Appeal No. UKEAT/0041/20/JOJ

# EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
on 22 April 2021
Judgment handed down
on 6 July 2021

**Before**

**THE HONOURABLE MR JUSTICE SOOLE**

**(SITTING ALONE)**

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| Miss LOUISE BROWN | APPELLANT |
|---|---|
| VEOLIA ES (UK) LIMITED | RESPONDENT |

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

For the Appellant

Mr ADAM OHRINGER
(Of Counsel)

Instructed by Bridge McFarland LLP

For the Respondent

Ms ANISA NIAZ-DICKINSON
(Of Counsel)

Instructed by Squire Patton Boggs (UK) LLP

**SUMMARY**

**Unfair dismissal**

The Claimant made claims to the ET of unfair dismissal and wrongful dismissal; and as to remedy sought uplift pursuant to s.207A TULRCA for alleged breaches of the ACAS Code of Practice. In the unfair dismissal claim, the ET held that her dismissal was related to conduct; and that the dismissing officer had reasonable grounds for his conclusion. As to fairness and s.98(4), the ET concluded that the investigatory and disciplinary process was a 'catalogue of ineptitude and misjudgement' but held that it was 'just persuaded' that the process fell within a reasonable band. The ET dismissed the claim of unfair dismissal.

The ET upheld the claim of wrongful dismissal, holding that the Claimant had not committed gross misconduct within the meaning of the Respondent's relevant policy.

On the s.207A claim, the ET awarded an uplift of 5% on the award of damages for wrongful dismissal. In doing so, it found that the Respondent had committed unreasonable breaches of the ACAS Code in respect of the disciplinary process but, in the light of its finding that the dismissal was fair, concluded that it would not be just and equitable to take these into account when considering an uplift to the damages for wrongful dismissal. An uplift of 5% was awarded, based upon a breach of the ACAS Code falling outside the disciplinary process.

The EAT allowed the Claimant's appeal on the unfair dismissal claim, in particular holding that the ET's decision as it related to the reasonableness of the investigatory and disciplinary process was perverse. Her appeal in respect of the reason for dismissal was dismissed. The s.98(4) issue, combining its substantive and procedural aspects, was remitted to the same ET for reconsideration in the light of the EAT's judgment.

The EAT allowed the appeal on the s.207A uplift, holding that the ET was wrong to disregard the breaches of the Code in respect of the disciplinary process because of the failure of the claim for unfair dismissal; and remitted the application for reconsideration by the ET.

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**MR JUSTICE SOOLE**

1. This is an appeal by the Claimant against the Decision of the Employment Tribunal sitting at Hull (Employment Judge Lancaster) sent to the parties on 2 August 2019, with written reasons thereafter requested and sent on 27 August 2019, whereby her claim of unfair dismissal was dismissed. Her claim of wrongful dismissal was upheld; and her award of damages was increased by 5% pursuant to the 'ACAS uplift' jurisdiction in s.207A Trade Union & Labour Relations (Consolidation) Act 1992 (TULRCA). The Claimant also appeals against the amount of that uplift.

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2. The Claimant was employed by the Respondent from April 2001 and by the time of these events held the position of Business Development Manager. In March 2018 the Respondent began an investigative and subsequently disciplinary process in respect of her conduct which was described in the Judgment as a **'catalogue of ineptitude and misjudgement'** on its part: [3, 28]. On 21 September 2018 she was dismissed. Her claim of unfair and wrongful dismissal followed.

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3. The Judge held that **'the principal reason for dismissal was related to conduct, and in particular an allegation of inappropriate conduct towards a subordinate, Neil Bolton…'** : [1]. The Judge held the dismissal to be fair. As to the reasonableness of the investigation, he concluded that notwithstanding his description of the process he was **'…just persuaded that the respondent was acting within the band of reasonable responses in treating it as sufficient in the circumstances'** : [28]. The Judge upheld the claim of wrongful dismissal, in particular having concluded that the Claimant's conduct did not meet the definition of gross misconduct under the Respondent's policy.

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4. Before considering the Grounds of appeal, it is necessary to consider the narrative of this matter in some detail. I do so by reference to the findings of fact in the Judgment.

5. On 28 February 2018 an employee Miss Broomhead sent the Respondent an e-mail making complaints principally against the Claimant's superior Mr Smedley, but also against the Claimant. This included allegations of potential corruption or bribery. As against the Claimant these **'amounted to a hearsay comment that Miss Broomhead had heard that two Fitbits had been passed on to a client, Humber Roads, who had helped the respondent in delivering some online training. That was a hearsay comment and on that basis, coupled with some other unsubstantiated general allegations that there may be irregularities in the posting of various finances, where the coding notes were not as I understand the responsibility of the claimant but of Admin, this enquiry was launched…' :** [6].

6. The further allegations were that Mr Smedley spent most of his time at a local hotel; and the **'rather vague allegation'** [5] that the Claimant would often go and meet him there. Apart from carrying out some general financial checks on Mr Smedley and the Claimant, the Respondent decided to focus the first phase of an investigation on the latter allegations. Its investigative officer (Mr Elshaw) approved the proposal of the Security Director for a security company to carry out surveillance of them both. The Judge described this as **'an overreaction and a great misjudgement'** [5] and **'a gross overreaction to commission a covert investigation of the claimant, intrusive of her privacy, to support a general allegation that she went out of the office to meet her superior'** [7].

7. The surveillance did not commence until 1 April and lasted for a month. The resulting report was received on 30 April. It showed **'nothing untoward so far as the observations of the claimant were concerned'** : [8].

8. At that point, the investigation moved to its second phase, namely **'enquiries into any potential financial impropriety'**. The Judge observed that this aspect of the enquiry had now been delayed for two months [8].

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9. Coincidentally, on the same date (30 April) the Respondent received an email from an employee Mr Bolton, constituting a grievance, which made allegations of bullying against him by the Claimant. Miss Broomhead had made reference in her original email to the interaction between the Claimant and Mr Bolton; but Mr Elshaw had not read it as an allegation of bullying. In the light of Mr Bolton's email, Mr Elshaw took a course which the Judge sharply criticised:

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**"9. …Mr Elshaw then determined rather than deal with this under the Dignity at Work policy as a bullying allegation where ordinarily therefore Mr Bolton would be spoken to that procedure, to be ascertained what relief he wished to obtain, and the claimant would similarly be spoken to, having been made fully aware at that very early stage of the allegations in the grievance against her, and similarly Mr Bolton would have been made aware of the claimant's response and then subsequently, as I understand the policy, a decision might well be made that it would lead to disciplinary procedures. Instead, Mr Elshaw determined from the very outset that when he summoned Mr Bolton to the preliminary meeting, which was on 11 May 2018, that would be a disciplinary investigation interview. Miss Broomhead was called in again for a further interview (on 16 May 2018) and clearly Mr Elshaw had already determined that he was set on a course to proceed down a disciplinary investigation, and I think there is some force in the claimant's assertion that he may have been predisposed to take that line: he had commissioned, no doubt at some expense and certainly at some time, a futile report into alleged misconduct on the part of the claimant and he was now looking to pursue other potential allegations against her. 10. Whilst I accept… that these allegations all originated on the face of it from external communications from one ex-employee and one current employee, there certainly does appear at this stage to be something of a predisposition on the part of Mr Elshaw to take the view that this should proceed to a disciplinary matter rather than look at any other possible recourse".**

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10. On 18 May the Claimant and Mr Smedley were summoned to a meeting and suspended; the suspension being for the purpose of a further investigation. Between that date and 4 June 2018 there was a series of interviews with potential witnesses. The Judge observed that after 4 June 2018 no further enquiries of witnesses nor examination of documents took place; and therefore, the primary purpose of the suspension had been met. However, there was **'no evidence the respondent ever at that stage or thereafter considered whether suspension of the claimant was still**

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**appropriate. That may have been largely unnecessary because she was certified unfit for work for a large part of this period'** : [11].

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11. The interviews disclosed eight witnesses, including Miss Broomhead and Mr Bolton, who made what the Judge described as **'generalised allegations of misconduct'** [12]. The paragraph continues: **"These are summarised by Mr Roberts in the course of the disciplinary interview and also then reflected in his written reasons, so he singles out particular comments. I do not pause to attribute them to particular witnesses, nor did he in the letter. The amount he (Mr Bolton) takes is unbelievable. The way he is spoken to and treated is what I describe as bullying. The way he is spoken to is quite manipulative. "She has been at Neil straightaway and shouting at him", "she's unprofessional, especially against Neil", "I really feel for him", "she was constantly on at him", "Neil has been in tears because she spoke to people badly", "it was very uncomfortable" directed at Neil Bolton "and very belittling"."** He added that there was also a number of other witnesses who did not substantiate any of those specific complaints from Mr Bolton [13].

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12. The Claimant and Mr Smedley were summoned to a first investigative interview on 6 June 2018. The letter of invitation (29 May) set out five bullet points as to the matters to be investigated. The Judge described these as:

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- **"bullying and harassment allegation in relation to more than one individual of the whole site over a prolonged period of time", so not limited to Mr Bolton and not identifying any particular employee;**
- **Financial misconduct in relation to multiple allegations of misappropriation of finances including withholding of revenue, misuse of the expenses policy, unauthorised purchase orders and lack of authorisation for sponsorship and charitable contributions;**
- **Inappropriate relations with your colleague, Gary Smedley, which directly impact the workforce;**
- **Unprofessional behaviour in your correspondence and communications with individuals at the site;**
- **Mismanagement and lack of leadership in relation to culture and colleague morale:** [14].

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From this the Judge observed: "**Under the respondent's own disciplinary process at the investigative stage details of the matters to be enquired into are supposed to be given in advance. Those subheadings are very vague**" : [15].

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13. The Judge continued: '**The respondent then mismanaged the process of investigation**' : [16]. His reasons for that conclusion are then set out in detail in paragraphs 16-27. It is important to have that detail in mind, but the criticisms in particular include:

(i) mismanagement of the arrangements for the interviews: [16,17];

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(ii) failure, at any stage of the investigative process and the three interviews of the Claimant, to give her copies of the 20 witness statements taken up to 4 June : "**A number of them were read out but she was never provided with the written version, and in part particular points of statements were cherrypicked and read out rather than giving the whole context, and I do note that that process was participated in by the HR Associate present who appears to have not taken a fully impartial stance in the course of these proceedings but was joining with Mr Elshaw in putting specific allegations to the claimant**" : [18]. Further, at no stage of her interviews bringing to her attention the witness statements which in part supported her case that she may have been abrupt in her manner but was not bullying; and which "**would potentially have been relevant**" : [23]. The witness statements were not supplied her until 3 September 2018, 9 days before the subsequent disciplinary hearing.

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(iii) only two of the allegations particularised in any detail: [19]. As to the second of those: "**That was the only specific allegation of alleged bullying that was ever itemised… In relation to that allegation, however, there is email correspondence, and it is perfectly clear to anybody reading that, that that cannot be and is not any form of bullying…How that materialised into any allegation of bullying let alone one that was ever pursued by the respondent is beyond me**" : [20].

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(iv) Mr Elshaw phrasing his questions to witnesses in a 'leading' manner, i.e. "**leading the witnesses to interpret any inappropriate conduct that might have taken place as in fact being bullying and harassment rather than giving a neutral account of what happened and allowing an objective assessment to be made of that behaviour and conduct"** : [21].

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(v) Mr Elshaw at no stage considering to go back to any of the witnesses and ask them for clarification of the specific allegations; nor to put to them the Claimant's case that she was sometimes abrupt, but was not bullying, i.e. **"that she accepted that she was sometimes abrupt, and indeed that appears to be a common pattern of witness evidence, even those who do not describe it as being bullying, but she was under considerable pressure at work at the time, and in relation specifically to Mr Bolton she identified that he was somebody that had to be taken to task because he did not always perform promptly what was expected of him, but she consistently denied ever having shouted at him. So there is clearly room for divergence of opinion: that one person who may object to being taken to task for underperformance perceives that as inappropriate bullying, whereas the claimant considers that simply to be an appropriate way without (which was never accepted) shouting or seeking to belittle Mr Bolton, managing what he did in the office."** : [22].

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(vi) Mr Elshaw at no stage conducting a more general enquiry to ascertain how the Claimant was perceived in the workplace, even after she had provided a list of names of people who might be able to assist : **"I have some sympathy for the claimant's perception that this was not a balanced investigation"** : [23].

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(vii) Giving just 9 days' notice of the disciplinary hearing on 12 September (and for the first time supplying copies of the 20 witness statements) : [24].

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(viii) For the purpose of that hearing, and following the lengthy enquiry and interviews, Mr Elshaw making no attempt to particularise the allegations beyond the initial five points. Further, maintaining the allegation of financial misconduct, for **"which so far as**

**I can see there is not a shred of evidence at all that the claimant ever misappropriated any sum of money, yet through ineptitude or laziness Mr Elshaw did not seek to modify that charge and left it hanging over the claimant, even after this lengthy period"** : [24].

(ix) Refusing the Claimant's request on 7 September for permission to contact potential witnesses; for an adjournment for that purpose; or to have someone other than an employee or a union representative (she was not a union member) to accompany her.

Those witnesses could have been **"relevant witnesses as to context, particularly given the fact that the charges remained in their general amorphous state, unaltered from the start of the investigation, leaving the claimant still largely unclear as to what specific parts of those 20 statements were in fact relied upon…"** : [25]. Further **"No-one seems to have addressed any attention to the fact that under the disciplinary policy the claimant would have been entitled to call witnesses as appropriate, and as a precursor to doing so she necessarily would have had to be able to make contact with them to establish they were relevant. Instead, having categorically denied her application for an adjournment the respondent then went on to purport to say that she could give reasons why they were relevant and therefore whether the Chair of the enquiry would need to ask them questions. It seems to me perfectly understandable that the claimant elected not to seek to pursue that in the circumstances"** : [26].

The refusal of an adjournment was a misjudgement in all the circumstances : **"The respondent had had six months to build their case against the claimant: they gave her nine days to respond to the specific and somewhat lengthy information they provided to her"** : [26].

Although there was no entitlement to the representation she sought, **"that again in my view would appear to be an error or judgment given the circumstances… particularly given the intervening ill-health of the claimant during this enquiry"** : [26].

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14. In the following paragraph, the Judge recorded the Claimant's acceptance that she was afforded an opportunity to put her case at the 12 September disciplinary hearing before Mr Roberts, adding **'and certainly there was then a subsequent appeal before Mr Williams where she had further time to consider her position.'** However he criticised the disciplinary hearing in these terms : **"But even at that disciplinary hearing Mr Roberts made no specific findings of fact because he had no factual information to say that this was said on a particular instance; he simply repeated the general allegations of belittling and abusive shouting behaviour as corroborated by a number of witnesses, and still when the claimant put her alternative account it never occurred to him to seek to test again the witness evidence, and indeed it appears to me that he got perilously close to prejudging this issue. When asked why he supported Mr Elshaw's decision not to allow any adjournment or the questioning of further witnesses his somewhat revealing comment in evidence was "those are already sufficient to prove the respondent's case", and it is clear from the tone of his interview on 12 September that he accepted without more the statements in front of him, which as I say had never been drilled down for any detail and had never been subject to any challenge, and of course there was never any suggestion that any of the these people actually be called as witnesses at the disciplinary hearing to allow the claimant to question of challenge their evidence."** : [27]

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15. The Judge nonetheless concluded that the investigation and disciplinary process satisfied the requisite test: [28], also [3]. Thus in his opening summary : **"The investigative and disciplinary process was however in my view a catalogue of ineptitude and misjudgement on the part of the respondent, but notwithstanding that I am just persuaded that it fell within the band of reasonable responses open to a reasonable employer to consider that that level of investigation in the circumstances was sufficient and appropriate."** : [3]. At [28] he gave his detailed conclusion : : **"So that is why I have described the conduct of this investigation as a catalogue of ineptitude and misjudgement, but nonetheless as I say I am just persuaded that the respondent was acting within the band of reasonable responses in treating it as sufficient in the circumstances. Even for a very large employer such as this I cannot expect the same standards of exactitude as, say, in criminal proceedings, or even in court proceedings. What they had done was to obtain evidence from a large number of people which described**

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**the adverse effect of the claimant's manner, particularly upon Mr Bolton, and there certainly was evidence from his interviews of clear apparent distress when raising these matters. There may be many issues as to why this had not been raised earlier, why Mr Bolton was somewhat disingenuous in his account of the holiday matter as being also bullying, why he made no mention of any issues with his performance**

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**that may have prompted the claimant speaking somewhat harshly to him, but there is still a body of evidence obtained during a lengthy investigation and even if matters could have been dealt with better I still consider it a permissible course of conduct. As I have said ultimately, although I consider that showing some compassion and a degree of common sense more time might have been afforded to the**

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**claimant to marshal her arguments, she was made aware of all the charges and she had certainly over the course of the lengthy investigation spread over three substantial meetings at least been told if not given written confirmation of the nature of the allegations against her."**

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**16.** The Judge then turned from the procedures to the substance of the decision to dismiss: **"Having come to that conclusion, that he accepted the evidence of the descriptions of the way the claimant dealt with Mr Bolton, I cannot and do not substitute my own view for that of Mr Roberts. On his finding this was a serious matter that justified termination, notwithstanding the substantial mitigation for the**

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**claimant's long service"**: [29]. His summary concluded: **"In short, I am satisfied that the respondent has established that the principal reason for dismissal was related to conduct, and in particular an allegation of inappropriate conduct towards a subordinate, Neil Bolton, and I accept the evidence of the dismissing officer, Mr Roberts, that although he did not represent this clearly within the termination**

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**letter, that was what weighed on his mind**: [1]. **I am further satisfied that Mr Roberts genuinely believed that the claimant had behaved inappropriately towards Mr Bolton, and he did have reasonable grounds for coming to that conclusion because in the course of the investigative process there had been a number of witnesses who supported that general allegation."** : [2].

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17. The Judge held that in all the circumstances the dismissal was fair within the meaning of s.98(4) ERA.

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18. Turning to the claim of wrongful dismissal, this was upheld: **"However, having heard the evidence over the last three days, as I have said I am not at all persuaded that the respondent has satisfied me that**

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**this in fact meets the definition of gross misconduct under their own policy.”**: [29]. **“Absent any attempts to verify the evidence and the accounts and the interpretations given by witnesses, I have the claimant's own account. I find her to be** [f]**rank in stating that she accepts she was abrupt, and indeed she could hardly do otherwise given the wealth of evidence of that, but I accept her evidence that if that conduct unbeknown to her had a deleterious effect on Mr Bolton that that was not her intention: that there were genuine perceived performance issues on his part, that generally she was seeking to support, and that if she did by her actions have the effect that it appears to have upon him that was not deliberate. There is no admission of bullying in her assertion today that she would have wished the opportunity if at all possible, to speak through and address those issues and discuss them with Mr Bolton and see if there was a resolution. That is entirely consistent with somebody who has inadvertently misconducted themselves in a manner that has unintentionally caused stress to one of their subordinate colleagues. The definition of “bullying” within the Dignity at Work policy expressly requires there to be that element of intention, and as I say the respondent has certainly not proved that before me at this Tribunal. So although they are entitled on the findings of Mr Roberts to conclude that what had actually happened because of the effect it had on Mr Bolton was so serious as to justify dismissal, that should have been dismissal on notice and not summary termination. So to that extent the claim succeeds.”** : [30].

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19. The final matter for decision was the Claimant’s claim for the award of an uplift on her award pursuant to s.207A TULCRA. In the light of the decisions on liability, this was now confined to the award of damages for wrongful dismissal. The Judge first noted that any uplift was discretionary, namely if he considered it *‘just and equitable in all circumstances’* (s.207A(2)); and observed that **‘there are certainly potential breaches of the Code of Conduct’** : [31].

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20. The first alleged breach was unreasonable delay in investigating the matter. In all the circumstances there had not been an unreasonable breach of the Code. There had been substantial delay from Miss Broomhead’s initial email of 28 February until the commencement of any investigation into financial matters. Although that decision to investigate had been **‘based upon a bad judgment call’**, there was a reason for the delay involving

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a company called Subrosia : [32], see also [6]. Further, the delay after Mr Bolton's complaint (30 April) had not been significant.

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21. The Judge held that there had been breaches of the Code in respect of the failures to allow an extension of time to prepare for the disciplinary hearing and to allow her to call potentially relevant witnesses. The parties agree that is the meaning of paragraph [33] and in particular its final sentence.

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22. However, in circumstances where he had held the dismissal to be fair, **'I do not consider it would be just and equitable if I were to then award effectively a windfall to the claimant for what is on the face of it and unreasonable breach of the Code of Practice. The two must be looked at in the round'** : [34].

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23. He held that this reasoning did not apply in respect of a further breach of the Code, namely the failure to keep the Claimant's suspension under review. This was because suspension fell outside the disciplinary process : **"Suspension is not if itself a disciplinary act, but the Code is quite clear: where suspension is considered appropriate it should be kept as brief as possible, should be kept under review as well as making clear that it is not considered of itself a disciplinary action"**. He therefore confined the uplift to that breach alone; and awarded **"the minimum amount that I would ordinarily award…5%"** : [35].

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**Ground 1 : reason for dismissal**

24. The first ground of appeal concerns the Judge's finding as to the reason for dismissal and hence the application of s.98(1)-(3) ERA 1996. Familiar as they are, I set out the relevant provisions:

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**'(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**

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**(a) the reason (or, if more than one, the principal reason) for the dismissal, and**

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**(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**

**(2) A reason falls within this subsection if it –**

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**(a) relates to the capability or qualifications of the employee work of the kind which he was employed by the employer to do,**

**(b) relates to the conduct of the employee,…**

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**(3) In subsection (2)(a) –**

**(a) "capability", in relation to an employee assessed by reference to skill, aptitude, health or any other physical or mental quality…'**

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25. On behalf of the Claimant, Mr Ohringer (who did not appear below) submits, first, that the Judge found that she had been dismissed because of her manner of communication with Mr Bolton. He points in particular to the Judge's findings that **'What they had done was to obtain evidence from a large number of people which described the adverse effect of the claimant's manner, particularly upon Mr Bolton, and there certainly was evidence from his interviews of clear apparent distress when raising these matters'** [28]; that her behaviour was **'entirely consistent with somebody who has inadvertently misconducted themselves in a manner that has unintentionally caused stress to one of their subordinate colleagues'** [30]; and that the Respondents were **'entitled on the findings of Mr Roberts to conclude that what had actually happened because of the effect it had on Mr Bolton was so serious as to justify dismissal…'**, albeit it should have been on notice rather than summary : [30].

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26. Mr Ohringer then points to the broad definition of 'capability' in s.98(3), including 'skill' and 'aptitude'; and submits that the Judge failed to resolve the issue of whether the Claimant was dismissed for misconduct or for lack of capability. Without the necessary and correct characterisation of the reason for dismissal, there is a risk that the tribunal will consider the appropriateness of the sanction and the fairness of the dismissal on the wrong basis, see e.g. Wilson v. Post Office (CA, A1/1999/1173 unreported); also Sandwell & West Birmingham

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Hospitals NHS Trust v. Westwood (UKEAT/0032/09) at [110]. The s.98(4) appraisal has to consider the procedural issues together with the (true) reason for dismissal: Taylor v. OCS Group Ltd [2006] ICR 1602 at [48]. For that purpose, the distinction between conduct and capability as the ground of dismissal is of potential and substantial importance, see e.g. the ACAS Code of Practice on Disciplinary and Grievance Procedures

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27. For the reasons advanced by Ms Niaz-Dickinson I reject this ground of appeal. In particular, the Claimant's argument takes no adequate account of the opening paragraphs of the Judgment, where the Judge expressly held that the principal reason for dismissal was related to conduct, **'and in particular an allegation of inappropriate conduct towards a subordinate, Neil Bolton'** [1]; that the dismissing officer Mr Roberts genuinely believed that the Claimant had behaved inappropriately towards Mr Bolton; and that he had reasonable grounds for that belief [2]. Those conclusions are in turn based on the evidence of the generalised allegations of her conduct towards Mr Bolton and its adverse effect on him ([12], [28]) and the Judge's finding that Mr Roberts accepted that evidence ([29] and [30] final sentence). Whilst the Judge's paragraphs [28]-[30] rather interweave the various issues arising in the unfair and wrongful dismissal claims, I consider that a fair reading of the whole Judgment leaves no doubt of his findings on the s.98(1)(2) issue.

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28. This conclusion is further supported by the absence of any argument on behalf of the Claimant below that the true reason for her dismissal related to her capability. Her case was that she had been dealing appropriately, if perhaps abruptly in manner, with Mr Bolton's underperformance; and that the Respondent had no honest or genuine belief that she had been guilty of misconduct, but had determined to get rid of her : see e.g. ET1 Particulars of Claim paras. 21 and 28; closing submissions paras. 2, 5 and 6. Insofar as her case referred to performance issues, this was in the context of sanction, not the reason for dismissal: see e.g. *'At best the evidence suggested the Claimant had a poor communication style that could have*

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*been dealt with by performance review'* : closing submissions para. 6(b). Consistently with that approach, the Respondent's witnesses were not challenged in cross-examination on the basis that the true reason for her dismissal was related to her capability.

29. Of course, the burden of proof is on the employer to establish the reason for dismissal. However, in the absence of any suggestion by either party that capability was the true reason for the Claimant's dismissal, I see no basis upon which the Judge could have so concluded.

**Grounds relating to s.98(4)**

30. I turn to the various grounds which relate to the Judge's conclusion that the dismissal was fair within the meaning of s.98(4) ERA.

**Ground 2**

31. The first contention is that the Judge's finding of a fair dismissal was based solely on his conclusion that the Respondent had a genuine and sufficient belief that the Claimant had committed misconduct; and that he failed to consider, or to consider properly in accordance with the authorities, whether the dismissal was unfair on 'procedural' grounds.

32. Noting the very detailed consideration and criticism of the investigative process in paragraphs [16] – [27] of the Judgment and the Judge's conclusion in [28] that he was **'just persuaded that the respondent was acting within the band of reasonable responses in treating it as sufficient in the circumstances'**, I sought clarification as to how this ground could be advanced. Mr Ohringer submitted that, if those paragraphs did constitute consideration of procedural unfairness, the Judge's error was in failing to consider overall fairness of the dismissal in the composite way required by the authorities, e.g. Taylor v. OCS Group Ltd.

33. I must deal with the ground in the terms that are clearly identified in the Notice of Appeal. Given the very detailed consideration of the fairness of the investigation and disciplinary

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process, I reject this ground of appeal and turned to the substantive challenges to the Judge's conclusion that the process was fair in all the circumstances, i.e. Grounds 3, 4 and 7.

**Grounds 3, 4 and 7**

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34. Ground 4 contends that, given his criticisms of the procedures adopted, the Judge's conclusion that the dismissal was fair indicates that he did not correctly apply the 'band of reasonable responses' test in Iceland Frozen Foods Ltd v. Jones [1983] ICR 17; and had set the bar for fairness too low. This Ground focuses in particular on the Judge's conclusion that the investigative and disciplinary process was a catalogue of ineptitude and misjudgement on the part of the respondent' : Notice of Appeal para. 31. Ground 7 contends that the finding of a fair dismissal was perverse, having particular regard to the Judge's criticism of the procedures, which included breaches of the ACAS Code. Following discussion with Counsel, these two Grounds were taken together as a perversity challenge to the Judge's conclusion on procedural fairness.

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35. For that purpose, Mr Ohringer of course accepts the high hurdle which is faced by such a challenge. Thus **'Such an appeal ought only to succeed where an overwhelming case is made out that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached'** : Yeboah v. Crofton [2002] IRLR 634 per Mummery LJ at [93].

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36. As the parties agree, **'The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances to the reasonableness of the decision to dismiss for the conduct reason'** : Sainsbury plc v Hitt [2003] ICR 111 per Mummery LJ at [30].

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37. Mr Ohringer's submission was focused squarely on the Judge's own findings about the Respondent's investigation and disciplinary process as it applied to the Claimant. Faced with the multiple examples of failings and the Judge's conclusion that it was a catalogue of ineptitude and misjudgement; no reasonable employment tribunal could have reached the conclusion that nonetheless it fell within the reasonable band. That overall conclusion was glaringly at odds with the findings which preceded it. As Mr Ohringer put it, to accept the conclusion would be to treat the reasonable band as infinitely elastic.

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38. In addition, by Ground 3 he contends that the Judge failed to take into account for this purpose the fact (as he later found when considering remedy for wrongful dismissal) that the Respondent had unreasonably breached the ACAS Code. Section 207(2) TULRCA provides: **'In any proceedings before an employment tribunal…any Code of Practice issued by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal…to be relevant to any question arising in the proceedings shall be taken into account in determining that question.'** The relevant breaches of the Code were identified by the Judge when considering whether to award an ACAS uplift pursuant to s.207A TULRCA: see [31]-[35], but not when considering the fairness of the dismissal. Mr Ohringer acknowledged that the substance of those breaches had been considered on the issue of procedural fairness; but submitted that this was not sufficient. By virtue of s.207(2) it was necessary to take into account the very fact that the relevant failing constituted a breach of the ACAS Code. That Code set the benchmark of a reasonable employer. If the tribunal did not have that benchmark in mind, then it would not be applying the correct standard. As he put it, the Code calibrates the standard of fairness. The importance of the express focus on the ACAS Code had been emphasised by the EAT (Morison P and lay members) in Lock v. Cardiff Railway Company Ltd [1998] IRLR 358. Thus: **'It seems to us that although the Code of Practice was not referred to expressly by counsel on Mr Lock's behalf, nor on behalf of the employers, industrial tribunals should**

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**always have the Code of Practice to hand as a guide for themselves as to what is good sound industrial relations. In other words, this Code sets out the standards, as we see it, of sound industrial practice based on a considerable body of experience. The lay members themselves also have such experience, but the Code forms, as it seems to us, the basis on which employers' conduct should be judged. It would have been of**

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**assistance, we think in this case, for the industrial tribunal to have taken the Code into account on the difficult question at issue before them as to whether a one-off act of misconduct, which this was to be treated as, could justify a dismissal'** : [12].

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39. As to the ACAS Code, Ms Niaz-Dickinson observed first that Counsel then appearing for the Claimant in her oral submissions had not highlighted specific paragraphs of the Code as being relevant to the issue of liability. Such references had only been made after the Judge had delivered

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his oral judgment on liability and then purely in relation to remedy by way of an uplift on the award of damages for wrongful dismissal. The breaches that were alleged for that purpose related to the requirements that suspensions should be as brief as possible and kept under review (Code

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para.8); that the disciplinary hearing should be dealt with without unreasonable delay (para.11); and that the employee should be allowed reasonable time to prepare her case and call witnesses (paras. 11 and 12). The Judge had rejected the complaint of unreasonable delay [32]; held that there were 'potential breaches' in respect of time to prepare and calling witnesses [33], but not

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considered it appropriate to make an uplift in that respect; and held that there was a breach in respect of the Claimant's continuing suspension and made an award in that respect [35]. Although the Judge made no reference to the ACAS Code on the issue of liability (no such argument having

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been advanced on behalf of the Claimant) his decision evidently did take into account the complaints in respect of suspension [11] and time to prepare and call witnesses [26]. Accordingly, as a matter of substance, those matters were considered. Furthermore, the Judge noted that

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consideration of lifting the suspension **'may have been largely unnecessary because she was certified unfit for work for a large part of this period'** [11]; and when referring to the appeal hearing (**'where she**

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**had further time to consider her position'** [27]) had expressed no concerns about her ability to call witnesses at that stage.

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40. As to the broader ground of perversity, the Reasons demonstrated that the Judge had carefully balanced his concerns about the investigation procedure against those aspects which he considered to be reasonable. This measured approach was further emphasised by his language that he was **'just persuaded'** that the investigation fell within the requisite band.

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41. Ms Niaz-Dickinson submitted that the factors which the Judge took into account on the other side of the scale, i.e. favourable to the Respondent, were : (i) the Respondent had carried out a lengthy investigation [28]; (ii) in the course of the investigation process there was a number

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of witnesses who supported the general allegation of inappropriate behaviour towards Mr Bolton [2]; (iii) the Respondent had obtained evidence from a large body of people that described the adverse effect of the Claimant's manner [28]; (iv) this included evidence from Mr Bolton of his

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**'clear apparent distress when raising these matters'** [28]; (v) the Claimant was made aware of all the charges [28]; (vi) the Claimant was, as she accepted, afforded an opportunity to put her case at the disciplinary hearing on 12 September [27]; (vii) there was a subsequent appeal when the

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Claimant had a further opportunity to consider her position [27]. She also pointed to the Judge's observation that **'Even for a very large employer such as this I cannot expect the same standards of exactitude as, say, in criminal proceedings, or even in court proceedings'** : [28].

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Conclusion on procedural fairness

42. I remind myself of the very high hurdle which is faced by a perversity challenge; of the associated need to guard against the error of appellate substitution of judgment; and of the need

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to consider substantive and procedural issues together when reaching a judgment on whether a dismissal is unfair : Taylor v OCS Group Ltd. However, in circumstances where the central

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challenge in this appeal is to the Judge's distinct finding on procedural fairness, I must reach a conclusion on that aspect of his overall assessment.

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43. Having done so I conclude that this is one of those rare cases where, with respect, the Judge's conclusion on the reasonableness of the Respondent's investigation and disciplinary process cannot stand.

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44. The starting point must be the Judge's overall description of this process as a **'catalogue of ineptitude and misjudgement'** on the part of the Respondent. His detailed analysis shows this characterisation to be wholly merited.

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45. The next step is to consider the grounds upon which the Judge concluded that he was nonetheless '**just persuaded'** that the process fell within a reasonable band. As Ms Niaz-Dickinson accepted in oral argument, those grounds are contained in the first sentence of paragraph 27 and paragraph 28 of his Judgment. Her list of factors (see para. 41 above) adds a finding from paragraph 2 of the Judgment.

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46. On the most favourable reading and when considered both individually and collectively, the listed factors in my judgment provide no significant counterweight to the Judge's primary description of the investigatory and disciplinary process. They involve no more than some very basic features of a reasonable process. Their absence would add further negative factors in the assessment; their presence adds very little. In any event they require significant qualification when set against the Judge's criticisms of the process. I take them in turn but of course also consider them collectively.

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47. Item (i) is that the Respondent had carried out a lengthy investigation. On its own that adds very little to the assessment; particularly in the context of the Judge's properly sharp criticisms of the various misconceived and unfair byways of its long course.

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48. Items (ii)-(iv) amount to little more than a summary of the evidence, which was obtained, insofar as relevant to the ultimate decision to dismiss. Apart from showing that the process included the very basic element of seeking and obtaining evidence in consequence of the complaint and grievance raised, it says little or nothing about the quality of the process.

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49. Item (v) is that the Claimant was made aware of all the charges. Whilst the absence of such a fundamental feature of a fair process would obviously be a strongly negative factor, it is hard to see how its presence can have significant positive weight against the catalogue of failures. But in any event, the Judge's apparent reliance on this factor is countered by his striking criticisms of the lack of specificity in the allegations against the Claimant. At [19] and [20] he identified just two allegations which were specified in any detail; the second of which produced his castigation that *'How that materialised into any allegation of bullying let alone one that was ever pursued by the respondent is beyond me.'* Further, at [33] he again criticised the Respondent's failure to narrow down the issues; and the consequent difficulty for the Claimant in identifying the potential relevance of calling witnesses on her behalf.

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50. Items (vi) and (vii) concern the opportunity for the Claimant to present her case both at the disciplinary hearing and the subsequent appeal. It is again difficult to see how these elementary features of a fair process can be given any significant positive weight when set in the balance against the catalogue. In any event, any such weight is again blunted by the Judge's criticisms of the lack of specificity in the allegations and of the fairness of the disciplinary hearing on 12 September: [27]. Furthermore, there was no finding to the effect that this was one of those cases where the appeal process had cured prior deficiencies in the process adopted. The positive features amounted to no more than that the Claimant had had the opportunity to present a case at the disciplinary hearing and subsequent appeal.

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51. I also do not consider that the Judge's contrast with the standards to be expected in criminal or other court proceedings takes matters any further.

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52. Having then stood back and considered these factors collectively, I can see no basis for a reasonable tribunal to conclude that, notwithstanding the identified catalogue of failings, the process fell within a reasonable band. In reaching that conclusion, I recognise and acknowledge the care with which the Judge evidently examined and considered the investigatory and disciplinary process; and for this purpose, have given full weight to his language that he was 'just persuaded'. However, in my judgment the Judge's conclusion cannot be sustained.

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53. I reach that conclusion independently of Ground 3 and s.207 TULRCA. On this point I acknowledge that the Judge was not expressly directed to these provisions and the ACAS Code of Practice when liability was being considered. The issue of compliance only arose at the stage of remedy; and then in the context of the uplift provisions of s.207A. However the authority of Lock emphasises the importance of the Code; and in my judgment it should have been considered at this stage. Whilst the Judge took into account those failings which in fact involved breaches of the Code, I do not consider that to be the same as taking into account the fact they were contrary to the Code. As Mr Ohringer put it, the Code sets the standard in these procedural respects. The fact that procedural failings constitute breaches of the Code has weight in itself.

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**Grounds 8 and 9**

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54. These grounds relate to the decision to award an ACAS uplift pursuant to s.207A TULRCA. The section applies to claims of both unfair and wrongful dismissal: Schedule A2. It provides, as material : **'(2) 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 employer has failed to comply with that Code in relation to the matter, and**

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**(c) that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%'.**

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55. By Ground 8, the Claimant contends that when considering an uplift to the award of damages for wrongful dismissal, the Judge erred in law in concluding that, having found the dismissal to be fair within the meaning of s.98(4); it would not be 'just and equitable' to award **'effectively a windfall to the claimant'** for the breaches of the Code which he had found in respect of

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the time given to the Claimant to prepare and the refusal to allow her to call witnesses.

56. By Ground 9, she contends that an uplift of 5% was perverse in the light of the findings

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concerning the extent of the breaches and the size and resources of the Respondent.

57. Mr Ohringer submits that it is irrelevant whether or not an unreasonable breach of the Code results separately in a successful claim for unfair dismissal. Furthermore, the award can be

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made without proof of loss and contains a penal element in response to a culpable breach of employment standards: Wardle v. Credit Agricole Corporate and Investment Bank [2011] ICR 1290 at [19]. [20]. To that extent an award necessarily involves a windfall. Accordingly, the Judge, in making his award, should have taken account of all the breaches which he found.

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58. Ground 9 contends that an uplift of 5%, i.e. as the Judge acknowledged, the lowest

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practicable percentage award, was in consequence perversely low. This argument is also advanced on the alternative basis that it was right to confine the award to the breach of the Code in respect of suspension.

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59. At the forefront of her response on both Grounds, Ms. Niaz-Dickinson emphasised the broad and discretionary terms of the s.207A uplift provisions, dependent on the tribunal's

A consideration of what is *'just and equitable in all the circumstances'*. The Judge duly referred to that test: [34]. His Judgment must be looked at as a whole. 'All the circumstances' properly included his findings of positive features in the investigatory and disciplinary process ([27][28])

B and his conclusion that the dismissal was fair. The Judge properly looked at the matter *'in the round'* [34]. His reference to 'windfall' merely highlighted the fact that any award would be of a financial nature; it was not the basis of his determination. All in all, there was no error of law in

C his approach. In consequence and in any event, there was no error of law or perversity in the Judge's conclusion that the uplift should be limited to 5%.

Conclusion on Grounds 8 and 9

D 60. Having reminded myself of the need to avoid undue textual analysis of a judgment, I nonetheless consider that the Judge's reference to 'windfall' cannot be brushed aside as a passing comment which had no impact on his decision on the uplift issue. On the contrary, and on a fair

E reading of [34], it was central to his decision that it would not be just and equitable for the purposes of the award of a s.207A uplift to take account of the breaches of the Code which had occurred within the disciplinary process in circumstances where he had found the dismissal not to be unfair.

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61. Whilst of course acknowledging the general breadth of the discretion under s.207A and the consequent limited scope for intervention on appeal, I consider that the Judge's approach fell

G into error in two connected ways. First, by treating his conclusion that the dismissal was fair within the meaning of s.98(4) as in effect absolving the Respondent for its breaches of the Code of Practice in respect of the disciplinary process. Those breaches existed independently of the

H finding of unfair dismissal and could properly be taken into account when considering the uplift application as it related to the award of damages for wrongful dismissal. Secondly, by concluding

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that any such uplift to the wrongful dismissal award would constitute an unjust windfall. This overlooked the distinct penal (and thus non-compensatory) element in uplift awards. In both ways the Judge wrongly fettered his discretion in respect of the application.

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62. It follows that the uplift of 5% must be set aside and considered afresh. If I had not reached this conclusion on the Judge's approach I would not have interfered with his award as it related to the breach in respect of suspension; and which in those circumstances would have fallen within the ambit of his discretion as to the amount of the uplift.

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**Grounds 5 and 6**

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63. These depend on the observations of Baroness Hale in Reilly v. Sandwell Metropolitan BC [2018] ICR 705 where she briefly considered the arguments which have been advanced in opposition to the British Home Stores v. Burchell [1980] ICR 303 test as definitively endorsed by the Court of Appeal in Foley v. Post Office [2000] ICR 1283. Mr Ohringer accepts that the alternative approach can only succeed in the Supreme Court; and simply reserves the Claimant's position. Those Grounds must therefore fail.

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**Disposal**

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64. In the light of my conclusion that the Judge's conclusion on the reasonableness of the investigatory and disciplinary process cannot stand, his finding that the dismissal was fair must be set aside. The question of whether the dismissal was fair within the meaning of s.98(4) ERA must then be reconsidered, of course taking combined account of its substantive and procedural aspects; but as to the latter in the light of my judgment. Subject to any further submissions on disposal I consider that the matter should be remitted to the same Judge for the purpose of that reconsideration. The Judge's decision on the application for an ACAS uplift must likewise be set aside and remitted for reconsideration in relation to the award for wrongful dismissal.

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