Case Number: 2200385/2020 **(V)**

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A. Williams	**v**	**The Westbury Hotel Limited**

Heard at: London Central (by video) **On**: 26 March 2021

Before: Employment Judge P Klimov, sitting alone

Representation

For the Claimant: Ms M. Tutin, of Counsel

For the Respondent: Mr J. Mitchell, of Counsel

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable due to the Coronavirus pandemic restrictions and all issues could be determined in a remote hearing.

JUDGMENT

The Respondent is ordered to pay the Claimant compensation for unfair dismissal of **£57,176.30** comprising of:

1. Basic Award: £6,300

2. Compensatory Award:

(i) Financial loss between the effective date of termination and 30 November 2020 (net)

Loss of salary, pension,
2019 Christmas bonus and healthcare benefits: £61,302.31

(ii) Financial Loss between 1 December 2020 and 30 June 2021 (net)

Loss of salary, pension and healthcare:	£17,273.26
Less "*Polkey*" reduction @ 50%	(£8,636.63)
Contribution towards costs of setting up new business:	£1,500
Total loss between 01/12/2020 and 30/06/2021:	£10,136.63
(iii) Loss of statutory rights:	£300
Total (i)+(ii)+(iii)	£71,738.94
Less Income Received:	(£24,225.36)
Total Financial Loss	£47,513.58
After ACAS uplift of 25%	£59,391.98
Less 30% reduction under s123(6) ERA	(£17,817.59)
Total Net Compensatory Award	£41,574.38
Grossing up net total compensatory award:	
balance of £30,000 allowance not used by Basic Award	£23,700
amount to be grossed up:	£17,874.38

Earnings				Tribunal Award		
Band	Gross	Tax	Net	Gross	Tax	Net
PA	12,500	0	12,500	0	0	0
BR	14.500	2,900	11,600	7,842.97	1,568.59	6,274.38
HR	0	0	0	19,333.33	7,733.33	11,600
Total	27,000	2,900	24,100	**27,176.30**	9,301.92	**17,874.38**

Adding back tax-free amount:	£23,700.00
Total Compensatory Award:	£50,876.30

Total Compensation for Unfair Dismissal:	**£57,176.30**

REASONS

Background and Issues

1. This case was heard on 16,17 and 18 November 2020 with judgment on liability issues reserved and a separate remedies hearing listed, if required. On 10 December 2020, I gave my reserved judgment dealing with the liability issues. I found that the Claimant was unfairly dismissed by the Respondent and directed that the issues of compensation be determined at a separate remedies hearing.

2. The remedies hearing was listed on 21 December 2020. However, due to the closure of the Tribunal's building on 18 December 2020 for health and safety reasons, the hearing was vacated.

3. The remedies hearing took place on 26 March 2021. As in the November's hearing, Ms M. Tutin appeared for the Claimant and Mr J. Mitchell for the Respondent. I am grateful to them for their helpful submissions and assistance during and after the hearing.

4. I heard from two witnesses: the Claimant and Mr Francesco Antonazzo (the Respondent's HR manager). They gave sworn evidence and were cross-examined. I was referred to a bundle of documents of 270 pages (including the witness statements). A further document (a redacted printout of the Claimant's bank statement – 14 pages) was submitted during the hearing. I accepted it in evidence.

5. The following list of issues was agreed by the parties:
   (i) Is the Claimant entitled to compensation?
   (ii) If so, has the Claimant mitigated his loss?
   (iii) What if any, reductions should be made in relation to contributory fault and Polkey v AE Dayton Services Ltd [1987] UKHL 8?
   (iv) *Is it just and equitable to increase the amount of compensation by up to 25% to reflect any unreasonable failure by the Respondent to follow the Acas Code of Practice on Disciplinary and Grievance Procedures?*

6. Based on my liability judgment it was accepted by the Respondent that the Claimant was entitled to compensation, subject to reduction for contributory fault and my decision on the *Polkey* issue.

7. The Respondent accepted the Claimant's calculation of the basic award: £6,300. The Respondent also accepted that the Claimant had mitigated his loss. Therefore, the first two issues were settled at the start of the hearing. The contributory fault reduction issue has been dealt with my liability judgment. I found that the Claimant's culpable conduct had contributed to his dismissal by 30%.

8. However, in addition to the *Polkey* and ACAS Code uplift issues, there were several areas of disagreement between the parties on the calculation of the Claimant's losses, which I needed to deal with at the remedies hearing. These were related to:

    (i) loss of private healthcare benefit,

    (ii) Christmas bonus,

    (iii) expenses incurred in setting up home delivery business,

    (iv) accounting for sums earned in mitigation,

    (v) whether the Claimant's employment on 10 October 2020 broke the chain of causation for the purposes of calculating his financial loss,

    (vi) the Claimant's "redundancy package" compensation, and

    (vii) grossing up.

    I have dealt with these issues in my oral judgment, with further clarifications provided to the parties after the hearing by email.

9. I announced my judgment on the remedy issues at the end of the hearing, however without giving detailed calculations of the financial award. The parties asked for a short adjournment to agree on a compensatory award sum. When the hearing resumed, the parties confirmed their agreement on the total compensation sum and confirmed that I could make a consent judgment for that sum.

10. However, shortly after the end of the hearing, Mr Mitchell contacted me by email asking for the hearing to be resumed because there was a material

error in the computation of the agreed sum. I resumed the hearing. Mr Mitchell explained that in agreeing the compensation sum he had made an error by failing to deduct the income received by the Claimant in mitigation. He applied for the consent judgment not to be entered because the agreed figure was erroneously calculated. Ms Tutin submitted that it was very unusual to set aside a judgment made by consent, and because it would not be in the interest of her client she could not accede to the request.

11. In my oral judgment I answered the disputed remedy issues, and the parties' calculations of the financial award had to reflect my judgment on those issues, including with respect to the Claimant giving credit for sums earned in mitigation. It appeared that the agreed sum had been calculated without taking into account the full extent of my judgment and therefore entering judgment for that sum would be inconsistent with my oral judgment on the remedy issues and, in my judgment, not in the interest of justice. For these reasons, I decided that the consent judgment should not be promulgated and should be revoked.

12. I announced that decision to the parties. The parties then agreed to recalculate the compensation sum and send me a revised agreed figure after the hearing.

13. On 31 March 2021, I received the parties' alternative calculations and a set of questions to clarify certain aspects of my oral judgment to assist the parties with coming to an agreement on the final compensation sum. I replied giving my decisions on the outstanding questions. I answered the parties' questions as follows:

> *The following should apply to the calculation of the award:*
>
> *1) I decided that there was a 50% chance that the Claimant would have taken voluntary redundancy on 30 November 2020, the date stated in Mr Antonazzo's witness statements as the date when the Respondent planned to make redundancies, and confirmed in his evidence to the Tribunal as the date when the Head Chef took voluntary redundancy.*
>
> *2) Loss of health insurance should be calculated 100% until 30/11/2020 and 50% from 1/12/2020 until 20/12/2020; and from 20/12/2020 until 30/06/2021 - as annual premium actually paid prorated over that period.*

3) Setting up business cost - the award is £1,500, it is not subject to the 50% Polkey reduction.

4) Income from mitigation - all sums earned in mitigation should be deducted before the Polkey reduction is applied. The 50% reduction should not be applied to the sums earned in mitigation after 1/12/2020.

5) Grossing up: Basic award should be deducted from £30,000. Grossing up calculations must be subject to the Claimant's correct tax position, based on the evidence available to the Tribunal. On the balance of probabilities, I find that in 2021/22 tax year the Claimant will be a higher rate taxpayer.

14. On 1 April 2021, I received a further request from Ms Tutin to clarify my answer on point 4, which I answered on the following day as follows:

The Claimant must give credit for the full sum earned in mitigation. i.e. £24,225.36. That is because a compensation awarded must cover losses that flow from the unfair dismissal.
The 50% reduction in relation to the second period of losses is applied to reflect the fact that from that moment there was a 50% chance that the Claimant's losses flowing from the unfair dismissal would have ceased, or to put it another way - it is found that if the Claimant had not been unfairly dismissed he would have been in that financial position from that moment onwards.

Therefore, the Claimant is compensated not for 50 but for 100% of his losses from 1 December 2020, which are attributable to the unfairness of his dismissal. It is against that sum he must give credit for all sums earned in mitigation after that date, under the usual principles (see Ging v Ellward Lancs Ltd 1991 ICR 222, EAT). If the credit is given only for 50% of the Claimant's earnings in the second period, the Respondent would be ordered to pay for the Claimant's losses, which are not attributable to the Respondent dismissing the Claimant unfairly, and that, in my judgment, would not be just and equitable.

While I appreciate that the "Polkey" rule is not without controversy, and by giving the employer a kind of "repêchage" might appear as sometimes producing a logically odd result, nevertheless until revisited by the Supreme Court it remains good law and binding on the tribunals.

15. On 9 April 2021, on behalf of the Claimant Ms Tutin requested written reasons pursuant to Rule 62(3) of the Rules of Procedure 2013, but without me making judgment on the financial award because the parties were still

not in agreement on a compensation sum, in particular on the issue of grossing up. The Respondent's solicitors requested that I give my judgment on the financial award.

16. On 11 April 2021, I replied to the parties as follows: "[..] *since all outstanding issues have now been dealt with, there is little point in reserving the financial award for a later decision. Therefore, I intend to include the financial award in my written reasons.*" I also provided the parties with my draft calculations for them to review and advise if they find any computational errors.

17. The parties responded with their helpful corrections and comments. Following that exchange, it appeared that the parties were in agreement on all calculation issues, except for how the compensation award should be grossed up. I will deal with this issue later in my judgment.

18. In addition to the remedy issues, there was the Claimant's costs order application I had to deal with at the remedies hearing. I decided to reserve my judgment on that issue, which is subject to my separate reserved judgment of 30 March 2021.

Findings of Fact

19. The Claimant was dismissed by the Respondent on 11 October 2019. At the time of his dismissal, the Claimant's gross salary was £116,000 per annum. In addition, he was entitled to the Respondent's pension contributions and private healthcare insurance. In the previous years, the Respondent also paid the Claimant discretionary Christmas bonus.

20. Following his termination, the Claimant made various attempts to find an alternative employment and to otherwise replace his loss of income. He received consultancy fees from Hainan Airlines of £850 per month until 15 August 2020, when his consultancy contract was terminated, £5,000 for cooking at the World Economic Forum in Davos in February 2020 and £1,500 from Box's Fresh Limited for the provision of recipes.

21. On 23 March 2020, due to the lockdown, the Respondent closed the restaurant where the Claimant work. All restaurant staff was put on furlough at 80% pay, capped at £2,500 per months. Around 10 staff of the

Respondent remained working. However, they were the hotel's and not the restaurant's staff. The restaurant was not re-opened when the lockdown was lifted in the summer.

22. On 30 November 2020, the Respondent made about 160 staff of the hotel and the restaurant redundant. The rest of the staff remain on furlough until 30 June 2021 (the end of the period when employers are not required to contribute to furlough payments under the government Coronavirus Job Retention Scheme), when they all will be made redundant due to the hotel's closure for a major refurbishment.

23. In 2020, the Respondent paid Christmas bonus only to Mr Antonazzo (£5,000) for his work for a different hotel in the group.

24. On 11 October 2020, the Claimant commenced new employment as a private chef for a wealthy family, working from their home on a salary of £96,000 per annum. His employment was terminated with the effective date of termination of 29 January 2021.

25. The circumstances of his dismissal were as follows. The family returned from holidays in South Africa where they had contracted Covid-19. The head of the family was seriously ill. Upon their return they asked all staff to return to work and look after them, working from their home. The Claimant refused due to the high risk of contracting Covid-19. He offered cooking remotely and delivering food to the family's home. The wife of the head of the family took exception to that and dismissed the Claimant.

26. On 12 March 2021, the Claimant launched a premium home delivery business. He incurred various costs in setting up the business.

Healthcare Policy

27. The Claimant purchased a healthcare policy with Axa PPP Healthcare ("Axa"), with effect from 20 December 2019. The policy included cover for cancer treatment for the Claimant's wife. The annual premium for the policy was £13,634.64.

28. On renewal, Axa quoted a premium of £18,004.92 for the policy commencing on 20 December 2020. The Claimant chose to reduce cover

to exclude cancer cover for his wife, and that reduced the premium to £5,126.08.

29. Because his wife required in the past and could potentially require further cancer treatment/monitoring, the Claimant decided that when his finances would permit, he would be putting aside £1,000 a month for any private cancer treatment that might be required. As at the date of the remedies hearing, he did not pay or set aside any such sums.

The Law

30. Section 118 of the Employment Rights Act 1996 ("ERA") provides that where a "*tribunal makes an award of compensation for unfair dismissal [ ] the award shall consist of:*

(i) A basic award (calculated in accordance with section 119 to 122 and 126), and

(ii) *A compensatory award (calculated in accordance with sections 123,124, 124A and 126)*."

31. The basic award is calculated in accordance with a statutory formula by reference to the employee's age, length of continuous service and the relevant amount of a week's pay. Any redundancy payment received by an employee must be deducted from the basic award (S.122(4) ERA).

32. Section 123 of ("ERA") provides that a compensatory award shall be: "*such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer*".

33. The objective of the award is "*to compensate, and compensate fully, but not to award a bonus*": (*see Norton Tool v Tewson [1972] ICR 501, per Sir John Donaldson at 504*).

34. As part of the compensatory award under section 123 ERA, the Tribunal may award expenses reasonably incurred by the employee in consequence of his dismissal, including a contribution towards costs incurred in setting up

a new business following the dismissal (*see Gardiner-Hill v Roland Berger Technics Ltd [1982] IRLR 498*).

35. *"In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland."* (S. 124 ERA)

36. *"In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence*." (see *Software 2000 Ltd v Andrews and ors 2007 ICR 825, EAT per Mr Justice Elias, the then President of the EAT)*

37. To calculate a compensatory award, it is first necessary to ascertain the employee's total loss in consequence of the dismissal, in so far as that loss is attributable to the employer's actions and from that amount make the deductions and adjustments in the following order:

    (i) deduction of any payment already made by the employer as compensation for the dismissal.
    (ii) deduction of sums earned by way of mitigation, or to reflect the employee's failure to take reasonable steps in mitigation — S.123(4) ERA
    (iii) 'just and equitable' reductions based on S.123(1) ERA, including reductions in accordance with the principle in *Polkey v AE Dayton Services Ltd 1988 ICR 142, HL*
    (iv) increase or reduction (adjustment) of up to 25 per cent where the employer or employee unreasonably failed to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures (S.207A

of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A)

(v) adjustment of up to four weeks' pay in respect of the employer's failure to provide full and accurate written particulars (S.38 Employment Act 2002)

(vi) percentage reduction for the employee's contributory fault (S.123(6) ERA)

(vii) deduction of any enhanced redundancy payment to the extent that it exceeds the basic award (if applicable).

(viii) application of the statutory cap, if applicable (S.124 ERA).

(see *Digital Equipment Co Ltd v Clements (No.2) 1998 ICR 258, CA)*

38. When an employee obtains new employment before the remedy hearing, as the general rule, the employee's earnings from the new employment should be offset against his losses to determine the overall loss for the relevant period (see *Ging v Ellward Lancs Ltd 1991 ICR 222, EAT*).

39. New employment does not necessarily break the chain of causation with respect to the employee's losses flowing from unfair dismissal, because this could lead to an award that is not just and equitable, especially where the new employment comes to an end after a short period of time through no fault of the employee. (see *Dench v Flynn and Partners 1998 IRLR 653, CA*).

40. Under section 207A TULR(C)A 1992 , in the case of proceedings relating to a claim by an employee under any of the jurisdictions in Schedule A2 to that Act, if it appears to the Tribunal that the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies and the employer has unreasonably failed to comply with the Code in relation to that matter, the Tribunal may, if it considers it just and equitable in all the circumstances of the case to do so, increase any award it makes to the employee by no more than 25%. Schedule A2 of TULR(C)A 1992 includes claims under s 111 ERA 1996 for unfair dismissal.

41. When considering uplifts, the relevant circumstances to be taken into account may vary from case to case but should always include the following:

(i) whether the procedures were applied to some extent or were ignored altogether,

(ii) whether the failure to comply with the procedures was deliberate or inadvertent, and

(iii) whether there were circumstances that mitigated the blameworthiness of the failure to comply. (per Mr Justice Underhill, then President of the EAT in *Lawless v Print Plus EAT 0333/09*)

42. Furthermore, the size and resources of the employer were capable of amounting to a relevant factor in the tribunal's consideration of whether an uplift was appropriate and, if so, by how much.

43. The ACAS Code states: "*it is important to deal with issues fairly*" whenever a disciplinary process is being followed. It outlines various elements of that: dealing with issues promptly and without unreasonable delay; acting consistently; carrying out any necessary investigations; and giving employees the opportunity to put their case before any decisions are made. It sets out six steps the employer would normally be expected to take in a disciplinary process:

(i) establish facts in the case,

(ii) inform the employee of the problem,

(iii) hold a meeting with the employee to discuss the problem,

(iv) allow the employee to be accompanied at the meeting,

(v) decide on appropriate action, and

(vi) provide employees with an opportunity to appeal.

44. The Code states: (my underlining): "*Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence. But a fair disciplinary process should always be followed, before dismissing for gross misconduct*."

Submissions and Conclusions

Polkey reduction

45. On behalf of the Claimant, Ms Tutin argues that although the restaurant was closed and its staff placed on furlough on 23 March 2020, because of his

seniority the Claimant would not necessarily have been placed on furlough. She relies on the Respondent's evidence that approximately 10 other staff of the Respondent, including at the director's level, continued to work during the lockdown. She further argues that, although the restaurant was closed, the Claimant could have continued to work on developing for the Respondent "meal at home kits" – a food delivery business.

46. Ms Tutin submits that even if the Claimant were placed on furlough, because of his seniority and his value to the Respondent, the Respondent would have topped up his furlough pay to his full salary, not capped at £2,500, and he would have been brought back from furlough sometime in the summer of 2020 when the lockdown restrictions were lifted.

47. Finally, in any event, she argues, the Claimant would have remained on furlough until the end of June 2021, at which point he would have been made redundant with the rest of the staff.

48. Mr Mitchell for the Respondent submits that the Claimant would have been treated no different to other restaurant staff and would have been placed on furlough on 23 March 2020 on the same terms (80% pay capped at £2,500 per month).

49. He points out that Mr Antonazzo evidence are that the Claimant might not have agreed to furlough because of a significant drop in pay, in which case he would have been made redundant on 23 March 2020. His further evidence are that the Claimant would not have been brought back from furlough because the restaurant did not re-open in the summer, and that there would have been little, if any, interest for the Respondent to develop any food delivery business. Finally, Mr Antonazzo evidence are that even if the Respondent had decided to re-open the restaurant, it would have used the general hotel's kitchen and its staff to cook meals, and not the Claimant's restaurant's kitchen, as it would have been a more economical option for the Respondent.

50. Mr Mitchell also argues that the Claimant's new employment as a private chef for the wealthy family paid him more than what would have been his furlough pay, and it should operate as breaking the chain of causation in relation to his losses flowing from the unfair dismissal.

51. Finally, it is submitted that the Claimant would have taken voluntary redundancy in November 2020, as did Mr Charlie Tayler, the head chef of the restaurant. However, the Respondent accepts that the compulsory redundancy has been and continues to be delayed until the expiry of the non-contributory period of the government furlough scheme on 30 June 2021.

52. I find (and all my findings on the *Polkey* issue are on the balance of probabilities) that the Respondent would have placed the Claimant on furlough on the same terms as it applied to its other staff (80% pay, capped at £2,500). In the circumstances when the restaurant and the hotel were closed and not generating any revenue for the Respondent, and there were no guests for the Claimant to cook for, I find it is improbable that the Respondent would have still decided to keep the Claimant on full pay.

53. I also find the Claimant would have accepted to go on furlough on 23 March 2020 on the offered standard terms (80% pay, capped at £2,500). His evidence are that at that time it was thought that the lockdown would not last long. Given that the lockdown had a severe impact on the entire hospitality sector, it is unlikely the Claimant would have had other employment opportunities immediately available to him. Therefore, in those circumstances, I find that there would have been no compelling reasons for the Claimant to refuse to go on furlough at the reduced pay.

54. I find that the Respondent would not have brought the Claimant back from furlough in the summer because the restaurant remained closed. I also find that the Respondent would not have been interested in having the Claimant developing the “meal at home kit” business, because such business would have required the Respondent to bring other staff from furlough (Mr Antonazzo and the Claimant had different views on how many staff would have been required, but I do not find this to be a decisive factor) and most likely would have been generating a modest loss making revenue for some period of time. In the circumstances when the Respondent was not planning to re-open the restaurant and the hotel for 2-3 years, it seems to me improbable that the Respondent’s management and the owners would have been interested in investing into such side business.

55. I find there is a 50% chance that the Claimant would have taken voluntary redundancy on 30 November 2020. I find this because on the Claimant's own evidence if he had stayed on furlough on the standard terms, in November 2020 he would have had to re-assess the situation. In my judgment, by that time, it would have been clear to the Claimant that the restaurant would not be re-opening in any foreseeable future, and the Claimant would have been looking to get a new permanent job elsewhere or to start his own business. His evidence are that his financial situation and outgoings are such that he simply cannot afford going any length of time without having an income. In those circumstances, to receive a substantial notice pay and a statutory redundancy payment would have been an attractive option for him.

56. On the other hand, the furlough scheme rules were such that the Claimant could have found another employment elsewhere while continuing to receive his furlough pay from the Respondent. That option would have given him the continued benefit of the private healthcare insurance cover provided by the Respondent, which is clearly an important issue for the Claimant.

57. Most likely, the Claimant would have had to obtain the Respondent's agreement for him to remain in the Respondent's employment (on furlough) while working elsewhere. However, I find that in those circumstances, it would have been reasonable for the Respondent to give its consent, and it is probable that it would have done so.

58. In short, in my judgment, it would have been a finely balanced decision for the Claimant to make, and therefore I assess the probability of him opting for voluntary redundancy in November 2020 as 50/50.

59. Following my oral judgment, the parties requested me to clarify whether the November date in my oral judgment was 1 or 30 November 2010. I responded that my decision was that there was a 50% chance that the Claimant would have taken voluntary redundancy on 30 November 2020. My detailed response is reproduced in paragraph 13 above.

60. Finally, I accept that in any event the Claimant's employment with the Respondent would have come to an end on 30 June 2021 when the Respondent will be making all its remaining staff redundant.

61. Therefore, the Claimant's financial loss shall be calculated as follows:

    (i) Between 11 October 2019 and 22 March 2020 – his normal salary and benefits

    (ii) Between 23 March 2020 and 30 November 2020 – his furlough pay and benefits

    (iii) Between 1 December 2020 and 30 June 2021 – 50% of his furlough pay and benefits.

62. The parties were able to agree on the furlough weekly basic salary loss - £444.10 and furlough weekly pension loss - £13.71 and on the calculation of the Claimant's loss of salary and pensions for the entire period up to 30 June 2021. I accept with the parties' calculations.

Christmas Bonus

63. The Respondent accepts that the Claimant would have been paid Christmas bonus of £2,595.44 for 2019, but not for 2020. I find that the Claimant would not have been paid any bonus for 2020. I accept Mr Antonazzo evidence that he was the only employee of the Respondent who received a bonus payment in 2020 and that was to recognise his work for another hotel within the group. No other staff, including the Respondent's directors who continued to work during the lockdown, received Christmas bonus, and I find no plausible reason why in those circumstances the Respondent would have made an exception for the Claimant.

Employment as a private chef

64. In my judgment the Claimant's employment as a private chef from 10 October 2020 until 29 January 2021 did not break the chain of causation in relation to the Claimant's losses flowing from the unfair dismissal by the Respondent. I find that it was not a long-term replacement job. Although it was not specifically contracted for as a temporary employment, I accept the Claimant's evidence that the arrangement was likely to last only during the pandemic because the father of the family had been largely working from

home. In any event, in the circumstances of how the employment came to an end, through no fault of the Claimant, I find that cutting the period of the Claimant's loss at the commencement date of that employment will lead to an unjust result. He, of course, must give full credit for the sums earned in that employment.

Costs of healthcare

65. The Respondent accepted that the Claimant took reasonable steps to mitigate his loss of private healthcare by purchasing Axa policy, however, it disputes that the Claimant is entitled to claim as his loss £1,000 a month, which he intends to set aside for possible private medical treatment for his wife, that is because the Claimant made no such payments or otherwise "set aside" the claimed sums.

66. The second area of disagreement between the parties was on how to calculate the Claimant's losses of healthcare benefit. Ms Tutin argues that based on my decision on the *Polkey* issue the Claimant is entitled to loss of healthcare benefit until 30 November 2020 at 100% and then 50% of the loss until 30 June 2021, and the fact that the Claimant started the new policy only on 20 December 2019 is irrelevant. She calculates the Claimant's loss until the start of the renewal of the AXA Policy as £15,875.40, doing that by reference to the initial premium of £13,634.64.

67. Mr Mitchell for the Respondent contends that the Claimant is only entitled to the actual premium paid £13,634.64.

68. For the period from 20 December 2020 until 30 June 2021, Ms Tutin argues that the Claimant's healthcare loss should not be calculated by reference to the actual premium paid (£5,126.08 per annum) because that policy is not comparable with the cover the Claimant was entitled to from his employment with the Respondent, which contained cancer cover for his wife. She calculates the Claimant's loss as £7,873.10 on the basis of the figures provided by the Respondent in the Counter Schedule by reference to an alternative BUPA cover, which the Respondent submitted would have been a reasonable cheaper alternative to the initial AXA Policy purchased by the Claimant (however, at the hearing, the Respondent did not pursue that point

and accepted that the Claimant mitigated his loss of healthcare benefit by purchasing the AXA Policy at the initial premium).

69. Mr Mitchell argues that the Claimant could only claim for the premium paid, which should be prorated to the relevant period 20 December 2020 to 30 June 2021. He points out that the premium is paid monthly and calculates the Claimant's total loss as £2,696.46.

70. In my judgment, the loss of healthcare benefit should be calculated on the following principles:

    (i) The Claimant cannot recover more than his actual financial loss;

    (ii) His actual financial loss should be assessed by reference to the premium he paid for the healthcare policy or other healthcare costs incurred by him;

    (iii) The 50% *Polkey* reduction must apply to loss of the healthcare benefit from 1 December 2020.

71. Applying these principles, I assess the Claimant's loss of healthcare benefit as follows.

72. I reject the Claimant's claim for £1,000 per month he intends to set aside for possible future medical treatment for his wife. The Claimant accepted on cross-examination that he had not spent or set aside any such sums, and that was just his intention to do so in the future when his income would allow him to. Therefore, I find that the claimed £1,000 cannot be properly regarded as the Claimant's financial loss. In my judgment, an intention to spend money (which are yet to be earned) for a particular purpose at some point in the future, cannot be accepted as damage, deprivation, injury or any other form of loss.

73. Further, even if the claimed sums could be considered as "future loss", on the Claimant's evidence he was not expecting to receive profits from his home delivery business until after July 2021. Therefore, I find it is unlikely he would be setting aside £1,000 a month before 30 June 2021 (the agreed "cut off" date for the purposes of calculating his losses).

74. Finally, in any event, I find that it will not be just and equitable to award a compensation for such future "loss".

75. Therefore, I find that his loss of healthcare insurance should be calculated by reference to the actual initial premium paid (£13,634.64) as 100% from the effective date of termination (11 October 2019) until 30 November 2020 and 50% (*Polkey* reduction) from 1 December 2020 until 20 December 2020, and by reference to the renewed policy premium £5,126.08 from 20 December 2020 until 30 June 2021, also applying the 50% *Polkey* reduction.
76. Following the hearing, I provided the parties with my further clarifications on this issue (see paragraph 13 above), and they were able to calculate and agree on the following figures:
    (i) 11/10/19 – 30/11/20 - £13,634.64 + £1,872.89 = £15,507.53
    (ii) 1/12/20 – 20/12/20 - £711 – 50% *Polkey* = £355.50
    (iii) 21/12/20 - £30/06/21 - £2,696.46 – 50% *Polkey* = £1,348.23
    which I accept.

Costs of setting up food delivery business

77. The Claimant claims that he has incurred £6,479.92 expenses in setting up his new premium home delivery business. He presented printouts of his redacted bank statements in support of his claim. The Respondent submits that the cost of setting up the business would have arisen in any event and the evidence submitted by the Claimant were insufficient to reliably ascertain that the claimed costs could be properly attributed to the setting up of the Claimant's business, as some of the claimed items appear to be for groceries purchased in supermarkets. The Respondent also points out that the print outs were submitted late.
78. Having considered the bank statement printouts, it appears that most of the claimed costs cannot be readily described as costs of setting up a business. These might be operational costs of the Claimant's business, such as costs of supplies of food and drinks and costs of other consumables.
79. However, the Claimant gave evidence, which I accept, that he had paid a third party to set up his business' website and had purchased various equipment and products for the launch of his business. On my summary assessment of such costs, I find it will be just and equitable to award £1,500 towards his costs of setting up his food delivery business.

Redundancy package

80. The Respondent accepts that the Claimant is entitled to the basic award of £6,300 and £300 for loss of statutory rights.

81. In these proceedings the Claimant is not bringing a claim for notice pay. Therefore, a compensation for wrongful dismissal (notice pay) was not an issue before this Tribunal.

82. Ms Tutin, however, submits that in calculating the Claimant's financial loss the redundancy package he would have received on his future redundancy on 30 June 2021 should be taken into account. The package would have comprised of his statutory redundancy pay plus his notice pay.

83. I reject this. Awarding the Claimant statutory redundancy as part of his "loss of earnings" in addition to the basic award, in my judgment, would be compensating him twice for the same loss. The function of the basic award is to compensate the employee for loss of his or her job security caused by the unfair dismissal. The statutory redundancy pay is a form of recognition of the accrued benefit through continuous service, which the employer must pay the employee when the employee's job is lost due to redundancy. Both awards are calculated by applying essentially the same formula. Therefore, in my judgment, by making a basic award the Tribunal gives compensation to the employee for him or her losing his/her accrued entitlement to the redundancy pay.

84. Further, under section 122(4) ERA:

"*The amount of the basic award shall be reduced or further reduced by the amount of—*

(a) any redundancy payment awarded by the tribunal under Part XI in respect of the same dismissal, or

(b) any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy (whether in pursuance of Part XI or otherwise)

85. I am not aware, and I was not referred to any authority to support Ms Tutin's contention that in addition to the basic award the Claimant's compensatory award should include an element of loss calculated as the Claimant's

statutory redundancy pay. I also find that awarding such additional amount will not be just and equitable.

86. I am equally unpersuaded by Ms Tutin's argument that although the Claimant is not bringing a claim for notice pay, I should award him, as part of the compensatory award, an amount equivalent to his notice pay because it would have been part of his "redundancy package".

87. In my judgment, awarding the Claimant any compensation for his notice pay, when he brings no such claim (most likely to preserve it to pursue through the civil courts), will be an error of law and also lead to a plainly unjust result. The Claimant would have been compensated for his notice pay and would still retain the right to claim for it again. In my judgment, the position is simple - either he brings a notice pay claim or he does not, and if he does not – he cannot be awarded a compensation for his notice by having it labelled as a "loss of earnings".

Income from mitigation

88. It was accepted by the Respondent that the Claimant took reasonable steps in mitigating his loss and the total income earned in mitigation was agreed by the parties as £24,225.36. However, following the hearing the issue arose as to whether the Claimant should give credit for the whole amount, or the sums earned in mitigation from 1 December 2020 should be reduced by 50% because his losses from that date are reduced by that percentage under *Polkey*.

89. Ms Tutin argues that if the Claimant can only recover 50% of his actual loss from 1 December 2020 but must give credit to 100% of his earnings during the same period, this will be neither just nor equitable.

90. I disagree. A compensation awarded to the Claimant must cover his losses flowing from the unfair dismissal. The 50% *Polkey* reduction in relation to the period from 1 December 2020 is applied to reflect the fact that from that moment there was a 50% chance that the Claimant's losses flowing from the unfair dismissal would have ceased, or to put it another way - it is found (applying the *Polkey* principles) that if the Claimant had not been unfairly dismissed, he would have been in that financial position from that moment

onwards. Therefore, in my judgment, the Claimant is compensated not for 50 but for 100% of his losses from 1 December 2020, which are attributable to the unfairness of his dismissal. It is against that sum he must give credit for all sums earned in mitigation after that date, under the usual principles (see *Ging v Ellward Lancs Ltd 1991 ICR 222, EAT*).

91. If the credit were given only for 50% of the Claimant's earnings after 1 December 2020, the Respondent would be ordered to pay for the Claimant's losses, which are not attributable to the Respondent dismissing the Claimant unfairly, and that, in my judgment, would not be just and equitable.

Is it just and equitable to increase the amount of compensation by up to 25% to reflect any unreasonable failure by the Respondent to follow the Acas Code of Practice on Disciplinary and Grievance Procedures?

92. Ms Tutin submits that in light my findings in the liability judgment, and in particular in paragraphs 151-155, that the outcome of the disciplinary procedure was pre-determined and that there had been numerous serious substantive and procedural failings, the Respondent's failures to follow the ACAS Code was wholly unreasonable and therefore it is just and equitable to apply the maximum 25% uplift to the compensatory award.

93. The Respondent accepts that an uplift should be applied but argues that it should be no more than 10%. Mr Mitchell took me through each element of the ACAS Code analysing it against my findings of fact in the liability judgment. He argues that the analysis shows that, albeit with some deficiencies, nonetheless the Respondent did follow each step of the Code and therefore awarding the maximum 25% uplift cannot be just and equitable when compared with a scenario where the employer did nothing at all and there was no process whatsoever. Awarding the maximum uplift of 25% against the Respondent, Mr Mitchell submits, would leave no room to distinguish with more heinous cases where the employer unreasonably fails to follow any process. Accordingly, some credit should be given to the Respondent for what it has done by way of following the ACAS Code in dismissing the Claimant.

94. In my liability judgment (see paragraph 155) I answered the question "Did the Respondent adopt a fair procedure?" as follows:

> I find that the respondent did not adopt a fair procedure. The outcome was predetermined, and the entire disciplinary process was a "side show". The stark inconsistency between the treatment of the "incidents" of 10th and 17th March 2019 and the lunch of 28 July 2019 speaks for itself. Mr Dominici and Mr Henning "serving" their warnings, including for not dealing with the lunch matter as Mr Cola thought it should have been dealt with, demonstrates that they lacked independence and were under considerable pressure to achieve the result Mr Cola either expressly communicated to Mr Henning, or Mr Henning thought Mr Cola expected to see. Mr Henning admitted that no thought was given to have the matter investigated and the disciplinary process conducted by other independent individuals. In the circumstances I find that would have been necessary to achieve a fair procedure. In short, I find that after the meeting in Monaco between Mr Henning and the Colas, "the writing was on the wall" for the claimant, and there was nothing he could have said or done during the disciplinary process, which would have made the predetermined outcome any different.

95. Given my findings that the whole disciplinary process was essentially designed to create the appearance of a fair process when in fact the outcome had been decided before the process even began, I have no hesitation to find that the Respondent's conduct was wholly unreasonable and contrary to the fundamental principle to deal with disciplinary issues fairly, which principle underpins the entire procedure set out in the ACAS Code. It would seem absurd for me to find that the Respondent should be given credit for going through the motions in order to create the appearance of it complying with the Code, when in reality it knew full well that the matter was done and dusted, and the process would not change the predetermined outcome.

96. I disagree with Mr Mitchell that dismissing an employee on the spot and without any process is a more heinous example of the procedural unfairness when compared with this case. On the contrary, I find that dragging the Claimant through a process for the sake of creating the appearance of fairness while at every step of the way denying him any opportunity to change the pre-determined outcome, thus adding to his stress and the feeling of injustice being done to him, is in fact an aggravating and not a mitigating factor for the Respondent. In short, I find that in the circumstances it is just and equitable to increase the compensatory award by the maximum 25% uplift.

Grossing up

97. Following my oral judgment there have been several attempts by the parties to agree on the final compensation figure. I am grateful for both Counsels' assistance and cooperation in making the necessary calculations. Ultimately, the parties were able to agree on all but one issue, namely on how grossing up of the compensatory award should be done.

98. Based on the evidence heard, I found that in the 2021/22 tax year the Claimant would receive £27,000 income from his home delivery business, and taking into account his compensation award, he would be a higher rate taxpayer. Accordingly, in my judgment, grossing up should be done by applying basic and higher rate tax bands. It was agreed by the parties that the sum that needed to be grossed up was £17,874.38 = £41,574.38 (total net compensatory award) – [£30,000 (tax free element) - £6,300 (basic award)].

99. On 14 April 2021, I sent the parties my grossing up calculations, with which Ms Tutin agreed. Regrettably, I have made a mistake in my calculations, for which I apologise. The mistake was not in grossing up £17,847.38, but in adding back £30,000 to the grossed up amount of £27,176.30, when the correct sum to be added back should have been £23,700 (£30,000 - £6,300(basic award)). The correct calculations are shown above in this judgment.

100. Mr Mitchell, however, argues that the Claimant's personal allowance of £12,500 should be deducted from £17,847.38 first, and the balance of £5,374.38 grossed up applying 40% tax rate, which on his calculation (5,374.38*40%) gives the addition sum of £2,149.75 to be added to the compensatory award.

101. Mr Mitchell submits that when the award will be paid by the Respondent, the Claimant will not have earned any other income, based on his evidence that he is expecting to generate profit in his home delivery business only in July 2021. Therefore, Mr Mitchell argues, his personal allowance, still not being used, must be applied against the award, as his first income received in the tax year, and not against his future earnings.

102. The reason I disagree with Mr Mitchell's contention that the Claimant's personal allowance of £12,500 should be deducted from £17,847.38 is because the sum of £17,847.38 represents part of the Claimant's net loss, and the purpose of grossing up is to give the Claimant the sum he would have had in his hand but for the Respondent's unfair dismissal.

103. Because the Claimant is expected to earn £27,000 in the 2021/22 tax year, he will have other income extinguishing his personal allowance. Accordingly, if £12,500 were deducted from £17,847.38 he would not receive a sum corresponding to his net loss of £41,574.38.

104. The personal allowance applies in respect of all income in the tax year in question, and therefore, in my judgment, the fact that the award will be paid by the Respondent before the Claimant receives income from his business is not determinative.

105. In my judgment, it will not be just and equitable to apply all or part of the Claimant's personal allowance towards the compensation sum that the Respondent is liable to pay the Claimant for unfairly dismissing him. It appears to me that the Respondent should not be entitled to reduce its liability to compensate the Claimant for his net loss caused by the Respondent's unfair dismissal by using or sharing into the benefit of the Claimant's personal allowance. For these reasons, I find that the Claimant's personal allowance should not be deducted from the sum of £17,847.38 before grossing it up.

106. For the sake of completeness, I shall add that Mr Mitchell's grossing up method of multiplying the net amount by the relevant grossing-up rate, in my view, is incorrect. Instead, the correct method is to divide the net amount by (1 minus grossing-up rate).

Employment Judge P Klimov
London Central Region

Dated 19 April 2021

Sent to the parties on:

19/04/2021

For the Tribunals Office

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