Case Number: 1600749/2017

EMPLOYMENT TRIBUNALS

Claimant: **Ms M Peiu**

Respondent: **Leonard Cheshire Disability**

Heard at: **Cardiff by video** **On: 25 March 2021**

Before: **Employment Judge R Harfield**
Members **Mr M Pearson**
Mrs W Morgan

Representation:
Claimant: In person
Respondent: Mr Islam-Choudhury (Counsel)

RESERVED REMEDY JUDGMENT

It is the unanimous decision of the Tribunal that:

- It is just and equitable to reduce compensatory award by 70% applying *Polkey;*

- There should be an uplift to the claimant's compensatory award by 10% in respect of the respondent's breach of the Acas Code;

- The claimant contributed to her dismissal and there should be a reduction to the claimant's basic award and compensatory award by 70%;

- After adjustments the sums payable by the Respondent to the Claimant are:
    - Basic award: £1026.90
    - Compensatory award: £2069.50
    - **Total award payable: £3096.40**

REASONS

Introduction

1. The remedy hearing came before us on 25 March 2021 following our liability judgment dated 23 September 2020 in which the claimant's ordinary unfair dismissal claim was upheld. Her other complaints of direct race discrimination, victimisation, protected disclosure detriment, and protected disclosure dismissal were unsuccessful and dismissed.

2. We had before us a remedy bundle extending to 260 pages. References in this Judgment in brackets [ ] (unless indicated otherwise) are references to that remedy bundle. We had a witness statement from the claimant. We had skeleton submissions from the respondent's counsel and an authorities bundle.

3. We heard oral evidence from the claimant. We received oral closing submissions from both parties. We have not set those out in this Judgment, but we took them fully into account. We were able to complete our deliberations on the day but there was insufficient time available to also deliver an oral judgment and we therefore reserved our decision to be sent in writing.

The issues to be decided

4. In a remedy case management order of 1 October 2020 Employment Judge Harfield identified that the issues to be decided appeared to be as follows:

    a. *If there is a compensatory award, how much should it be? The Tribunal will decide:*

        i. *What financial losses has the dismissal caused the claimant?*

        ii. *Has the claimant taken reasonable steps to replace her lost earnings, for example by looking for another job?*

        iii. *If not, for what period of loss should the claimant be compensated?*

        iv. *Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? (this is often referred to as "Polkey" – which is simply a reference to the name of a case which decided that Tribunals may have to consider this point when*

deciding what compensation to award in an unfair dismissal claim)

v. *If so, should the claimant's compensation be reduced? By how much?*

vi. *Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?*

vii. *Did the respondent or the claimant unreasonably fail to comply with it?*

viii. *If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?*

ix. *If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?*

x. *If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?*

xi. *The cap of 52 weeks' pay will apply.*

b. *What basic award is payable to the claimant, if any?*

c. *Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?*

Additional findings of fact/ further background relating to remedy

5. The claimant was seeking to leave employment with the respondent prior to her dismissal. However she was hampered by difficulties obtaining clinical references. She was able to secure a place on a Return to Acute Nursing course which commenced on 30 October 2017 [180-187]. The claimant therefore started on the course before she received notification of her dismissal by the respondent on around 7 or 8 November. The contractual documents explain that it was a fixed period of a maximum of 300 hours within a 6 month period. If the claimant successfully completed the programme she would then be given a substantive contract of employment. On 12 March 2018 the claimant was given a permanent contract of employment with the Hywel Dda University Health Board as Staff Nurse Band 5 [188-199]. The contract of employment says that the claimant's full time salary pay scale applicable at band 5 at that time was £22,129 to £28,747 a year based on 37.5 hours a week.

6. The claimant says that when she worked for the respondent she received enhancements. She says when she initially worked for them in 2014 she was earning on average £394.18 a month in enhancements. There are pay slips for July, August and September 2014 at [240-243] which include payments for additional hours, night enhancement, overtime enhancement and weekend working on top of basic pay. The claimant says in her witness statement that as time went on she did not always receive these enhancements because she was, at times, suspended or on sick leave or annual leave. She states, however, that her notional ongoing earnings with the respondent, if she had not been dismissed, should be include within them those enhancements. The claimant values those enhancements at £270 a month. She says in her written witness statement that at times during her suspension she received an Average Pay Uplift as a supplement to her pay. She says that the respondent must therefore have valued a loss of enhancements at that level such as to pay the Average Pay Uplift.

7. The respondent in their Counter Schedule of Loss says that the respondent ceased paying premium rates such as weekend or overnight rates in April 2017 and therefore they are not sums that the claimant would have continued earning if she had remained employed. The respondent says that new contracts were issued to all staff including the claimant where the contractual rate of pay was increased from £12 to £16 an hour but with the removal of enhancements, other than for "sleeping and waking nights."

8. The claimant's signed contract that applied at the time of her dismissal is at [172-179]. It sets out that hourly rate of £16 as at April 2017. The contract says that the hourly rate applies other than on Christmas Day, Boxing Day and New Year's Day which were to be paid at twice the basic rate and it also makes provision for "sleeping and waking nights." The claimant accepted that she did not work sleeping or waking nights. She said her preference was to try to boost her earnings when she could by working overtime (even if at the basic rate) or additional hours, such as covering staff shortages. She said that is the kind of thing that nurses do to boost their take home pay. The claimant also accepted that prior to 2017 her previous terms and conditions provided for an hourly rate of £14 an hour with an overtime enhancement of 10% for hours worked over the basic weekly 37.5 hours and a weekend and night time enhancement at 20%.

9. The claimant's pay slip for 31 October 2017 [201] does include £270.88 on top of basic pay and termed "Average Pay Uplift" but we had no information before us as to what that was for or how it was calculated. It is not on her September 2017 payslip with the respondent [200]. Her final

payslip for November 2017 at [202] only includes a small "Average Pay Uplift" of £18.75. We have one other payslip for the claimant's time with the respondent at [243] dated May 2017 which shows an Average Pay Uplift of £157.51. We return to this dispute about enhancements/ additional hours/ Average Pay Uplift in our conclusions below.

10. The claimant's payslips with her new employer are at [203- 237]. These show the claimant receiving various enhancements in her new employment. Her first payslip is dated December 2017. The claimant explained in evidence that was for hours worked for October, November and December because she was on the course and only working a few hours a week. The claimant said that because of her lack of clinical references she struggled to get an NHS nursing role and the return to acute nursing course was the only way she could find to get back in which meant she ended up starting again at the bottom of the pay band.

11. The claimant said that by April 2020 she had then risen to the top of pay band 5 in the NHS.

12. The claimant said in evidence that if she continued working for the respondent she would have received pay rises with them. She referred to job adverts with the respondent advertising an hourly rate of £17.87. In the course of the remedy hearing the respondent's counsel said he had instructions on the pay increments that had been given since the claimant's dismissal. The claimant initially objected to that information being provided. We discussed that with her because consenting to the provision of the information was potentially in her interests as it could increase her loss of earnings claim. The claimant then consented to the information being provided. The respondent's pay rates were £16 in April 2017, £17 in April 2018, £17.51 in April 2019 and £17.87 in April 2020.

Discussion and Conclusions

Basic award

13. Under section 118 Employment Rights Act (ERA), where the award sought in a successful unfair dismissal claim is compensation, the award must consist of a basic award and a compensatory award. The basic award is calculated in accordance with sections 119 to 122 ERA. The amount awarded depends on whole years length of service, age and a week's pay. A week's pay is in turn calculated by Part XIV Chapter 2 ERA.

14. The claimant in her schedule of loss at [168] did not claim a basic award. The Tribunal is, however obliged under sections 112 and 118 to award one (subject to any reduction for contributory fault – addressed separately

below). The respondent's calculation is set out in their Counter Schedule of Loss at [169- 171] and the Tribunal adopts that calculation and figure of **£3423.00** (subject to consideration of any reduction for contributory fault).

Compensatory award

15. The compensatory award is governed by sections 123 and 124 ERA. In particular section 123 says, where relevant:

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable and in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include –

(a) Any expenses reasonably incurred by the complainant in consequence of the dismissal, and
(b) Subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal. …

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales…

(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.

Loss of earnings

16. We have to first calculate the claimant's loss of earnings before we consider applying any adjustment to them. This involves comparing what the claimant would have earned if she had continued working for the respondent as against what she has earned in new employment. The respondent does not argue that the claimant has failed to mitigate her loss.

17. It is not in dispute that the claimant would have received annual increments at the respondent. What is in dispute is whether the claimant

has lost the value of enhancements or additional hours that she would have been able to work at the respondent to boost her basic pay.

18. The Tribunal accepts that the claimant lost the entitlement to various enhancements in 2017 with the respondent when she accepted the new contractual terms that increased her basic hourly rate of pay to £16. We are unable to make any findings as to the Average Pay Uplift as there was simply insufficient evidence before us as to what it was for and how it was calculated and why it was in some of the claimant's payslips when suspended but not others.

19. The Tribunal also accepts that it is likely that the claimant, as a nurse, would have wanted to work additional hours/overtime if the opportunity presented itself as a way to boost her income (albeit not at an enhanced rate with the respondent). We consider, however, that it is likely the claimant would also want to do so when working for the NHS. She told us that is what nurses like to do and her NHS payslips do have entries for things like weekend working, overtime, night duty, bank holidays and unsocial hours.

20. We have very little evidence before us as to exactly what would have been available to the claimant in this regard when working for the respondent or indeed in her subsequent NHS role.

21. We therefore decided a just and equitable approach would be to conclude that the claimant probably had equivalent opportunities both at the respondent and in the NHS. It is therefore likely, on the limited evidence we have available, that there was no real loss in that regard in respect of additional hours work available to the claimant. Her opportunities to work additional hours for the respondent would be replicated in the NHS.

22. We then went on to consider the claimant's loss of earnings flowing from her dismissal in respect of her basic pay. To ensure we were undertaking a comparison of basic pay alone we used the gross basic pay figures from the claimant's NHS payslips and compared them with the claimant's notional gross basic pay with the respondent (with the hourly rate of pay adjusted for annual increments).

23. The Tribunal considers it likely that HMRC would deem part of any loss of earnings award to be Post Employment Notice Pay, as no notice pay was paid to the claimant by the respondent on her dismissal. The claimant had a contractual right to 4 weeks' notice [176]. That equates to £2336.00 gross. We therefore isolated this element and left it as a gross sum. We

did not offset any earnings from the NHS with it applying the *Norton Tool* principle.

24. The other figures were gross figures which needed to be netted down as the claimant will have lost the net value of her loss of earnings. The respondent's pay increments coincided with the relevant HMRC tax years. We therefore applied standard tax and national insurance contribution rates for each tax year and netted down the earnings comparison for each year.

25. As the figures in the table below show, the gap between the claimant's notional basic earnings with the respondent and her earnings in the NHS have been narrowing and by March 2021 was just over £3000 gross a year or £2200 net. The claimant has reached the top of her NHS banding but she will, however, receive any cost of living annual pay rise. The pay rise due for NHS Wales this year has not been finalised but the Tribunal anticipates is likely to be higher than 1%. In Scotland it is 4%. A 4% pay rise would take the claimant to £31,839.60. Assessing any future loss of earnings claim is a speculative exercise and we consider it is reasonable to use that figure of 4%.

26. We therefore decided to award 1 year's future loss for that difference for the year end of March 2021 through to end of March 2022. We decline to award any further loss of earnings thereafter. The Tribunal considers it likely that the claimant's NHS earnings will within that period match that with the respondent. In particular, the claimant will have worked back within the NHS for some 5 years and it is likely to have resolved the issues the claimant initially had with clinical references and give her the opportunity to look for better paid work elsewhere if she so chooses. We have not factored in any pay increase for the respondent as the rate of increase had been slowing and we do not consider it is likely to be as significant as within the NHS.

27. Our loss of earnings calculation is therefore as follows:

Period	**Basic earnings claimant would have earned at LCD**	**Less basic earnings received at NHS**	**Award**
07/11/17 – 6/12/17 Claimant's notional notice period	4 weeks' gross pay = £2336.00		**£2336.00 (**left gross as PENP and in respect of which mitigation is not required [*Norton Tool*])

6/12/2017 to 01/04/2018 = 17 weeks (end of notice period to pay increment date at respondent)	£16 an hour x 36.5 hours a week x 17 weeks = £9928.00 To produce a net calculation for comparison the sum needs to be increased to a notional whole tax year figure. This assumes the claimant would have earned £20,440 in the other 35 weeks of the year producing a total annual figure for comparison of £30,368.00. Assuming standard rates of tax and national insurance the equivalent net income for that whole tax year would be £23,929.92	£190.18 Dec 2017[203][1] £237.66 Jan 2018 [204] £260.29 Feb 2018 [205] £1522.15 March 2018 [206] £2210.28 gross income in period in NHS job. To produce a net calculation for comparison the sum needs to be increased to a notional whole tax year calculation. Again assuming the claimant would have earned £20,440 in the other 35 weeks of the tax year this produces a figure for comparison of £22,650.28. Assuming standard rates of tax and national insurance the equivalent net income for that whole tax year would be £18,681.87	£9751.61 gross loss in period **£5248.05** net loss in period
02/04/2018 to 01/04/2019 = 52 weeks (calculation to next pay increment at respondent)	£17 an hour x 36.5 hours a week x 52 weeks = £32,266.00 Assuming standard rates of tax and national insurance the equivalent net income would be **£25,321.76**	£1188.30 April 2018 [207] £2129.25 May 2018 [208] £2129.25 June 2018 [209] £2129.25 July 2018 [210] £2129.25 August 2018 [211] £2129.25 Sept 2018 [212] £2161.17 Oct 2018 [213] 2161.17 Nov 2018 [214][2] £2161.17 Dec 2018 [215][3] £2161.17 Jan 2019 [216][4] £2161.17 Feb 2019 [217] £2216.49 March 2019 [218] £24,856.89	£7409.11 gross loss in period **£5038.20** net loss in period

[1] We have pro-rated this payslip as the claimant said it covered from 30 October 2017 to the end of December but we are only interested in the claimant's income from 6 December onwards. We therefore presumed that the total payment covered 9 weeks producing an average of 4.8 hours a week. There were 3 ½ weeks between 6 December 2017 and 31 December 2017. The claimant was earning about £11.32 an hour. This meant she worked about 16.8 hours in the 3 ½ week window. At £11.32 an hour this produces £190.18.

[2] We adjusted this sum to adopt the basic rate of pay from October 2018 because it appears the claimant took a period of sick leave. The parties have not given us a comparative analysis of the two sick pay schemes and there is nothing to suppose the claimant also would not have been on sick leave at LCD. Using the standardised basic rate of pay means that we are comparing like with like which would be the just approach.

[3] Same approach applied in respect of basic pay/sick pay

[4] Same approach applied in respect of basic pay/sick pay

		Assuming standard rates of tax and national insurance the equivalent net income would be **£20,283.56**	
02/04/2019 to 01/04/2020 52 weeks (calculation to next pay increment at respondent)	£17.51 an hour x 36.5 hours x 52 weeks = £33,233.98 Assuming standard rates of tax and national insurance the equivalent net income would be **£26,134.94**	£2271.67 April 2019 [219] £2271.67 May 2019 [220] £2271.67 June 2019 [221] £2271.67 July 2019 [222] £2271.67 August 2019 [223] 2271.67 Sept 2019 [224][5] £2271.67 Oct 2019 [225][6] £2271.67 Nov 2019 [226][7] £2271.67 Dec 2019 [227] £2271.67 Jan 2020 [228] £2271.67 Feb 2020 [229] £2330.70 March 2020 [230] £27,319.07 Assuming standard rates of tax and national insurance the equivalent net income would be **£22,112.81**	£5914.91 gross loss in period **£4022.13 net loss in period**
02/04/2020 to 1/04/2021 52 weeks	£17.87 an hour x 36.5 hours x 52 weeks = £33,917.26 Assuming standard rates of tax and national insurance the equivalent net income would be **£26,704.74**	£2551.25 April 2020 [231] £2551.25 May 2020 [232] £2551.25 June 2020 [233] Claimant was earning basic pay of £2551.25 a month/£30615.00 a year. Assuming standard rates of tax and national insurance the equivalent net income would be **£24,458.20**	£3302.26 gross loss in period **£2246.54 net loss in period**
Future loss 02/4/2021 to 01/04/2022	Gross sum £33917.26 Assuming standard rates of tax and national insurance the equivalent net income would be **£26703.74**	Gross sum £31,839.60 Assuming standard rates of tax and national insurance the equivalent net income would be £**25290.93**	£2077.66 gross loss in period **£1412.81 net loss in period**
Total loss of earnings (gross notice pay figure and net loss thereafter)			**£20,303.73**

[5] Same approach applied in respect of basic pay/sick pay
[6] Same approach applied in respect of basic pay/sick pay
[7] Same approach applied in respect of basic pay/sick pay

Other losses claimed as part of the compensatory award

28. The respondent accepts that they used to reimburse the claimant her NMC registration fee. The claimant does not now get that benefit at the NHS. It is £120 a year each December. The Tribunal awards the loss of that benefit for December 2017, 2018, 2019, 2020 and 2021. The Tribunal does not award that loss thereafter as the Tribunal is satisfied that the claimant's overall package will, or would with mitigation, by then become a similar level with the package at the respondent. 5 x £120 = **£600**.

29. The claimant has claimed the value of 8 days spent in the employment tribunal. That is a cost sustained in the litigation and not a loss that flows from the dismissal itself and the Tribunal makes no award in that regard.

30. That leaves the position in relation to pension. The claimant says that she has lost the value of pension contributions that would be made by the respondent. The respondent says that their scheme was a money purchase auto enrolment scheme and that the claimant when working in the NHS will be in a much better defined benefit scheme. The respondent says that the claimant was contributing 1% at the respondent but that this would have risen to 5%. We do not know the size of the respondent's own contributions. In the NHS the claimant was contributing between 7.1% to 9.1% but contributing to what was probably a more valuable scheme overall. We have been given no figures as to the actual value of the claimant's NHS pension (other than we are told there is an accrual rate of 1/54 which at the claimant's annual salary would be £566.94) or the NHS' own contributions. The respondent says that the claimant's NHS pension is a form of deferred remuneration for which she should give credit.

31. The loss of earnings calculation undertaken above did not take into account employee pension contributions to ensure the Tribunal undertook a like for like comparison. We do not award the claimant anything for loss of employer pension contributions because it is likely that she has ended up in a better public sector scheme. Our calculation above is also based on the claimant's basic pay which we have netted down without taking account of pension contributions. The method of calculation therefore does not give rise to the argument made by the respondent that the claimant could have increased her net pay in the NHS by opting out of the pension scheme as the net pay figures for comparison are based solely on basic pay.

32. In relation to the respondent's argument that, when looking at the total package, the claimant has ended up in a better position overall once the public sector pension scheme is taken into account, we consider that it is

just and equitable to award the loss of earnings we have set out above. These are financial losses the claimant sustained immediately when she lost her employment which she says, and we accept, caused her in the immediate aftermath serious financial difficulties in supporting herself and her family as a single parent. In that regard being in a pension scheme would at the time have offered her no relief. It is, however, a factor we have taken into account when declining to award any further future loss of earnings award.

33. We now have to consider whether there should be any adjustments to the basic award and the compensatory award.

Polkey

34. Under Section 123 of the Employment Rights Act 1996: "*the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."*

35. It has been established since Polkey v AE Dayton Services Ltd [1988] ICR 142 that where an employee has been unfairly dismissed due to procedural failings, the Tribunal may reduce the compensatory award to reflect the likelihood that the employee would have lost their job in any event even if a fair procedure had been followed. There is no need for an all or nothing decision. If the tribunal thinks there is doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his or her employment. Although this inherently involves a degree of speculation, tribunals should not shy away from the exercise. A similar exercise was also required by what was then section 98A(2) (part of the now repealed statutory dispute resolution procedures), and the guidance given by the Employment Appeal Tribunal in paragraph 54 of Software 2000 Limited v Andrews [2007] IRLR 568 remains of assistance (although the burden expressly placed on the employer by section 98A(2) is not to be found in section 123(1).)

36. This exercise requires us to assess whether, had there been a fair investigation and procedure, it would have been within the band of reasonable responses to dismiss the claimant for these matters rather that impose a lesser disciplinary punishment and, if so, how likely that outcome was. We have to consider not a hypothetical fair employer, but the actions of the employer before us, on the assumption that the employer would this time have acted fairly. Could this employer have fairly dismissed and, if so, what were the chances that it would have done so?

37. A deduction can be made both for contributory conduct and *Polkey* but when assessing those contributions the fact that a contribution has already been made or will be made under one heading may well affect the amount of the deduction to be applied under the other heading.

38. In our liability judgment we concluded that Ms Browning's personal conclusions on what she saw as the claimant's gross misconduct were genuinely held and were, on the evidence Ms Browning looked at before her, within the range of reasonable responses open to her based on what she had before her. We, however, found that there were some elements in respect of which the investigation /procedure followed were unfair and outside of the range of reasonable responses. This included a failure to take some potential evidence into account (or not lose it to start with).

39. Whilst we accept that if a fair procedure had been followed by the respondent it would still have been within the range of reasonable responses for the respondent to dismiss the claimant, that is not, however, the end of the question. We also have to consider how likely that outcome was. The respondent submits that it was inevitable and that there should be a reduction of 100%. However, the Tribunal does not consider it automatically or necessarily follows that this employer would always inevitably have dismissed the claimant if a fair procedure had been followed. We say this because:

    (a) One of the procedural failings identified was that SJ's interview with SU2 was lost. There are no notes of it and it will never be known what SU2 said. There is a prospect that SU2 could have said something supportive about the claimant. He had at times said some supportive things previously such as, for example, telling one of the carers that the staff had been talking about the claimant and that he wished they would not do so as he liked the claimant. It is possible that this kind of evidence could have led Ms Browning or Mr Clubb to reflect differently on whether dismissal was the appropriate sanction. It may have, for example, led Ms Browning to a different viewpoint on the likelihood of SU2 have embarked on a conversation with the claimant on her return to work on 12 September or whether it gave a different perspective on the consistency of SU2's accounts or whether there was greater mitigation for what she perceived the claimant had done. Mr Clubb likewise told us in evidence at the liability hearing that he spent some time considering sanction and using HR as a sounding board. Dismissal was therefore not a decision either had rushed to make and it is possible a more supportive account from SU2 could likewise have changed his assessment of the severity of the claimant's actions. That said we do consider the prospect of SU2s

account as being along these lines as being on the lower end of a probability scale.

(b) We also found that Ms Browning should have let the claimant submit her email of 17 September 2016 (page [316] of the liability hearing bundle) and Ms Browning should have taken that into account in her deliberations. We further found that the respondent should have retrieved all the relevant entries from SU2's records that were before us. Our observations in relation to that are similar to the above. These were pieces of evidence that had the potential for Ms Browning (and Mr Clubb) to have weighed the evidence about what had happened between SU2 and the claimant in a different way and in turn affected their view as to the overall sanction. The relevant records from SU2's records may also have potentially contributed to a different view being taken as to whether the claimant had on 25 September been genuinely concerned about SU2's welfare and in turn how the claimant's subsequent contact with the carers and with social services/safeguarding where then also viewed by Ms Browning and Mr Clubb thereafter.

(c) The disciplinary process took too long and as a consequence claimant was suspended for an unreasonable time. In *Mezey v South West London & St George's Mental Health NHS Trust [2007] EWCA Civ 106* Sedley LJ disagreed with the assertion that suspension is a "neutral act preserving the employment relationship." He observed that it changes the status quo from work to no work, and inevitably casts a shadow over the employee's competence. The Tribunal considers that a long disciplinary process combined with suspension brings with it the increasing risk of sending a message, even if subconsciously, to those involved in the decision making that there is a degree of seriousness about the charge. A shorter suspension process and a quicker disciplinary process would not have produced such a risk of a "shadow" and again brings with it a prospect, however small and in conjunction with the other matters raised, that Ms Browning or Mr Clubb may have looked at things differently. A quicker disciplinary process would also have made it much less likely that the interview with SU2 would have been lost.

40. That all said, we do, however, consider that if this respondent had conducted itself in a procedurally proper manner the prospect of the claimant not being dismissed is in relative terms a small one. We therefore apply a deduction to the compensation award of **70%** to reflect the chance a fair procedure would have resulted in this employer reaching a decision on the same outcome of dismissal.

Acas Uplift

41. Section 207A(2) TULR(C)A provides that: "*If in any 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 that matter, and (c) the 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 per cent*."

42. Under section 124A ERA any adjustment only applies to the compensatory award.

43. In the liability judgment we found that the respondent had been unreasonably in breach of the Acas Code by not carrying out the investigations without unreasonable delay, not holding the meeting without unreasonable delay, not giving the claimant a reasonable opportunity to present evidence and in not keeping the period of suspension as brief as possible and kept under review.

44. We do consider it just and equitable to award an uplift. The delay was serious and substantial. It contributed to evidence being lost. As we commented in our liability judgment: "*There seems absent in this case any overarching consideration of the claimant who remained the respondent's employee and who, it was acutely known to the respondent, also had hanging over her the NMC case relating to SU1 which she had been cleared of in the respondent's own disciplinary process, and who (again known to the respondent) had been subjected to an extended suspension and investigatory process that first time around… The claimant's situation was out of the ordinary and any reasonable employer would have better monitored and expedited the whole process."* We do, however, also take into account that the respondent did generally follow a procedure that was largely compliant with the Code. There was, for example, an investigation phase, the disciplinary hearing was conducted by a manager different to the investigating officer, the claimant was given the right of appeal and we found that in general Ms Browning had allowed the claimant to give her account. On balance, we therefore award an uplift of **10%.**

Contributory fault

45. Section 122(2) of the Employment Rights act says:

"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice

was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

46. Section 123(6) supplements section 123(1) to say:

"*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."*

47. For the basic award there is no requirement for a causative relationship between the conduct and the dismissal. The compensatory award does require a causal connection. The employee's conduct need only be a factor in the dismissal; it need not be the direct and sole cause. In Steen v ASP Packaging Ltd [2014] ICR 56 the Employment Appeal Tribunal suggested the following should be assessed:

(a) What is the conduct which is said to give rise to possible contributory fault?

(b) Is that conduct blameworthy? The tribunal has to assess as a matter of fact what the employee actually did or failed to do (not what the employer believed).

(c) Did any such blameworthy conduct cause or contribute to the dismissal to any extent (this is only relevant to the compensatory award)?

(d) If so, to what extent should the award be reduced and to what extent is it just and equitable to reduce it? Here the EAT noted that "A separate question arises in respect of section 122 where the tribunal *has to ask whether it is just and equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so."*

48. In Nelson v BBC No 2 [1980] ICR 110 it was said:

"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But is also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody minded. It may also include action which, though not meriting any of those more pejorative terms, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all

unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved."

49. When considering contributory fault, here we do have to assess the facts for ourselves.

50. We do consider that the claimant committed blameworthy conduct that was causally linked to the dismissal. We found that the claimant engaged in a two way conversation with SU2 on 12 September 2016 about other staff not liking the claimant and with the claimant saying that she was being bullied. Even if initiated by SU2 it was not an appropriate conversation for the claimant to have had with SU2, a vulnerable individual in her care. We also found that in relation to the subsequent interaction between the claimant and SU2 (and then Ms Wilkinson) on 16 September, it was likely the claimant may have asked SU2 questions about what he had been hearing. Again that was not appropriate. The whole situation was causing SU2 distress and the claimant was contributing to this by seeking to gain information. On 25 September 2016 we again found it was likely the claimant had asked SU2 some questions about him saying he was upset about being asked to sign the letter. We also found it unlikely that SU2 had told the claimant that Ms Wilkinson had forced him to sign it (as opposed to being asked) or that Ms Wilkinson had threatened him with eviction and that the claimant subsequently exaggerated these things when contacting social services.

51. The claimant then spoke with SA. In doing so she said that Ms Wilkinson had told SU2 he would be evicted if he did not sign the statement. She talked about the fact that she was herself under investigation for bullying and that she thought the respondent wanted to get rid of her and so were forcing SU2 to sign something against her. She talked about her own situation to such an extent that SA was uncertain if the claimant was calling to complain about her own treatment or how SU2 was being treated. She came across at times as incoherent in what she was saying and irate. It was not an appropriate manner in which to make a safeguarding referral or appropriate content in its entirety and in that regard could be said to have potentially affected the respondent's reputation with a regulator. It was unprofessional. It also led to the claimant's own fitness to practice being questioned as well as SU2 ending up being involved in more conversations and investigations about it all. The claimant was also motivated in part by her own private interests. She was seeking to shine a light on how she saw herself as a personal victim of mistreatment to an external body that she knew had a position of authority over the respondent. That was not an appropriate use of safeguarding services.

52. The next day the claimant spoke to safeguarding and again said that SU2 had been forced to sign a document and threatened with eviction by Ms Wilkinson. Again these were exaggerations. She again also imparted her own personal information saying that she was suing the respondent for race discrimination for £350,000.00. This was inappropriate for what was supposed to be a safeguarding referral about SU2.

53. On 30 September 2016 the claimant obstructed on various occasions Ms Wilkinson's and Ms Young's efforts to meet with her. In doing so she ultimately triggered her own suspension when it is likely it otherwise would not have happened. She then left work without discussing it specifically with Ms Wilkinson. Her conduct that day led to additional disciplinary charges being levelled against her.

54. This is substantial and serious conduct which was causally linked to the claimant's dismissal. However, there are also some mitigating factors which we do also take into account.

55. Firstly, it is relevant to note the background to the whole situation. The claimant had previously been suspended for a year in relation to the allegations relating to SU2, and still then had to face disciplinary proceedings. Even when cleared in that first disciplinary hearing she then had to face the NMC proceedings thereafter. The claimant's grievance about the length of that first investigation and suspension process was upheld by the respondent. The claimant returned to work in April 2016 a person damaged by those earlier experiences and stressed by the ongoing NMC process. Her experiences left her with a burning sense of injustice as to how she felt she had been dealt with compared to others. But it also left her worried about facing other allegations and about having witnesses or documents recorded to back her up. She felt that anything she saw as poor practice should be called out and that others should be subject to formal processes. Ms Wilkinson found this all difficult to manage but it was also a product of that which the claimant had been through and which was known to the respondent and which they had played their part within.

56. In June 2016 Ms Young advised Ms Wilkinson to keep tackling each issue with the claimant, yet she did not hold formal, documented supervision sessions with the claimant. If they had been held and documented it is likely that would have been to the benefit of both parties. The claimant was a loose cannon. She needed structure and she felt unsupported, isolated and exposed, even though Ms Wilkinson would say she spent huge amounts of time gatekeeping issues. What was happening with other staff was also not under control given we have found it is likely they were talking about the claimant negatively behind her back and that had come

to the attention of SU2. If there had been greater control of the whole situation, it is possible that things would not have unfolded or escalated in quite the way they did in terms of the claimant's subsequent actions.

57. Less than a month before the first interaction with SU2 the claimant learned the NMC were proceeding with action against her in respect of SU1. Just before her interaction with SU2 she had also been absent from work with work related stress. It is as against that personal background that the Tribunal found that the claimant let her guard down on 12 September and had the discussion with SU2. She should not have done so, but we considered it came from a place of real personal vulnerability at that point in time.

58. It is also relevant mitigation to note that on 16 September we found that SU2 had told the claimant that staff were stabbing her in the back, she had been called a bitch, and they wanted her to leave the home. It is likely this really fed the claimant's perception of how she was being treated and that there was some kind of plan in place to force her out.

59. In relation to 25 September, we found that SU2 had expressed some upset that Ms Wilkinson had asked him to sign a letter which referenced a complaint about the claimant and bullying which he did not want to sign. We found the claimant did genuinely believe that SU2 may have been treated inappropriately by Ms Wilkinson as he was saying he did not want to sign the document and was exhibiting some signs of distress. We also found that the claimant contacted SU2's GP and tried to contact his advocate because she genuinely thought he was unwell and needed independent support. We found she did genuinely believe that there was pressure on SU2 in some way as a vulnerable adult to sign the document and that it was jeopardising his health. We did not find that the claimant's actions were a deliberate ploy by the claimant to coerce SU2 to say things the claimant could use to derail an anticipated disciplinary investigation against her. We found her motivations in contacting and speaking with social services were mixed but did include SU2's welfare as well as her own personal interests. On the 25 September she had been rushing around trying to call various people and trying to call again whilst looking after service users. The claimant was flapping with the stress of it all and it is likely that contributed to her having come across as incoherent.

60. We also considered that when the claimant went to get two colleagues to witness what SU2 was saying, she was seeking protection for herself by getting a third party involved. But we also considered that was understandable bearing in mind her previous experiences with the family of SU2. She did not think she was causing any harm to SU2.

61. We also considered that the claimant's conduct on 30 September, whilst obstructive and counterproductive to her own interests, probably came from a place of stress and fear. She was still under the NMC process. It is likely that the sense she was facing investigation and potential disciplinary action again brought back to her everything that she had felt and experienced first time around with SU1 and she was trying to ward it off. She left work because of that and because she was feeling unwell. She should not have left without speaking with Ms Wilkinson, but she did discuss it with MK.

62. On a final note, the claimant in her closing submissions very much focused on the actions of Ms Wilkinson and what she saw as a failure to deal with her email of 17 September 2016. We have already addressed above the position in relation to SU2 saying that staff were bad mouthing the claimant. But we should also observe that we did not find in our liability Judgment that the respondent had failed to respond to the claimant's email of 17 September. At paragraph 105 we found that Ms Young had responded to the claimant about it.

63. In all the circumstances we have decided it is just and equitable to make a reduction to both the basic award and the compensatory award to the extent of **70%** to reflect the claimant's contribution to her unfair dismissal. In assessing this percentage we took into account our Polkey assessment and took a step back to look at our overall remedy assessment to ensure the overall outcome was one we considered just and equitable.

Final calculations

- Basic award: £3423.00
- Less 70% Polkey reduction: **£1026.90**
- Compensatory award:
    - Loss of earnings £20,303.73
    - Plus NMC fees £600
    - Total before adjustments: £20903.73
    - Less 70% Polkey reduction: £6271.12
    - Plus 10% Acas uplift: £6898.23
    - Less 70% reduction for contributory fault: £2069.50
    - Total net compensatory award **£2069.50**

Recoupment

64. The claimant was not in receipt of benefits and therefore there is no recoupment order made.

Employment Judge R Harfield
Dated: 30 June 2021

JUDGMENT SENT TO THE PARTIES ON 1 July 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS