Case Number: 3303416/2020 (V)

EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mrs K. Olliver	**v**	Licenced Trade Charity

Heard at: Reading by Cloud Video Platform **On:** 19 and 20 April 2021

Before: Employment Judge Chudleigh

Appearances
For the Claimant: Ms Hart, Counsel
For the Respondent: Mr Curtis, Counsel

JUDGMENT ON REMEDY – corrected under the slip rule

The judgment of the employment tribunal is:

1. The respondent wrongfully dismissed the claimant. The respondent is ordered to pay the claimant damages for breach of contract in the sum of £14,693.

2. There should be a "Polkey" reduction from the compensation for unfair dismissal of 75%.

3. The claimant contributed to the dismissal by 50%. Both the compensatory award and the basic award should be reduced by this sum.

4. The claimant failed to comply with the Acas code of practice by failing to appeal the dismissal. It would be just and equitable to reduce her award for unfair dismissal by 10% in the circumstances.

5. The respondent is ordered to pay the claimant compensation for unfair dismissal in the sum of £9,686.59 comprising a basic award of £807.00 and a compensatory award of £8,879.59.

6. The recoupment provisions apply:

   (a) the total monetary award for unfair dismissal is £9,686.59;
   (b) the amount of the prescribed element is £7,469.76;
   (c) the period to which the prescribed element relates is 6 January 2020 to 20 April 2021;

(d) the amount by which the total monetary award exceeds the prescribed element is £2,216.83.

REASONS

1. On 6 January 2020 the claimant was unfairly dismissed by the respondent within the meaning of ss. 94 & 98 of the of the Employment Rights Act 1996 ("ERA") when she was dismissed without notice.

2. The issues relating to liability were determined at a hearing on 4, 5, 25 and 26 March 2021. I decided that the dismissal was unfair for two reasons.

3. First, it was outside the band of reasonable responses not to interview a witness called Rebecca Wilde either at the investigation stage or at some later point before the decision to dismiss was made. The respondent did not reach the decision to dismiss for misconduct on reasonable grounds following a reasonable investigation because of the failure to interview or obtain an account from Rebecca Wilde who was a witness to key events.

4. Secondly, it was outwith the range of reasonable responses for the respondent to have gone ahead with the disciplinary hearing in the claimant's absence on 6 January 2020.

5. The agreed issues for the remedy hearing were:

<u>Wrongful dismissal</u>

1. Whether the claimant was wrongfully dismissed by the respondent and if so, the extent of the damages to be awarded?

<u>Remedy – basic award</u>

2. The parties agreed that the basic award is £1,614 subject to any deduction for contribution.

3. What adjustment, if any, should be made to any basic award to reflect contribution? In particular:
   a) What conduct is said to give rise to possible contributory fault?
   b) Is that conduct culpable or blameworthy?
   c) Is it just and equitable to reduce the amount of the basic award to any extent?

<u>Remedy – compensatory award</u>

4. What amount is just and equitable to award to the claimant as compensation for her unfair dismissal? This will involve consideration of the following:

5. What losses has the claimant incurred as a result of her unfair dismissal? In particular:
   a) What are the correct figures for the claimant's weekly net and gross pay when employed by the respondent? These were agreed by the parties to be £5,462.35 gross per month which was £3,192.23 net.

b) For what period would it be just and equitable to award the claimant losses for her unfair dismissal? (Includes questions of whether the claimant has taken adequate steps to mitigate her losses).
c) Is the claimant entitled to accommodation and removal costs? If so how much?
d) Is the claimant entitled to future losses? If so how much?
e) What sums has the claimant earned by way of mitigation since her dismissal? (Both earnings and pension contributions)

6. What adjustment, if any, should be made to any compensatory award to reflect the possibility that that the claimant would still have been dismissed had a fair procedure been followed? In particular:
   a) It is possible to reconstruct what would have occurred had Rebecca Wilde been interviewed and / or at the disciplinary hearing or is it too speculative?
   b) If it is possible to reconstruct, what is the percentage chance that the claimant would have been dismissed?
   c) If a percentage chance, then what period of time would it have taken to have followed a fair procedure before that percentage chance of dismissal? The respondent's case is two weeks, the claimant's case is six weeks.

7. What adjustment, if any, should be made to any compensatory award to reflect contribution. In particular:
   (a) Was the claimant's conduct culpable and / or blameworthy?
   (b) Did the conduct cause or contribute to the dismissal?
   (c) Is it just and equitable to reduce the award by the portion specified, this may include taking into account any reduction for **Polkey**?

8. Should there be a deduction for any unreasonable failure by the claimant to comply with the ACAS Code, if so how much? The respondent relies on the claimant's failure to appeal which is admitted by the claimant to be a breach of the Code.

6. I heard evidence on behalf of the respondent from Ian Mullins, the Executive Director of Education and Operations for Licensed Victuallers' School ("LVS") and the person who made the decision to dismiss the claimant. I also heard evidence from the claimant. Evidence and submissions occupied the two days set aside for the remedy hearing so the decision was reserved.

7. I made the following findings of material fact:

   a) As outlined in the liability judgment, the evidence before Mr Mullins at the disciplinary hearing can be summarised as follows (the numbers in square brackets refer to pages in the bundle and the witnesses are those referred to in the investigation report):

      a. Parents and/or children had made the following complaints against the claimant:

i. The claimant lacked compassion and understanding, and failed to show empathy to a child whose brother had passed away (witness 8/allegation 1 [356-7], [320])

ii. When speaking to the parents of a child who had ill-health: the claimant's approach was like an interrogation; The claimant contradicted the account of the child's teacher re: whether the child made friends; the claimant threatened the parent re: having "*social services knocking on your door"*. The claimant's behaviour was so bad that the parent did not want to speak to her again, and did not want their child coming into contact with her (witness 9/allegation 3 [362-6], [321]).

iii. The claimant was abrupt, condescending and regarded children as guilty before investigating a situation. The manner in which she spoke to the parents of a pupil re: a suspected pregnancy was inappropriate as the claimant had not spoken to the child; the timing of the call was on a Friday afternoon as the parents were on their way to the bus stop to collect the child; there was no invitation to the parents to come in for a meeting to discuss the issue. Further, the claimant had not properly supported a child in a previous 'sexting' allegation, contrary to the school's E-safety policy (witnesses 10 & 11, allegation 4 [375], [381-2], [321]).

iv. The claimant together with another teacher, was involved in putting 'unacceptable pressure' on a child, brow-beating her, using 'strong arm tactics and interrogation' until the child 'cracked' and revealed the name of a friend whom she suspected was pregnant. This included asking the child how she would feel if the friend went on to self-harm or commit suicide. The claimant had said that she wanted children to be scared of her, and children would not go to her because she was unpleasant and unapproachable (witness 1, allegation 5. [377], [316]).

v. The claimant upset a child with cerebral palsy to such an extent that he walked around the perimeter of the school to avoid seeing her. The parents did not want the claimant teaching their child in the remaining time at the school. The parents did not trust the claimant's judgment when raising a safeguarding issue (witness 4, allegation 6 [378], [384], [318]).

b. Items ii-v above came to light in the period 9 October 2019 to 29 November 2019.

b) Ian Mullins determined that the claimant was in breach of points 48 and 49 of the relevant Keeping Children Safe in Education guidelines which provided:

Record keeping
48. All concerns, discussions and decisions made, and the reasons for those decisions, should be recorded in writing. If in doubt about recording requirements, staff should discuss with the designated safeguarding lead.

Why is all of this important?
49. It is important for children to receive the right help at the right time to address risks
and prevent issues escalating. Research and serious case reviews have repeatedly shown the dangers of failing to take effective action.15 Examples of poor practice include:

- failing to act on and refer the early signs of abuse and neglect;
- poor record keeping;
- failing to listen to the views of the child;
- failing to re-assess concerns when situations do not improve;
- not sharing information;
- sharing information too slowly; and
- a lack of challenge to those who appear not to be taking action.

c) Mr Mullins found that the claimant was in breach of these guidelines as the records she had kept of discussions and decision made were not recorded in writing as they should have been. He told me and I accepted that on its own this issue would have resulted in a final written warning.

d) He also said that it was clear from the evidence at the disciplinary hearing that the claimant was unapproachable, insensitive, rude and had demonstrated poor judgement on a number of occasions. It was clear to him that a number of parents and students no longer wanted to have contact with the claimant.

e) Additionally, Mr Mullins found that the claimant's behaviour was bringing the school's reputation into disrepute amongst parents and in an online community. He concluded that this was wholly inappropriate and not what was expected from the head of pastoral care and DSL.

f) Mr Mullins considered that if the complaints had been one off events the outcome might not have been quite so severe but due to the volume and severity of the complaints cumulatively the matters amounted in his view to gross misconduct. However, he was also of the view that the recent complaints made by the parents of three pupils would have constituted gross misconduct even if they were considered in isolation. These are the children who were the subject of the allegations outlined in §§ 5(a) (iii), (iv) and (v) above.

g) One of these incidents ((iv) or allegation 5) was said to have been witnessed by another member of staff – Rebecca Wilde. Mr Mullins did not consider

that it would be appropriate to interview her, she had not been interviewed as part of the investigation and the disciplinary process concluded without her input.

h) In the circumstances Ian Mullin's decision at the disciplinary hearing was that the claimant was guilty of gross misconduct.

i) In relation to sanction, Ian Mullins concluded at the disciplinary hearing that a demotion or a lower sanction than dismissal would not be a suitable alternative to dismissing the claimant due to the seriousness of the allegations against her and the potential harm she had caused and could continue to cause pupils. He was not aware that the claimant had demonstrated remorse for her actions or recognised that her behaviour may have been inappropriate or adversely affected pupils. In the circumstances, he concluded that the claimant should be dismissed with immediate effect.

j) On 7 January 2020 Mr Mullins wrote to the claimant confirming that she was dismissed. He informed the claimant that she had the right to appeal but she did not exercise that right.

k) After the promulgation of the liability judgment in this case the respondent obtained a witness statement from Rebecca Wilde. In that statement Rebecca Wilde said of the incident on 22 November 2019 referred to at 5(a)(iv) above involving alleged brow-beating of a child and strong-arm tactics, that the claimant's conduct was not to be criticised. She said that following a child's disclosure of a potential high-level safeguarding concern regarding another student's alleged pregnancy the claimant followed what she deemed to be the correct safeguarding procedure; regular well-being support was given to the child, no pressure for more information was given and the Head Teacher was consulted on further action.

l) Accordingly, had there been a reasonable investigation, this matter would not have formed the basis of a disciplinary allegation and/or sanction against the claimant. This was agreed by Mr Mullins. Indeed, he had no option but to agree as the case against the claimant fell away once Rebecca Wilde's account was obtained. That issue was the most serious of all the original allegations against the claimant.

m) In addition, Mr Curtis conceded at the remedy hearing that part of allegation 1/witness 8 (an allegation concerning something alleged to have been said about a child wearing a seatbelt) would have fallen away had there been a proper investigation. The allegations that would have remained were:

    a. Allegation 1/witness 8: the claimant failed to show empathy to a child when they were still grieving for loss of a sibling, using words like *"I know your brother's passed away but you need to snap out of it and get on with your life"*;

b. Allegation 3/witness 9: treatment of parents whose child was absent for medical reasons ('*approach was like an interrogation' 'cut to the chase we have a school refuser on our hands' 'you'll have Social Services knocking on your door' parents did not want child having contact with C again'*);

c. Allegation 4/witnesses 10 & 11: telephone call to parents on a Friday afternoon re: potential pregnancy/termination of pregnancy; lack of support following sexting incident; handling of child being 'drunk at school';

d. Allegation 6/witness 4: the claimant's attitude at meeting on 8 November 2019; the claimant's inaccurate account to parents re: whether child was happy at school; mobile phone incident;

e. Lack of a safeguarding file for the child with the suspected pregnancy;

f. Other matters:

i. The claimant saying that she wanted the children to '*be scared of her'* (witness 1);

ii. Children saying that they would not go to the claimant as she is unpleasant and unapproachable (witnesses 1, 2, 3, 6, 10 & 11);

iii. Not disseminating information re: a child soon enough or wide enough (witness 5);

iv. Parents reporting that the claimant is abrupt, condescending and uncaring;

v. Witnesses stating that they did not trust the claimant's judgement re: safeguarding (witnesses 2, 3, 4).

n) There was a dispute between the parties as to when the disciplinary hearing would have taken place had it not unfairly gone ahead on 6 January 2020. The respondent was anxious to hold the hearing as soon as possible, and I considered that the hearing would have taken place on 20 January 2020, that is two weeks on from 6 January 2020. Rebecca Wilde could have been interviewed in this time and this gave ample time to make arrangements with the claimant's trade union for her attendance at the hearing. There was some suggestion that there might have been other witnesses as the claimant had said at one point that there were eleven witnesses. However, no such witnesses were named in these proceedings and concluded that it was unlikely therefore that there would have been any additional witnesses other than Rebecca Wilde.

o) Mr Mullins said at the remedy hearing that he would have dismissed the claimant even on the revised allegations which he said he would have decided against the claimant even if she had attended a disciplinary

hearing and given her account. However, I found at the remedy hearing that his evidence was not reliable and I concluded that I could not accept his evidence as to what conclusions he would have reached. This was because Mr Mullins was determined at the remedy hearing to justify the original decision to dismiss. I was deeply troubled by his evidence as to what findings he said he would have made and what sanctions he would have imposed as it differed from what he had told me a few weeks previously at the liability hearing. For example, he said at the remedy hearing that he would have found the failure to keep records to be gross misconduct when he had previously said that the failure to keep proper records would have resulted in a final written warning. This was despite it having become clear by the time of the remedy hearing that the failure as regards record keeping only related to one child.

p) Mr Mullins also said at the remedy hearing that the fact that the claimant had not spoken to the allegedly pregnant child over the course of a particular week showed a lack of empathy on her part when in fact the evidence showed that the claimant did not know who the child was until the Friday 22 November 2019, so she could not have spoken to her over the course of the week. This could be construed as a simple failure to appreciate what the evidence was, but I concluded that by the time of the remedy hearing Mr Mullins was blinkered by his desire to persuade the tribunal to find that there was a 100% chance of a dismissal had a fair process been adopted.

q) Another example of Mr Mullins refusal to make positive finding in favour of the claimant related to the issue as to when the parents of the allegedly pregnant child were telephoned. The claimant's case that she had been waiting for guidance from the Head Teacher, Christine Cunniffe on what to do was supported by an email the claimant sent to Mrs Cunniffe at 3.00 pm on 22 November 2019 in which she said *"…been teaching and waiting to hear how you want it to go"*.

r) Even if there had been a misunderstanding between Mrs Cunniffe and the claimant as to what the claimant should do as regards this difficult situation when a child might have been pregnant and might have had a termination, the documents showed plainly that the claimant was waiting for a steer from the Head Teacher. In my view that was not surprising at all in such a serious situation as a potentially pregnant 14-year-old child even though as Head of DSL the claimant had overall responsibility for child protection/safeguarding issues. Yet at the remedy hearing Mr Mullins was determined that even if the claimant had been told by the Head Teacher to await her guidance as to what to do, the claimant should have ignored that advice and dealt with the matter herself and her actions in awaiting the guidance of the Head Teacher and delaying in contacting he parents by about two hours amounted to gross misconduct. This was not a credible position for Mr Mullins to adopt, and I rejected the evidence he gave on this issue at the remedy hearing.

s) I considered that had there been a disciplinary hearing on 20 January 2020 at which the claimant had attended with her trade union

representative then Mr Mullins would have given the claimant a fair hearing, he might have accepted some of her arguments and I consider that there was a chance that he might not have dismissed the claimant and instead imposed a final written warning. I assessed the chance of this scenario playing out as 50%. To my mind, it was a decision that could have gone either way.

t) However, I also concluded that there was a chance that the claimant might have left the respondent's employement in the claim period (dismissal to a date six months from the remedy hearing). I considered that there was a 25% chance that claimant would either have resigned or been fairly dismissed in this period. The claimant might have left of her own accord particularly as she would have been issued with a warning which would have upset her, and might have made her want to move on despite the attractive nature of the terms of her job with the respondent. In addition, the respondent might have found a good reason to dismiss fairly, possibly due to a breakdown in relationships or further misconduct after the issue of a written warning on 20 January 2020.

u) For the purposes of the wrongful dismissal claim and the allegation of contributory fault, it was for me to make my own findings on the facts. None of the parents or teachers who gave evidence as part of the investigation appeared before me, but I had careful regard to the investigation report and the documents in the bundle and in particular the parent's written complaints.

v) The claimant presented a defence to all the allegations at the remedy hearing and I formed a view on the facts having assessed all the available evidence

w) I did not accept that the claimant failed to show empathy to a child when that child was still grieving for loss of a sibling by using words like *"I know your brother's passed away but you need to snap out of it and get on with your life"*. I found it to an incredible suggestion that the claimant would have used these words and I accepted her evidence that she did not.

x) I was prepared to accept that in relation to the parents whose child was absent for medical reasons, that the claimant's communications with them felt like an interrogation to them. Also, I accepted that the claimant said something to those parents like *'cut to the chase we have a school refuser on our hands'* and *'you'll have Social Services knocking on your door'.*

y) Insofar as the telephone call to the parents of the child with the suspected pregnancy was concerned, I accepted the claimant's evidence that she could not have telephone the parents sooner as (1) the identity of the child was not known until the day of the phone call; (2) the claimant had quite reasonably been waiting for guidance from Mrs Cunniffe before speaking to the parent; (3) it was too late by 3/3.30pm on a Friday to ask the parents to attend school; and (4) the parents needed to be spoken to that day as it was the end of the week and they were entitled to know that

their daughter might have been pregnant and that she might have had a termination.

z) I did not consider that the claimant was guilty of any culpable and blameworthy behaviour as regard her actions in telephoning the parents that day in any respect at all.

aa) Nor did the claimant have a chance to speak to the child that day or that week before she spoke to the parents.

bb) I also rejected the suggestion that the claimant had been guilty of culpable and blameworthy conduct in relation to an earlier sexting incident and the handling of child being drunk at school. I accepted her version of events in relation to those issues.

cc) Allegation 6/witness 4 raised potentially serious issues. The boy in question had medical conditions and was apparently walking around the perimeter of the school to avoid seeing the claimant because of her treatment of him. He was a sensitive child who liked to be able to speak to his mother frequently on the phone during the school day. Phones were not permitted at school.

dd) I found that it was insensitive of the claimant to have taken the child's phone away and an error of judgment, but I do not consider that it was in the realms of misconduct. Nor do I consider that the claimant lied to the parent about the child having gone to lessons quite happy. The child did look happy at the point that the claimant saw him apparently returning to lessons.

ee) However, I concluded that the claimant did not handle the meeting with these parents on 8 November 2021 very well and that she said *"Do you want your son at this school"* which was, again, an error of judgment and not a wise thing to say to worried parents of a troubled child with attachment issues at a fee-paying school.

ff) Insofar as the safeguarding file of the child who might have been pregnant is concerned, the file itself was not missing. Letters on the file about the sexting issue (which involved this same child) were seen by the investigator, but there were no notes of the conversations with the parents about the pregnancy. There should have been. It is important to keep notes, particularly for this child who was vulnerable. My finding was that the claimant did not make notes because she was busy. This was culpable and blameworthy behaviour.

gg) I did not accept that the claimant said that she wanted the children to '*be scared of her*'.

hh) I did accept that children said that they would not go to the claimant as she was unpleasant and unapproachable and that parents reported that the claimant was abrupt, condescending and uncaring. I also accepted

that witnesses stated that they did not trust the claimant's judgement regarding safeguarding.

ii) Finally, I did not find that the claimant was guilty of failing to disseminate information regarding a child soon enough or wide enough. Witness 5's account was that the claimant only informed teaching staff about the pupil in a briefing on 29 November 2019 but there was an email circulated by the claimant to teaching staff on 19 November 2019. Further, I accepted that the claimant reasonably believed that witness 5 (another member of staff) was going to circulate the information, not her.

jj) In the circumstances, I concluded that the claimant had been guilty of conduct that was culpable and blameworthy and that she contributed to the dismissal by 50%.

kk) However, I did not consider that the claimant's conduct was properly categorised as gross misconduct or that it was so serious as to be repudiatory and go to the root of the contract between the parties. The overarching issue was that the claimant was not suited to the role of DSL. She did not come across well to parents and children and she did not exercise good judgment. It was not conduct that was serious enough to entitle the respondent to dismiss the claimant without notice.

ll) The claimant has had three different jobs since her dismissal. She worked for Skills for Life from September 2020 to December 2020, Minerva Virtual Academy from November 2020 to March 2021 and a Preparatory School from January 2021 to the date of the hearing. In addition, she made four separate applications to various schools but was unsuccessful.

mm) I considered that the claimant took reasonable steps to mitigate her losses. She has not earned as much as she earned when employed by the respondent, but that was because the job market has been flat due to covid and she has been hampered by the blight on her record arising from her dismissal. It was not unreasonable for her to cease searching for more highly paid work once she was in paid employment.

nn) After leaving the premises she occupied adjacent to LVS in around February 2020, the claimant and her family had to rent premises in Folkestone at the cost of £1,000 per month. The family own their own home in Canterbury but they did not return to that home. I was not told why. It might have been rented out or inconvenient for the family to move into that house. However, but for the dismissal, the claimant would have been living in free accommodation and in my view, the cost of the rent in Folkestone is properly recoverable at least until the claimant took up her current role as a house mistress in January 2021 as the claimant's current role comes with accommodation. I accepted that the Claimant had a sound reason for not moving back into the home the family owned.

oo) The claimant incurred removal cost of £2,300 which is a cost that would not

have been incurred but for the dismissal.

pp) The claimant was paid £5,462.35 gross per month by the respondent which was £3,192.23 net.

qq) The claimant earned £14,848 in the period from September 2020 to March 2021 which needs to be set off against the claim. The claimant also worked in April 2021.

rr) The claimant was in receipt of a pension when employed by the respondent and the respondent made contributions of £1,294.20 per month. In her current job the claimant's employer made contributions for the period from 1 January 2021 to 31 March 2021 of £451.78. Future pension contributions from the new employer for the period from 1 April 2021 onwards will be 5% of gross salary.

ss) After the remedy hearing concluded, by email dated 22 April 2022, the parties supplied me with the following information:

"The parties agree the quantum of damages for wrongful dismissal as follows:-

1. *The pay element of the wrongful dismissal claim (the net notice pay) is £9,260.99.*
2. *There is also a potential award for accommodation costs, which the parties agree amounts to £1,677.42. Whether the accommodation cost is awarded will depend on whether the Tribunal find that the claimant failed to mitigate her loss by failing to take up alternative accommodation which she owned in Canterbury, instead of incurring accommodation costs in Folkestone."*

tt) These sums omit the pension contributions that the respondent would have made in the notice period which, on a pro rata basis, would have amounted to £3754.60 (£1,294.20 per month).

Submissions of the parties

8. The parties relied on written submissions that they supplemented orally. There was no real dispute between them as to the law.

The law

Wrongful dismissal

9. The issue insofar as wrongful dismissal is concerned is whether the employer was entitled to terminate the contract of employment without notice due to repudiatory conduct on the part of the employee. The tribunal must assess the evidence and reach its own decision as to what occurred and the seriousness of the employee's conduct.

10. A repudiatory breach of contract is one that is so serious that it entitles the innocent party to the contract to terminate it.

11. There can be no reduction for contributory conduct in a successful action for wrongful dismissal.

Unfair dismissal

12. S. 123 of the ERA requires an employment tribunal to have regard to the loss incurred by the employee as a result of the dismissal and to award that which is just and equitable.

*"**Polkey**"*

13. The case of **Polkey v AE Dayton Services Ltd [1988] ICR 142**, was a case about procedural unfairness that led to a finding of unfair dismissal. Lord Bridge said:

"If it is held that taking the appropriate steps which the employer failed to take before dismissing the employer would not have affected the outcome, this will often lead to the result that the employee, though unfairly dismissed, will recover no compensation or, in the case of redundancy, no compensation in excess of his redundancy payment."

14. Whether and to what extent a **"Polkey"** reduction was appropriate was a was a significant issue in this case as the two reasons for the finding that the dismissal was unfair were procedural. There are two possible approaches - loss of a chance or balance of probabilities. The difference is that a balance of probabilities assessment will result in an all or nothing outcome, whereas a claimant who recovers compensation on a loss of a chance may recover the proportion of her losses equivalent to that chance.

15. The parties were both of the view that I should adopt a loss of a chance approach. I agreed. The reason for dismissal was not in dispute in this case. However, there was a serious dispute as to whether a proper procedure would have avoided dismissal or simply delayed a dismissal. It was hypothetical as the key witness, Rebecca Wilde was not interviewed at the time, and the claimant's version of events was not ever heard by the respondent.

16. I had regard to the case of **Software 2000 Ltd v Andrews and others [2007] I.C.R. 825,** a case that as concerned with Polkey issues and the now repealed s 98A of the ERA. The case is instructive in terms of its analysis of the proper approach to assessing compensation in unfair dismissal cases, although it needs to be treated with caution in so far as it refers to the repealed s 98A (2). The EAT indicated at § 54 the some of the applicable principles are:

"(1) 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……(3) However, there

will be circumstances where the nature of the evidence ……..is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. (4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. 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……...(7) Having considered the evidence, the tribunal may determine: ……..(b) that there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly; (c) that employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in O'Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615 ; (d) that employment would have continued indefinitely. However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

17. As Ms Hart submitted, this requires the tribunal to consider both whether the employer could have dismissed fairly and whether it would have done so. The emphasis is on what the employer would have done not a hypothetical fair employer.

18. It was submitted on behalf of the claimant that, whilst tribunals should attempt to predict and speculate as to what would have happened had a fair procedure been followed, there are some cases where such an exercise would be too speculative. It was submitted that this is more likely to be the case for misconduct dismissals (than for e.g. redundancy dismissals), where it may be simply not possible for the ET to determine what would have occurred had a fair disciplinary process been undertaken. See for example **Swanston New Golf Club Ltd v Gallagher [2013] EATS/0033/13**, where the ET was unable to speculate as to what would have happened at the disciplinary hearing. I accepted these submissions.

Contribution

19. In relation to the basic award s. 122 of the ERA provides that a basic award can be reduced for contributory conduct:

"(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was notice before the notice was given) was such that it would be just and equitable to reduce or further reduced the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly"

20. In relation to the compensatory award s. 123 of the ERA provides that:

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding".

21. It was submitted by both counsel, and I accepted, that the tests for contribution in relation to any reduction of the basic award and the compensatory award are different. A tribunal has a wider discretion to reduce the basic award than the compensatory award since any reduction of the basic award is based on what is just and equitable, whereas the tribunal 'shall' reduce the compensatory award if the conduct in question caused or contributed to the dismissal. The fact that there are different statutory tests means that any reduction need not be the same for both the basic and compensatory award, although it usually is.

22. In relation to the contributory award, according to **Nelson v BBC (No 2) [1980] ICR 110** a reduction for contributory conduct should only be made if the conduct is culpable and / or blameworthy; the conduct actually caused or contributed to the dismissal; and it is just and equitable to reduce the award by the portion specified.

23. In considering whether the conduct is culpable or blameworthy the tribunal should only take into account conduct of employee not the employer or other employees.

24. It is for the tribunal to reach it own view on the evidence and it is not bound by the conclusions of the employer.

Reduction for failing to comply with the Acas Code of Practice

25. The Trade Union and Labour Relations (Consolidation) Act 1992 provides at s. 207A that:

"(3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employee has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%."

And s. 124A of the ERA provides that:

"*Where an award of compensation for unfair dismissal falls to be—*

(a) reduced or increased under [section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992] ….

…..

the adjustment shall be in the amount awarded under section 118(1)(b) and shall be applied immediately before any reduction under section 123(6) or (7).

26. A tribunal may reduce the compensatory award by up to 25% if it considers it just and equitable in all the circumstances to do so. The reduction can only be made where there is a failure to comply with a provision of the Code and where that failure was unreasonable. In determining the amount, the ET should take into account the degree of culpability.

Order of adjustments

27. It was agreed between the parties that the order of relevant adjustment should be:
    a) calculate the loss that the claimant has sustained in consequence of the dismissal taking into account any deductions for mitigation;
    b) make any reduction for Polkey;
    c) make any reduction for failure to comply with the ACAS Code;
    d) make any reduction for contribution;
    e) apply the statutory cap.

28. Where there are concurrent unfair dismissal and wrongful dismissal claims as there are here, it is important to avoid double recovery. The tribunal has a choice as to when to deduct any sum awarded for wrongful dismissal: **Shifferaw v Hudson Music Co Ltd (2016) EAT/0294/15**, §§ 36 and 37. The options are that either the compensatory award for unfair dismissal starts at the expiry of the period compensated by the wrongful dismissal award, or that notice pay or that notice pay can be deducted from the unfair dismissal compensatory award.

Conclusions

Wrongful dismissal

29. For the reasons outlined above, I concluded that the claimant was not guilty of repudiatory conduct and the respondent was not entitled to summarily dismiss her. I acknowledge that I have found that the claimant was guilty of conduct that was culpable and blameworthy for the purposes of the unfair dismissal claim, but that conduct was not, in my view, serious enough to be categorised as gross misconduct and nor was it repudiatory.

30. It was common ground that the claimant was entitled to a term's notice. She entitled to be put in the position that she would have been in had the contract been performed.

31. The claimant did not work during the notice period. She would have earned the agreed sum of £9,260.99 net during this period plus the respondent would have made pension contributions in the sum of £3754.60.

32. Further, she would have had free accommodation but instead incurred £1,677.42 by way of accommodation costs. I rejected the respondent's case that the claimant failed to mitigate her losses by moving into her own home in Canterbury after the dismissal. I accepted that the claimant had sound reasons for not moving into that house and considered it appropriate and just and

equitable to award her the cost of alternative accommodation as part of her claim for damages for wrongful dismissal.

33. The total award of damages for wrongful dismissal is **£14,693.01**.

34. I have awarded the claimant damages for wrongful dismissal separately from the award for unfair dismissal. It is a stand-alone claim. The claimant is not however entitled to double recovery so she must give credit for the sum awarded for wrongful dismissal against her compensation for unfair dismissal.

Basic award

35. The parties agreed that the basic award to be awarded is £1,614 subject to a potential reduction for contributory fault. S.122(2) of the ERA gives the tribunal a broad discretion to reduce the basic award where it considers it just and equitable to do so.

36. I have found that the claimant was guilty of conduct that contributed to the dismissal by 50%. I could see no reason in the circumstances why it would not be just and equitable to reduce the basic award by this proportion. Accordingly, I have reduced it to **£807**.

Compensatory award

37. The issue for me to determine was what amount would be just and equitable to award to the claimant as compensation for her unfair dismissal?

38. I concluded that had a fair procedure been adopted, the disciplinary hearing would have taken place on 20 January 2020 and that there was a 50% chance that on that date the claimant would have been dismissed by the respondent. In making these decisions, I have rejected the claimant' s case that the exercise of deciding what would have occurred was too speculative. I was satisfied on the evidence available to me that I could reconstruct what would have occurred had a fair process been followed in January 2020. There was a 50% chance that the claimant would have been dismissed after a fair process and a hearing on 20 January 2020.

39. The respondent argued that the claimant would have been dismissed or resigned at a later date even if she had not been dismissed on 20 January 2020. The claimant capped her period of loss at a point six months after the remedy hearing.

40. I considered that there was a 25% chance that claimant would either have resigned or been dismissed in the claim period (a period ending six months after the remedy hearing). The claimant might have left of her own accord particularly as she would have been issued with a warning which would have upset her, and might have made her want to move on despite the attractive nature of ther terms of her job with the respondent. In addition, the respondent might have found a good reason to dismiss fairly, possibly due to a breakdown in relationships or further misconduct.

41. The two loss of a chance adjustments – a 50% chance of dismissal on 20 January 2020 and a 25 % chance of dismissal in the claim period, makes a total **Polkey** deduction of 75%. However, in my judgment it would be just and equitable to award the claimant her losses in full for the two weeks to 20 January 2020. It did not seem to me to be just and equitable or appropriate to reduce the losses in this period by reason of **Polkey**, the claimant's contributory conduct or because of the failure to appeal. The reason for the precipitous disciplinary hearing was entirely the fault of the respondent.

42. I have found that the claimant contributed to the dismissal by 50%. In my view, it would be just and equitable to reduce the compensatory award by this sum and in making this decision I have taken into account that there is also to be a significant **Polkey** deduction. It does justice to both parties to make these deductions. In making this decision I have reflected on the overall total of the award set out below and I was satisfied that the award was appropriate within the meaning of s. 123 of the ERA.

43. The various adjustments apply to the losses that were incurred after 20 January 2020 save that the claimant is entitled to payment of the award of damages for wrongful dismissal in full in my view. This is a separate head of loss and the claimant is entitled to the damages in question in full as she had not been guilty of repudiatory conduct.

44. Six months of future losses are claimed which was appropriate in my view.

45. As at the date of the remedy hearing the shortfall in the claimant's pay between what she was earning with the respondent and the sum she was currently earning was £907.00. However, during the remedy hearing the claimant was asked by her current employer to undertake some Spanish teaching work in addition to her house mistress job. I was advised by the claimant's solicitors on 22 April 2021 (after the remedy hearing) that: "*In respect of the potential additional work teaching Spanish, the claimant and her Solicitor have been unable to obtain any clarification. Emails have been sent to the Bursar at ***** school and the claimant's Solicitor has spoken to the Bursar twice today on the telephone to try and establish the situation. The Bursar stated that she has not yet had confirmation that the claimant will be teaching Spanish and she is not able to give any indication of salary until she receives confirmation. The rate of pay is specified by the Head Teacher once the role is confirmed. At this point in time, she does not have this information and said she does not know when or if the appointment will proceed. The uncertainty of this potential teaching role arises partly out of the fact the teacher whose role the claimant may cover, does not know the extent of her husband's illness or the care she may need to provide and ****** school do not want to apply any pressure on her in the current circumstances.".*

46. The situation was still unclear as at the date of the issue of this judgment. However, it was apparent to me that the claimant was likely to pick up more work with her current employer even if the work covering for the teacher referred to above does not materialise. The school is obviously aware that the claimant is an experienced teacher and also quite capable of undertaking

management tasks or roles within the school. Accordingly, I considered that it would be just and equitable to calculate future losses on the basis that the ongoing pay differential will be reduced to around £500 per month for the purposes of future losses over the next six months.

47. In respect of pension loss, pension contributions from the current employer from 1 January 2021 to 31 March 2021 were £451.78 and future pension contributions from the that employer from 1 April 2021 will be 5% of gross salary. The claimant had been in receipt of pension contribution of £1,294.20 per month with the respondent. I considered that the claimant was likely to earn around £3000 per month gross with her current employer in the future (she was earning £2,285 at the date of the remedy hearing). The pension she will receive on this sum will be £150 per month. There will be a shortfall of £1,144.20 per month over the six-month future loss period as compared with the pension the claimant received when employed by the respondent.

48. In my view, the claimant is entitled to recover the accommodation and removal costs in the sums claimed. They were expenses incurred directly as the result of the unfair dismissal. The claims in respect of those sums will of course be subject to the adjustments.

49. It was common ground that the claimant breached the Acas Code of Conduct by failing to appeal. The respondent argued for a 15% reduction on compensation to reflect this fact. I did not accept the claimant's case that she had good reasons not to appeal because of the way she had been treated. In my view she ought to have followed the internal process and she had the support of her trade union who would have accompanied her to any hearing. It was unreasonable not to have appealed. I considered that it would be just and equitable to make a reduction from the compensatory award for the failure to appeal. In my judgement the appropriate reduction is 10%.

50. The sums the claimant has earned since her dismissal until the end of March 2021 were agreed between the parties to be £14,848. It was necessary to add a sum to this figure as the last day of the remedy hearing was 20 April 2021. I estimated that the claimant earned sum of £2,000 for the additional period to 20 April 2021 (a broad-brush approach on the basis of the figures available to me) making the sum of £16,848 to be set off against the loss of earnings claim.

Past loss

51. The claimant' s losses from 6 January 2020 to 20 January 2020 (the 2-week period before the date the disciplinary period would have taken place had the respondent been acting fairly) were as follows:

    Loss of earning - £1,473.23
    Loss of pension contributions – £597.32

    Total - £2,070.55

52. There was no loss of free accommodation in this period as the claimant had not started renting alternative premises by 20 January 2020.

53. The claimant's losses from 20 January 2020 to 20 April 2021 were as follows:

Loss of earnings - £47,883.45
Loss of pension contributions - £19,413
Loss of free accommodation - £10,538.47
Relocation costs - £2,300

Total - £80,134

Less:

Damages for wrongful dismissal - £14,693.01
Earnings from other employment - £16,848.00
Pension in other employment - £600.00
(I have added a sum for pension for the month of April 2021 to the parties' figures)

Total deductions - £32,141.01

Total loss before adjustments - £47,992.99

Applying the **Polkey** reduction of 75% leaves - £11,998.25
Applying the Acas reduction of 10% leaves - £10,798.42
Applying the reduction for contribution of 50% - £5,399.21

54. The total award for past loss from 6 January 2020 to 20 April 2021 is therefore:

6 January 2020 to 20 January 2020 - £2,070.55
20 January 2020 to 20 April 2021 - £5,399.21

Total - **£7,469.76**

Future loss

55. The award for loss of future earning over the six months from 20 April 2021 is as follows:

Loss of earnings - £3,000 (£500 x 6)
Loss of pension contributions – £6,865.20 (£1,144.20 x 6)

Total future loss before adjustments - £9,865.20

Applying the **Polkey** reduction of 75% leaves - £2,466.30
Applying the Acas reduction of 10% leaves - £2,219.67
Applying the reduction for contribution of 50% - £1, 109.83

Loss of statutory rights

56. The award for loss of statutory rights is the agreed sum of **£300.**

Total compensatory award

57. The total compensatory award is therefore

Past loss - £7,469.76
Future loss - £1, 109.83
Loss of statutory rights - £300

Total - **£8,879.59**

Compensation for unfair dismissal

58. The total award therefore is **£9,686.59** comprising a basic award of £807.00 and a compensatory award of £8,879.59.

_____

Employment Judge Chudleigh

Date: 9 June 2021

Sent to the parties on:

9th June 2021

…….
For the Tribunal: