Mrs Justice Stacey) in the Employment Appeal Tribunal, in **Komeng v Creative Support Ltd [2019] UKEAT/0275/18**, that the Tribunal's focus should be on the actual injury to feelings suffered by the claimant and not the gravity of the acts of the respondent employer.

101. Injury to feelings awards are designed to be compensatory, not punitive, and the Tribunal needs always to bear in mind that injury to feelings awards compensate for non-pecuniary loss, but while available in discrimination and detriment cases, injury to feelings awards are not available for unfair dismissal, as per the well-known judgment of the House of Lords in **Dunnachie v Kingston upon Hull City Council [2004] UKHL 36.**

102. The claimant provided credible and reliable first-hand evidence about his treatment by the respondents, and the manner of it, and how that had affected him, and we found his testimony in that regard compelling and convincing. We have no doubt , having heard Mr Saki's evidence, that he felt, and still feels, hurt about the respondents' treatment of him, summarily dismissing him, and making no payment as yet of sums previously awarded to him by the Tribunal.

103. Applying a broad brush, we assess the amount payable to the claimant for injury to feelings for the act of victimisation that he suffered on 17 September 2018 as **£4,500** in today's money, and so that is the amount which we have

ordered the respondents to pay to the claimant, as per paragraph 2(b) of our Remedy Judgment above.

104. In terms of **Schedule A2 to the Trade Union & Labour Relations (Consolidation) Act 1992, Section 207A** applies to unfair dismissal claims under **Section 111 of the Employment Rights Act 1996** as also to discrimination at work cases under **Section 120 of the Equality Act 2010.** It is therefore within our powers to make an uplift, or downlift, if we consider it appropriate to do so. The claimant's Schedule of Loss did not seek any uplift on the injury to feelings award. In these circumstances, we have decided to make no uplift for this award, but we have decided to award interest thereon.

105. While the respondents made no submissions, we deal with the point raised by Ms Mohammed in her Final Hearing closing submissions – a ***Polkey*** type deduction cannot be applied to an injury to feelings award, even if a claimant would have been fairly dismissed at a later date – the award reflects the injury to feelings caused by the knowledge that the reason for the act was discrimination, which cannot be offset by the fact that a lawful termination may have been carried out in any event : per the Court of Appeal in **Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615**.

106. Accordingly, we now turn to the question of interest. The Tribunal is empowered to make an award of interest upon any sums awarded pursuant to the **Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.** The rate of interest prescribed by **Regulation 3(2)** is the rate fixed for the time being, currently an amount of 8 *per cent per annum* in Scotland.

107. By **Regulation 6**, in the case of any injury to feelings award, interest shall be for the period beginning on the date of the contravention or end of discrimination complained of and ending on the day of calculation. In the case of other sums for damages or compensation and arrears of remuneration, interest shall be for the period beginning with the mid-point date and ending on the day of calculation.

108. For these purposes, the day of calculation is today's date, that is to say, 2 March 2021 being the date of this Judgment. The only award is for injury to feelings. Financial losses have been assessed in the separate awards made for compensation for unfair dismissal. There is no separate claim for financial loss arising from the victimisation, as the victimisation was the act of dismissal on 17 September 2018.

109. Where the Tribunal considers that a serious injustice would be caused, if interest were to be awarded for the periods in **Regulation 6(1) and (2),** it may, under **Regulation 6(3),** calculate interest for a different period, as it considers appropriate. We received no submission to that effect from either party, and , in any event, we do not consider it appropriate to do so. We cannot, of course, alter the interest rate of 8%, as that is prescribed by law, and it is a matter in respect of which we have no judicial discretion to vary the interest rate, only the period to which that rate refers.

110. Accordingly, the appropriate interest rate is 8%. Further, we also order that the respondents shall pay to the claimant the appropriate sum of interest upon the injury to feelings award of **£4,500** calculated at the appropriate interest rate of 8% p.a. for the period between 17 September 2018, being the date that the claimant's employment with the respondents ended, and that being the date of the victimisation complained of, and 2 March 2021, that being the date of this Judgment, a period of 2 years, 5 months and 14 days (a total of **898 days).** Our calculation of interest payable is **£4,500 x 0.08 x 898 / 365 days** = **£885.70**, as per paragraph (2) (b) of our Remedy Judgment above.

111. Finally, we turn to Ms Yuill's request that we consider making a financial penalty against the respondents. It is not a matter that was foreshadowed by her in her Schedule of Loss intimated to the respondents on 7 July 2020, or at any later point. It arose from discussion with the Judge at this Remedy Hearing. As it has now been raised, we consider it in the interests of justice that we give it our careful consideration.

112. While the power to make Financial Penalty Orders has been in place since 6 April 2014, it would seem that few, if any, have been made, and as such, so far as I can ascertain, there have been no appellate judgments from the Employment Appeal Tribunal on such Orders. However, the relevant law is fairly straightforward, and contained within the bounds of **Section 12A**. Further, we remind ourselves that the UK Government's explanatory notes are guidance, they are not the law, but an interpretation of the law.

113. As such, we refer ourselves to the clear words of the statute, and there is no gloss, whether by appellate case law authority, or otherwise, upon the wording of **Section 12A**. The absence of a statutory definition of "***aggravating features***" is peculiar, but Parliament has so made the law, and we have to do our best to interpret its meaning, and the extent of its application.

114. In the absence of any statutory definition of those two words, it seems to us that we need to have regard to the ordinary and natural meaning of those two words as they are used in the English language. In that regard, we accept, as falling within the proper meaning and effect of those two words, the various examples cited by the explanatory notes. However, we equally well recognise that, as in all cases before the Employment Tribunal, cases are all fact-sensitive, and everything depends on the particular circumstances of the specific case before the Tribunal.

115. In such circumstances, we turn to the facts and circumstances of the present case. While, at the Final Hearing, we heard evidence from the claimant, and from Dr Wilson for the respondents, at this Remedy Hearing, we have not heard any evidence from the respondents, nor received any written representations, or submissions. They chose not to participate in the Remedy Hearing, which proceeded in their absence.

116. What is clear, from our original Judgment, issued on 13 February 2020, against which the respondents made no application for reconsideration, and no appeal to the Employment Appeal Tribunal, is that they infringed the claimant's

employment rights, in several ways, and we so found in our liability Judgment. Further, we are of the opinion that the breach of those rights had one or more aggravating features.

117. Specifically, we find, from the facts and circumstances of this case, as established in evidence at the Final Hearing, that the acts and omissions of the respondents, through their director, Dr Karen Wilson, were deliberate, although we do not go as far as to state that it is established that they were done with malice towards the claimant.

118. Viewed in that light, the acts and omissions of the respondents seem to us to have been more money focussed, and economically driven, in the sense of seeking to avoid any financial responsibility falling at the door of the respondents, rather than personally vindictive out of spite, or for some other improper personal motive, towards the claimant.

119. It is not evident to us, on the limited information available to the Tribunal, whether at the material time, in September 2018, the respondents had a dedicated HR team, but what is clear is that they had engaged the services of an employment consultant, from Croners, who formerly acted as their representative in these Tribunal proceedings, until she withdrew in the lead up to this Remedy Hearing. We are satisfied, from the evidence before us at the Final Hearing, that the respondents are a micro-employer.

120. Finally, from the extent of their breaches of the claimant's employment rights, we cannot regard the respondents' established breaches of employment law as having occurred due to a genuine mistake – their acts and omissions are indicative of failures by deliberate design, rather than by inadvertent default of their obligations, or some pretended ignorance of their statutory and contractual responsibilities as an employer.

121. In these circumstances, in terms of **Section 12A (1),** we are satisfied that the first part of the statutory test is met, which takes us on next to the ability of the respondents to pay, under **Section 12A (2).** It is provided that the

Tribunal "***shall have regard to the employer's ability to pay***." That is a mandatory requirement, as evidenced by the use of the word "***shall***", but it is then provided that ability to pay is to be had regard to in deciding whether to make such an order, and in deciding the amount of a penalty.

122. We also bear in mind that the power under **Section 12A(1)** is discretionary, as evidenced by use of the words "***the Tribunal may order the employer to pay a penalty to the Secretary of State,"*** and in the exercise of our powers, we bear in mind the overriding objective under **Rule 2** to deal with cases fairly and justly, taking into account the interests of all parties affected by these Tribunal proceedings, and not just the interests of the respondent employer as the potential paying party, where, if ordered, the ultimate recipient of any penalty is HM Exchequer, and not the claimant.

123. As the respondents did not participate in this Remedy Hearing, we have not heard from them on this application, nor on their ability to pay. Their failure to appear, or be represented, at this Remedy Hearing, is unreasonable conduct of the proceedings by them, and we consider that these features too can fall within the scope of "***aggravating features***".

124. Having decided that the respondents acted in a way that a Financial Penalty Order might be made by the Tribunal, we have also asked ourselves whether we should exercise our discretion by granting the claimant's application, and make such an Order against the respondents. We know from his evidence at this Remedy Hearing that the claimant has not received the payment ordered for the unlawful deduction from wages, for, through the Law Clinic, he wrote to the Tribunal seeking an Extract to enforce his Judgment against the respondents, and he instructed Sheriff Officers to attempt to recover the sum awarded by the Tribunal, but without success.

125. After careful and anxious reflection, we have decided that it is not appropriate for us to make such an Order against the respondents. To do so, we genuinely believe would place in jeopardy, the chances (if any) of the claimant receiving from the respondents the various amounts that we have ordered the

respondents to pay to the claimant. If we were to make such an Order, the respondents might well decide to give priority of payment to the Secretary of State, rather than the claimant. In these circumstances, we have decided to refuse the application made by Ms Yuill, on behalf of the claimant, and we decline to make any Order under **Section 12A** against the respondents.

126. Accordingly, it is not required that we go on and decide upon an appropriate sum to award against the respondents. What we will say, at this point, is that under **Section 12A(2),** the Tribunal is obliged (rather than permitted) to take into account the respondent employer's ability to pay, when considering whether or not to make an Order or how much that Order should be for. We had no information before us to consider ability to pay, and we did not consider it appropriate to seek that information from the respondents by correspondence, when there was no guarantee that they would reply, and that would simply have further delayed issue of this our Remedy Judgment.

127. A check of the Companies House online website, as at the date of this Remedy Hearing, showed the respondents as still an active company. As at 30 September 2020, they had filed the micro company accounts made up to 31 December 2019, and Dr K Wilson was still shown as the only company director. That said, we had no information as to their current trading and financial status, nor any documented, or vouched information, about their current financial circumstances, and so their ability to pay, or not.

128. Having carefully considered the claimant's application, the Tribunal has decided to refuse the application, and make no such order in favour of the Secretary of State, considering it to be in the interests of justice to make only the monetary award of compensation for unfair dismissal, with uplift, and separate award for injury to feelings for the discriminatory act of victimisation, with interest, both payable to the claimant, as set forth at sub-paragraphs (a) and (b) of paragraph 2 of our Remedy Judgment above.

129. In summary, the Tribunal therefore orders that the respondents shall pay to the claimant, in terms of this Remedy Judgment, the total amount of

£8,120.70. The sum of **£7,399.19**, previously awarded, in respect of unlawful deduction of wages, as per our original Judgment, issued on 13 February 2020, remains unaffected by this further Judgment.

Employment Judge: Ian McPherson
Date of Judgment: 2nd March 2021
Entered in Register: 2nd March 2021
Copied to Parties