Case No: 2200415/2017

EMPLOYMENT TRIBUNALS

Claimant: Mr J Bannerjee

Respondent: Royal Bank of Canada

Heard at: London Central **On:** 5, 6 & 7 July 2021

Before: Employment Judge H Grewal

Representation

Claimant: Ms S McKie, Queen's Counsel

Respondent: Mr D Craig, Queen's Counsel

JUDGMENT

1 The compensation awarded to the Claimant is increased by 5% because of the Respondent's unreasonable failure to comply with the ACAS Code of Practice.

2 The Respondent is to pay the Claimant compensation in the sum of £1,112,956.17(that includes the 5% uplift).

3 The Claimant's application for costs is refused.

REASONS

1 The liability hearing of this claim took place from 23 April to 10 May 2018. In a judgment sent to the parties on 21 May 2018 the Tribunal (EJ Tayler) found that the Claimant had been unfairly dismissed under section 103A of the Employment Rights Act 1996, that any award of compensation should be reduced by 25% because his conduct contributed to the dismissal and that it should be subject to an uplift of 25% because of the Respondent's failure to comply with the ACAS Code of Practice.

2 The remedy hearing took place on 4 – 7 December 2018. In a judgment sent to the parties on 1 February 2019 EJ Tayler decided that there would be a reconsideration of the ACAS uplift once it was known what the compensatory award was and what the monetary value of the uplift would be. He recognised that it was an error to make a final determination about the uplift without going through that stage. He also held that the Claimant's losses were to be calculated on the basis of a gross total annual salary (including bonus) of £280,000 per annum to 19 April 2021.

3 The parties had agreed prior to today's hearing certain elements of the award to be made. These were a basic award of £718.50, a compensatory award of £793,533.20 before any adjustments and the grossing up of any award.

4 The only issues that I had to determine in relation remedy were:

(a) The percentage figure of the ACAS uplift in light of its total monetary value; and

(b) The final sum that should be awarded to the Claimant having made the necessary adjustments.

5 In addition, I had to determine the Claimant's application for costs dated 14 June 2021.

The ACAS uplift

The Law

6 Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("TULR(C)A 1992") provides,

> "*(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.*
> *(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 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%".

7 In **Wardle v Credit Agricole Corporate and Investment Bank [2011] ICR 1290** the Court of Appeal considered the uplift for failure to follow procedures relating to dismissals under a different legislative provision, namely section 31(3) of the Employment Act 2002. Under that section if the Tribunal found that there was non-completion of the statutory procedure then in force and that the non-completion was wholly or mainly attributable to the employer, it had to increase any award by 10% and could, if it considered it just and equitable, increase it by a further amount up to 50%. Elias LJ stated,

"*The size of the award ought in an appropriate case to be a factor informing the tribunal's determination of what is just and equitable under that provision. No doubt in most cases where the compensation is modest it will not affect the tribunal's analysis. But in other cases it can be a highly material consideration."*

He accepted that in a case where the award was large, the failure to have regard to that factor would be an error of law. Although Elias LJ accepted that the award under that section had a significant punitive element he thought that it would be wrong to see the uplift purely in penal terms. He said that the Tribunal was enjoined to start with 10% and that it must then consider whether it was just and equitable to increase that percentage and, if so, by how much. He continued,

"*In my opinion an increase to the maximum of 50% should be very rare indeed. It should only be given in the most egregious of cases… the mere fact that the employer has ignored the procedures altogether would not in my view just an increase to the maximum, although it would often justify some increase beyond 10%.*

Once the tribunal has fixed on the appropriate uplift by focusing on the nature and gravity of the breach, but only then it should consider how much this involves in money terms. As I have said, this must not be disproportionate but there is no simple formula for determining when the amount should be so characterised. However, the law sets its face against sums which would not command the respect of the general public, and very large payments for purely procedural wrongdoings are at risk of doing just that …

In considering the sort of sum which would be proportionate and acceptable it is, in my view, of some relevance to have regard to the sums which the courts are willing to award for injury to feelings and for aggravated damages…

I do not suggest that these are entirely analogous situations, but I think that, save in very exceptional cases, most members of the public would view with some concern additional payments following an uplift for purely procedural failings which exceeded the maximum payable for injured feelings."

22 In that case, following the Court of Appeal's rulings on other aspects of the appeal, the parties agreed the amount of compensation payable to the claimant prior to the uplift. Prior to grossing up that figure was £192,361.67, of which £124,177.87

represented the loss that was wholly referable to the dismissal. The Court of Appeal, on the basis of submissions to it, concluded, having regard to the serious and cavalier breaches found by the tribunal, that the appropriate figure for the uplift would be 15%. That would increase the net figure by a sum which was a little short of £19,000. (**Wardle v Credit Agricole (No.2) [2011] IRLR 819**).

23 In **Acetrip Ltd v Dogra EAT/0238/18** the ET had awarded an uplift of 25% (which came to £21,158.25) in circumstances where it had concluded that the respondent's witnesses had made up previous disciplinary warnings and then manufactured the claimant's dismissal under false pretences. The respondent's failures to follow the Code of Practice were *"manifest and profound.".* The EAT held that the guidance in **Wardle** applied equally to the uplift under Section 207A in TULR(C)A 1992. The judge said,

> "*It seems to me, on a careful reading of the guidance in **Wardle** that the absolute value of a given percentage uplift is not something which it is simply permissible to take into account, but something which, in a case where the underlying award is of a significant amount, the Tribunal needs to take into account as a relevant consideration.*
>
> *There is, inevitably it seems to me, a punitive element to an adjustment award under these provisions, because the Tribunal is not simply compensating a claimant for some additional readily identifiable or quantifiable loss that he has suffered. The adjustment is bound, to a degree, to be reflective of what the Tribunal considers to be the seriousness and degree of the failure to comply with the ACAS Code on the employer's part. However, the fact that it has a punitive aspect to it makes it, it seems to me, all the more incumbent on the Tribunal to consider the absolute value of its award, if that absolute value is likely to be significantly large, and bearing in mind that, in fixing on the amount which it considers just and equitable, the Tribunal must have regard to justice and equity to both parties.*
>
> *In this case the absolute value of the uplift, at 25%, was in excess of £20,000. That is a figure which was certainly of a significantly large amount. Therefore, in not considering the absolute value of this award before it determined the percentage level at which to set it, or, if it did consider it, certainly in not spelling out that it had considered it, and what view it took of it, the Tribunal erred in law on this point as well."*

24 In **Secretary of State for Justice v Plaistow [EAT/0016/20]** Eady J said,

> "*Although there may be a compensatory element to the uplift (by analogy with the statutory regime under consideration in **Wardle**, a failure to use the procedures under the **Acas Code of Practice** may deprive the employee of the opportunity to persuade the employer that dismissal would be inappropriate or unfair), inevitably there is a punitive quality to such an award. The statute might not provide that the uplift is to be expressed in a precise amount but it does require that the ET considers that it is "just and equitable" to increase any award by that amount. It would be neither just nor equitable if, having regard to the actual sums involved, the final figure awarded by way of uplift was entirely disproportionate in terms of both the employee's loss and the employer's breach."*

25 In **Abbey National plc v Chagger [2010] ICR 397** the ET upheld the claimant's complaints of unfair dismissal and race discrimination and awarded him compensation of £2,794,962.27. It found that there had been a complete failure by the respondent to comply with the statutory dismissal procedure. It reduced the uplift under section 31(3) of the Employment Act 2002 to 2%. Section 31(4) entitled a tribunal to award less than the minimum of 10% if there were exceptional circumstances that would make an increase of that percentage unjust or inequitable. The Court of Appeal held that the amount of compensation could be an exceptional circumstance. Elias LJ stated,

> "*…the uplift operates as an incentive to encourage parties to make use of the statutory procedures. We do not think that Parliament would have intended the sums awarded to be wholly disproportionate to the nature of the breach. In our view, that would have been the effect of awarding even a 10% uplift. There is no definition of "exceptional circumstance" and we are satisfied that it was open to the tribunal to conclude that the size of the award was one such circumstance."*

26 The Claimant relied on two other cases. The first was **Michalak v Mid Yorks Hospital NHS Trust & Others (1810815/2008)**, a decision of an Employment Tribunal. In that case the ET awarded the Claimant compensation in the sum of £2,075,409 for race and sex discrimination. The Tribunal concluded that were it not for the value of the award it would have had no hesitation in concluding that a 50% uplift was appropriate. It continued,

> "…*were we to impose such an uplift we would, when the tax grossing up calculation is taken into account, effectively be requiring the Respondent to pay an additional sum of about £3,000,000. We agree that that is wholly disproportionate and would not command public respect."*

It concluded that 15% was an appropriate uplift because that was the percentage that the Court of Appeal in Wardle had thought was appropriate for "serious and cavalier breaches of the procedures". That equated to £311,311.35.

27 The second was a case involving the Respondent in this case – **King v Royal Bank of Canada Europe Ltd (EAT/0333/10)**. In that case the Employment Tribunal had awarded an uplift of 50% because of the Respondent's failure to follow the statutory disciplinary and dismissal procedure that was in place at the time. The Tribunal had heard that the Respondent's normal practice, which was common in the banking industry, was to call the employee to a meeting and to notify him/her of the dismissal and the reasons for it and to put the employee on garden leave with no right of appeal. The EAT agreed with the Tribunal that such a practice was wholly unacceptable and explained why it was unacceptable.

28 In **Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102** the Court of Appeal identified three broad bands for compensation of injury to feelings and the sums to be awarded in each band. The sums have ben updated since then and the current guidelines are as follows:

(i) Top band: £27,400 - £45,600. Sums in this range should be awarded for the most serious cases, such as where there has been a lengthy campaign of harassment on the grounds of race or sex.

(ii) Middle band: £9,100 - £27,400. Sums in this range should be awarded for serious cases which do not merit an award in the top band.

(iii) Lower band: £900 - £9,100. These should be awarded for less serious cases.

The Court of Appeal held that only in "*the most exceptional cases"* should an award for compensation for injury to feelings exceed £45,600.

29 The Respondent also drew my attention to the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases. I list below the guidelines for some serious injuries:

(a) Paraplegia - £186,890 - £242,490
(b) Moderately severe brain damage - £186,890 - £242, 590
(c) Severe PTSD - £51,070 - £85,880
(d) Mesothelioma - £59,730 - £107,410
(e) Loss of both arms - £205,420 - £255, 930
(f) Very severe facial scarring - £25,000 - £83,050

The Tribunal's decision

30 In its liability decision the Tribunal made the following findings - from the start of the Claimant's employment with the Respondent on 15 June 2015 his time-keeping and, in particular, his not arriving for work at 7 a.m., was an issue that his manager, Mr Adamson, repeatedly raised with him. As early as October 2015 he was warned that it could result in a written warning. The raising of time-keeping had nothing to do with any concerns that he was raising. Poor time-keeping led to the Claimant's probation being extended in December 2015 to 9 March 2016. On 11 April 2016 the Claimant sent an email in which he said that his colleagues spent less than three minutes completing the annual attestation which showed that they regarded it simply as a box ticking exercise. That email was circulated to some of the most senior managers at the Respondent and the decision taken was to shut down the complaint and not to investigate it. In the course of a grievance that the Claimant had raised he had antagonised people in HR who referred to him as "*a particularly odious character"* and a "*horrid man."* Mr Adamson continued to be frustrated by the Claimant's late arrivals at work. Mr Monaghan instructed Mr Adamson to document the Claimant's late attendance as he was beginning to think that it might provide an opportunity to deal with the Claimant whose email of 11 April was making waves. On 27 July 2016 Mr Adamson sent an email at his own behest in which he said about the Claimant,

> " *His apparent lack of care as to any action being taken and the perception of being 'above the law' or one rule for some, another for me, continues to undermine both my position and the desk. Furthermore it utterly negates any positive impact from what he does bring to the table…*
> *Much that it thoroughly disappoints me and I feel the Bank will lose valuable intellectual capital the position has fast become untenable. His lack of care has led to a breakdown of trust."*

On 16 August a decision was taken by senior managers (Mr Monaghan and Ms Hurrell) and ER and HR (Ms Devitt and Ms Morris) to dismiss the Claimant without going though any procedure. On 17 August Ms Morris typed a document designed falsely to appear as if it had been sent by Ms Hurrell to her and Ms Devitt. That

document and a script for the hearing suggested that time-keeping was the reason for the dismissal. On 18 August the Claimant was called to a meeting and dismissed with notice. The reason given for the dismissal was his poor timekeeping. He was put on garden leave. The Claimant appealed against his dismissal. Ms Devitt was obstructive when the Claimant sought documents for his appeal. The person who chaired the appeal did not look into matters thoroughly.

31 The Tribunal's conclusions were as follows. The Claimant's email of 11 April was a protected disclosure. That email was the principal reason for the Claimant's dismissal. Had it not been for that email the Claimant's late arrival on 27 July 2016 would have been likely to result in a disciplinary process leading to a written warning. EJ Tayler concluded,

> "*171. I accept that, unusually, the Claimant, notwithstanding the bank's egregious actions, bears an element of responsibility for his dismissal, because of his persistent failure to attend work on time, despite his repeated protestations that he would do so. I consider that he contributed to his dismissal by 25%.*
>
> …
>
> *173. The Respondent dismissed the Claimant without the slightest attempt to adopt a fair process in circumstances where they have ben told by the Employment Tribunal and the Employment Appeal Tribunal that to do so is totally unacceptable. This is a case that manifestly warrants an uplift for failure to comply with the ACAS Code of Conduct of the maximum 25%"*

The parties submissions

32 The Claimant's case was that, having taken into account the monetary value of the award, the uplift should remain at 25%. That would result in the Claimant being awarded an extra £198,383.30 for the procedural failures in his case. His total award would be increased from £793,533.20 to £991,916.50. When those figures were grossed up, the Claimant would end up receiving £1,329,374.33 (an increase of £270,522.69).

33 The Claimant argued that the ACAS uplift is gauged in terms of a percentage and not by reference to a band and/or range of possible figures. The guidance given in **Wardle** about the awards for injury to feelings being "*of some relevance"* must not be seen in any way to fetter the Tribunal's discretion to award what is just and equitable in all the circumstances. The Vento bands are of minimum relevance. In both **Wardle** and **Michalak** awards of 15% were made. The latter was more comparable to the present case having regard to the levels of compensation; in that case the 15% equated to monetary award of £311,311,35. That suggested that an award of £198,383.30 would not be disproportionate in this case or out of step with the principles laid down in **Wardle** and their application in subsequent cases.

34 The Claimant also submitted that the final percentage figure of the uplift needed to do justice to both parties and to reflect the fact that the uplift had a punitive value. It was clear from the Tribunal's findings that the Respondent had deliberately decided to follow no procedure whatsoever in the dismissal of the Claimant, it had lied throughout the dismissal process and had tried to conceal its action by not recording the dismissal process. Had it followed a fair process, the Claimant would not have been dismissed. Having been dismissed, the Claimant had to fight to clear his name

to ensure that he could work again in a regulated industry. Awarding a 25% uplift in those circumstances would command the respect of the public. The decision in **King** was further grounds for suggesting that a 25% uplift in this case would command the respect of the public. The Respondent had been reprimanded for exactly the same behaviour before and had wilfully failed to change its conduct. There was also a significant public interest element in the whistleblowing carried out by the Claimant.

35 The Respondent's case was that the Claimant should not be awarded an ACAS uplift of more than £25,000, i.e. an uplift of 3.15%. if that were awarded the Claimant would receive a total award of £818,533.20, which would be grossed up to £1,092,942.55 (an increase of £34,090.91).

36 The Respondent's submissions were that the whole purpose of the last stage was to look at the monetary value of the award when exercising the discretion to award what was just and equitable for a failure to follow the ACAS Code of Practice. The reason for that was that in cases where the compensatory award was large, if the uplift was decided purely on the basis of a percentage it could lead to a very high award for purely procedural failings that would not command the respect of the public. **Wardle** did not set a tariff of 15% for *"serious and cavalier"* breaches. In setting that percentage the Court of Appeal took into account that that would increase the award by a net sum which was a little short of £19,000. In **Michalak** the Tribunal did not correctly apply Wardle and interpreted Wardle as setting down a tariff of 15% for serious and cavalier breaches. In **Acetrip** the EAT considered that an award in excess of £20,000 for the very serious failures that the Tribunal found in that case was "*a significantly large amount".* The awards in **Wardle** and **Acetrip** were an indication of the kind of figures that it would be just and equitable to award for procedural failures. **Michalak** was an outlier.

37 The Court of Appeal had made it clear in **Wardle** that very large payments for purely procedural wrongdoings would not command the respect of the general public. An award of about £270,000 would not command the respect of the public and would be regarded as an excessive windfall. Although awards for injury to feelings are not determinative of what would be just and equitable for an ACAS uplift, it is relevant to have regard to them. Both those awards and the amounts awarded for serious personal injuries give an indication of what the public would regards as acceptable for awards for procedural failures. The average/median net pay in the UK was about £25,000.

Conclusions

38 EJ Tayler has already decided that the Respondent's failure to follow any process in circumstances where it had been previously told by the EAT that that was unacceptable warranted an uplift of 25%. My task at this hearing was, having assessed what the monetary value of that would be, to consider what percentage of uplift it would be just and equitable to award. The Court of Appeal made it clear in **Wardle** that that exercise has to be carried out because "*very large payments for purely procedural wrongdoings are at risk of"* not commanding the respect of the general public. In considering that I need to bear in mind that there is a punitive element to the award, it must not be disproportionate, it must be such as to command the respect of the general public and have regard to justice and equity to both parties.

39 Under the previous regime (section 31(3) of Employment Act 2002) if there was failure to follow the statutory disciplinary procedure the Tribunal had to increase any award by 10% and could increase it up to 50%, unless there was an exceptional circumstance that permitted it to award less than 10%. The awards in **Chagger, Wardle** and **Michalak** were made under that regime. It is difficult to reconcile the award made by the ET in **Michalak** with the dicta of the Court of Appeal in **Chagger** and **Wardle** and the awards made in those two cases. Under the present regime (section 207A TULR(C)A 1992) the Tribunal has a discretion to increase any award that it makes by up to 25%. In **Wardle** the Court of Appeal awarded around £19,000 and in **Acetrip** the EAT considered that an award in excess of £20,000 was a significantly large amount. If the compensatory award had stood in **Chagger** the uplift would have been in the region of £55,000 (gross).

40 It is important for employers to follow the disciplinary procedure as outlined in the ACAS Code of Practice not only because it promotes fairness and transparency, but also because it could prevent dismissals that are procedurally unfair, discriminatory under the Equality Act 2010 or automatically unfair, i.e. for some impermissible reason under the Employment Rights Act 1996. Employers who dismiss for a discriminatory or impermissible reason often try to conceal that by using some other ostensibly fair reason. If they have to follow a transparent process to establish that ostensible reason and to justify dismissal for it, they might not be able to do so. That having been said, the purpose of the uplift is not to compensate the employee for the loss that flows from the discriminatory or unfair dismissal which might or would have been avoided if the procedure had been followed. The compensatory award compensates him for that, and if the dismissal is discriminatory or for an impermissible reason, it compensates him fully for his losses as it is not subject to any statutory cap.

41 There is a significant punitive element to the award, but unlike the financial penalty that the Tribunal can award under section 12A of the Employment Tribunals Act 1996, it is not paid to a third party but to the employee in question. Therefore, the employee in question benefits from it and receives a sum in addition to the compensatory award which has compensated him for his losses. In considering whether a particular award for purely procedural failures would command the respect of the general public or would be regarded as an excessive windfall, it is necessary to look at the monetary value of that award (the sums involved) and not only at percentage figures. To do otherwise would be contrary to what the Court of Appeal in **Wardle** and subsequent cases have said that a tribunal must do. If the amount of the uplift is determined in purely percentage terms (without having regard to how much money that would lead to the claimant receiving), it would follow that those who got very large compensatory awards would receive very large awards for the uplift. I consider that the ET in **Michalak** erred because it did not consider whether an uplift of £311,311.35 would command the respect of the public or would be regarded as an excessive windfall. I do not accept that awards in that range (around £300,000) for purely procedural affairs would command the respect of the public because the employees in question had received very large compensatory awards. I have no doubt that they would be regarded as excessive and disproportionate awards for the employer's failure to follow the disciplinary procedure. To my mind, the inevitable consequence of what the Court of Appeal said in **Wardle** is that the higher the compensatory award the smaller the percentage of the uplift is likely to be.

42 It is clear why an uplift in the range of £300,000 would be regarded as excessive, disproportionate and would not command the respect of the general public when one looks at the awards for injury to feelings for discrimination cases and personal injury awards. An award of around £300,000 is over six times the maximum award for injury to feelings which is awarded in the most serious of cases, such as where there has been a lengthy campaign of harassment on the grounds of race or sex. It would be more than is awarded for serious injuries such as loss of both arms, very severe facial scarring, Mesothelioma, severe PTSD, moderately severe brain damage and paraplegia. It is abundantly clear to me that an award for failure to follow procedures that exceeded those awards would not command the respect of the public.

43 I accept that it is a relevant factor that this Respondent had previously been told in another case that it was totally unacceptable not to follow procedures and that it had chosen to disregard that and repeated that behaviour in this case. Notwithstanding that, for the reasons given above, I do not consider that it would be just and equitable to award an uplift of that would lead to the Respondent having to pay out £270,522.69 and to the Claimant receiving an extra £198,383.80 because of the failure to follow procedures. Having taken into account all the matters set out above, I concluded that it would be just and equitable to award an uplift of 5%. The effect of that would be that the Respondent would have to pay out an extra £54,102.52 and the Claimant would receive an extra £39,676.66 because of the Respondent's failure to follow any procedure. I consider that those amounts adequately reflect the punitive element of the award, are proportionate, do justice and equity to both parties and would command the respect of the public.

44 Using the agreed calculations in the schedule of loss, the 5% uplift results in the following figures:

Basic award	£718.50
Compensatory award before adjustments	£793,533.20
An ACAS uplift of 5%	£833,209.86
25% deduction for contributory fault	£624,907.39
Grossing up ((£624,907.39+£718.50) - £30,000)/0.55 £1,082,956.17 + £30,000	£1,112,956.17

Costs application

45 On 14 June 2021 the Claimant applied for his costs of £161,223.08 + VAT from the receipt of the Grounds of Resistance until the end of the liability hearing. He applied primarily on the grounds that the Respondent's defence to his claim had had no reasonable prospect of success but also on the grounds that he had incurred costs through the Respondent's disruptive and unreasonable conduct of the proceedings.

The Law

46 Rule 76(1) of the Employment Tribunals Rules of Procedure 2013 ("the 2013 Rules of Procedure") provides,

> "*A Tribunal may make a costs or a preparation time order, and shall consider, whether to do so, where it considers that –*
> *(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
> *(b) any claim or response had no reasonable prospect of success."*

47 If the Tribunal wishes to make a costs order in excess of £20,000 the amount has to be determined by way of a detailed assessment carried by an Employment Judge in accordance with the Civil Procedure Rules 1998 (Rule 78(1)(b)). I indicated to the parties that a limited number of Employment Judge at London Central are trained to do detailed assessments and that I am not one of them. It was agreed that I would determine whether the threshold for making a costs or was met and whether I thought it appropriate to exercise my discretion to award costs. If I decided that it was appropriate to award a sum higher than £20,000, a detailed assessment would have to be carried out by another Employment Judge as to what amount should be awarded.

48 In **Radia v Jeffries International Ltd [2020] IRLR 431** HHJ Auerbach in the EAT gave guidance on how the ET should approach an application seeking the whole costs of the litigation on the grounds that the claim had no reasonable prospect of success from the outset. He said,

> "*It should first, at stage 1, consider whether that was, objectively, the position, when the claim was begun. If so, then at stage 2, the Tribunal will usually need to consider, whether at that time, the complainant knew this to be the case, or at least ought reasonably to have known it. When considering these questions, the Tribunal must be careful not to be influenced by the hindsight of taking account of things that were not, and could not have reasonably been, known at the start of the litigation. However, it may have regard to any evidence or information that is available to it when it considers these questions, and which casts light on what was, or could reasonably, have been known, at the start of the litigation."*

As Sir Hugh Griffiths said in **ET Marler Ltd v Roberston [1974] ICR 72**,

> "*Ordinary experience of life frequently teaches us that that which is plain for all to see once the dust of battle ahs subsided was far from clear to the combatants when they took up arms. We do not therefore attach undue weight to the fact that at the end of a skilful cross-examination on the last day of the hearing the employee was forced to concede that the employers had acted reasonably in dismissing him."*

The same principles apply when the application is made by the claimant on the grounds that the respondent's defence had no reasonable prosect of success from the outset.

49 In considering an application for costs on the basis of the paying party's unreasonable conduct of the proceedings, Mummery LJ said in **McPherson v BNP Paribas [2004] ICR 1398 at paragraph 40**,

> "*The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring* [the receiving party] *to prove that specific unreasonable conduct by the* [paying party] *caused particular costs to be incurred."*

50 Addressing the same issue subsequently in **Barnsley MBC v Yerraklava [2012] IRLR 78** Mummery LJ said at paragraph 41,

> "*The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages … from my judgment in McPherson was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. I had no intention to give birth to erroneous notions, such as that causation was irrelevant …"*

Relevant facts

51 In his claim form presented on 2 March 2017, and amended on 18 September 2017, the Claimant alleged that between 30 October 2015 and 11 August 2016 he made 14 protected disclosures and that the sole or principal reason for his dismissal on 18 August 2016 was the cumulative impact of those protected disclosures. In respect of many of the disclosures he claimed that the same disclosure had been made on multiple occasions to different individuals.

52 In the Respondent's response it stated that the Claimant's employment had been terminated by the Respondent on the grounds of his repeated poor timekeeping and the repeated failure to follow the reasonable and lawful directions of his employer which led to a breakdown in trust. It said that the Claimant's initial probationary period had been extended because of his repeated failure to arrive for work on time and set out at paragraphs 13 – 18 the numerous occasions on which Mr Adamson had raised time-keeping issues with the Claimant, culminating in the email of 27 July 2016 (see paragraph 30 (above). It denied that the Claimant had made protected disclosures or that they had been the principal reason for the dismissal.

53 The Claimant did not have two years' service and, therefore, the onus was on him to establish that the sole or principal reason for his dismissal was that he had made the protected disclosures.

54 The Claimant's witness statement was 98 pages long. A large part of the Claimant's witness statement (almost 50 pages) was devoted to the 14 protected disclosures and the Claimant's view that many actions that happened, such as the extension of his probation and the raising of various concerns, was because of the protected disclosures that he had made. Although the Claimant was no longer pursuing complaints of having been subjected to detriments because he had made protected disclosures, it was necessary for the Respondent and the Tribunal to deal with them because it was evidence from which the Tribunal could conclude that the Claimant had been dismissed for making protected disclosures. The Respondent's

witnesses also had to deal with those protected disclosures in its evidence.

55 The Claimant's case, as was said several times in closing submissions on his behalf, was that the cumulative impact of the protected disclosures was the principal reason for his dismissal. The Claimant's closing submissions comprised 66 pages. 33 of them deal with the 14 protected disclosures and set out in respect of each one why it amounted to a protected disclosure. The Respondent disputed that 13 of the alleged disclosures were either made as alleged or amounted to protected disclosures. The exception was the email of 11 April 2016 which the Respondent treated as a whistleblowing complaint. The detail of the alleged protected disclosures and why they did not in fact constitute such disclosures was dealt with in a separate annexe to the Respondent's closing submissions.

Liability Judgment

56 The Tribunal found that the email of 11 April 2016 was a protected disclosure. It did not find that the Claimant had made any other protected disclosures. The Tribunal found that the Claimant had repeatedly raised concerns about the Global FX Sales and Trading Policy (protected disclosures 1 and 2) and that he was not alone in raising those concerns. The Tribunal found that his managers were concerned that "*the Claimant was expressing himself in excessively forceful language and displaying antagonism to regulators"*, the concern "*was about the tone rather than the content of Claimant's contributions to the discussions about the new policy"* and that when Mr Adamson told him that he was putting people's noses out of joint that was "*a reference to the forcefulness with which the Claimant was raising his concerns more than with their content."* Several of the Claimant's alleged protected disclosures related to the actions of a trader in Hong Kong in December 2015 and the concerns that he had raised as a result of that. The Tribunal found that the Claimant's key concern had been that the loss incurred to his book from that trade should be made good. The Claimant's suggestion that one of his managers had offered him a bribe not to escalate the matter was rejected by the Tribunal. It found that the Claimant had not made any protected disclosures about breach of the Equality Act 2010.

57 The Tribunal made a large number of findings about the Claimant's time-keeping which clearly showed that it was a source of serious concern to his managers. Some of these are set out at paragraph 30 (above). These included the following,

> "*It is noticeable that the criticism of the Claimant for arriving late to work and the possibility of a written warning as raised before the Claimant made any of his alleged protected disclosures. I accept that it was a genuine concern."*
>
> *"In the exchange the Claimant was reminded of the 7 am start time. I do not accept that this was being done because the Claimant was raising concerns about the Global FX policy. By this stage* [November 2015] *the Claimant's failure to attend work on time was a long standing cause of friction."*
>
> *"I accept that his poor timekeeping was the genuine reason for the extension of the Claimant's probation. The Claimant did not challenge the extension at the time. I also consider that Mr Monaghan and Mr Adamson considered if that his timekeeping did not improve formal disciplinary action would be required."*
>
> On 7 July 2016 the Claimant was late again and Mr Adamson wrote him an

email in which he said,
"*Please take this email as a final warning before further more formal action is taken regarding persistent tardiness."*

On 27 July 2016 Mr Adamson sent the Claimant the email which is quoted at paragraph 30 (above). This was sent at his own behest and he did not allege that he was asked to write it by anyone else.

"*I accept that Mr Adamson had long-standing concerns about the Claimant's failure to attend work on time. By the middle of 2016 he was becoming increasingly impatient with the Claimant. I accept that he wrote the email of 7 July 2016 and his email of 27 July 2016 because he was genuinely infuriated by the Claimant's tardiness."*

58 The Tribunal found that none of the disclosures made by the Claimant prior to 9 March 2016 had a significant impact on the decision to dismiss him. It also found that his raising the SEC15a-16 issue at the end of March had nothing whatsoever to do with his dismissal.

59 The Tribunal concluded found that on 8 August 2016 Ms Devitt sent an email in which she said "Things have moved on since this trail" and on 10 August Mr Monaghan sent Mr Adamson a text message in which he said "I will remove you from the conversation when the time comes." The Tribunal concluded that that was a reference to the dismissal of the Claimant and that a decision to dismiss him had been made by that time. The Tribunal rejected the Respondent's evidence that the decision to dismiss the Claimant for his timekeeping without going through any procedure was taken at a meeting between Mr Monaghan, Ms Hurrell, Ms Morris and Ms Devitt on 16 August 2017 for a number of reasons:

- there was no record of the meeting. Ms Morris' notebook for that period had been destroyed, Ms Devitt's work mobile telephone had been wiped in 2017 and her personal phone in use at the time had been given to her son and destroyed;
- In the response it had been said that the decision to dismiss had been taken by Ms Hurrell alone whereas at the hearing it was said that the decision had been taken jointly by Ms Hurrell and Mr Monaghan;
- Ms Hurrell and Ms Devitt in their witness statements had relied heavily on the fact that the Claimant had breached his loss limit shortly before the meeting as a significant factor in their decision but the Claimant's dogged pursuit of disclosure had established that the breach of the loss limit took place later on that day after the meeting;
- None of them could remember who suggested dismissing the Claimant without any procedure rather than going through a procedure and/or giving him a written warning. All of them sought to bolster their reason for dismissal by saying that he would be a risk if he remained at the desk;
- All the documents prepared at the time suggested that the only reason for the dismissal was timekeeping;
- They could not explain why they did not await the return of the Claimant's line manager, Mr Adamson, before making the decision;
- On 17 August 2016 Ms Morris typed a document designed, falsely, to appear as if it had been sent by Ms Hurrell to her and Ms Devitt. It was headed Solicitor Client Privileged, Litigation Privileged, Confidential. Ms Hurrell's

evidence was that no lawyers were involved and she could not explain the heading.

60 The Tribunal concluded that the Claimant's suggestion in the email of 11 April 2016 that the attestation records showed that many employees were only spending a few minutes completing the form "*rang alarm bells".* Rather than undertaking a proper investigation the Respondent had shut the complaint down. The Claimant was "*dogged in the extreme".* It found that that email was a protected disclosure and considered that there was a clear inference to be drawn that the Claimant was dismissed for making that public disclosure.

61 The Tribunal also concluded that in the absence of the email of 11 April 2016 the Claimant's persistent lateness would have been likely to have resulted in a disciplinary process and a written warning. It also found that he bore an element of responsibility for his dismissal because of his persistent failure to attend work on time, despite his repeated protestations that he would do so. The Tribunal found that he contributed 25% to his dismissal.

62 The Respondent appealed against the liability decision. HHJ Stacey in the EAT allowed the appeal to proceed to a full hearing. She said,

> "*It is arguable that the Employment Tribunal has either (1) not properly explained how it viewed the Claimant's line manager, Mr Adamson's email of 27 July 2016, when set against a background of repeated and genuine concerns about the Claimant's failure to get to work on time at 7 am as required leading to what the Employment Tribunal accepted was Mr Adamson being "genuinely infuriated by the Claimant's tardiness" when reaching its conclusion that the principal reason for the dismissal was the Claimant's qualifying and protected disclosure, or (2) reached a perverse conclusion, especially in light of the absence a finding as to the identity of the decision maker."*

The Respondent had also appealed against the 25% uplift for failure to comply with the ACAS Code of Practice. When EJ Tayler reconsidered that decision, the Respondent decided not to pursue the appeal.

63 In an email to the parties dated 17 January 2020 EJ Tayler informed the parties that on 25 October 2019 he had responded to an email from a DC Khan who said that he was investigating an allegation of perjury made by the Claimant. His response had been "*The Tribunal made no finding of perjury in this case."* He ended the email of 17 January 2020 by saying,

> "*For the avoidance of doubt, I confirm that having heard the totality of the evidence I did not consider that there was evidence that warranted a referral of Ms Devitt to the DPP to consider prosecution for perjury."*

Conclusions

64 I considered first whether the response had had no reasonable prospect of success and whether the Respondent had acted unreasonably in defending it. The Claimant's case was that the cumulative effect of his 14 protected disclosures was the sole or principal reason for his dismissal. Although the Claimant did not pursue

claims of whistleblowing detriments, he relied on what he said were the Respondent's negative reactions to his protected disclosures to establish that they were the reason for his dismissal. A very large part of the case put forward by the Claimant was rejected by the Tribunal. It found that he had made only one protected disclosure. It found that he had raised some concerns about certain matters but that these had either not amounted to protected disclosures or had not concerned the Respondent and led to them treating him adversely, and had played no part in the decision to dismiss him.

65 The Respondent's case that the Claimant had been dismissed for his poor timekeeping was not without substance. The Tribunal accepted that the Claimant's timekeeping had been a matter of serious concern throughout his short period of employment. His probationary period had been extended because of it. The concern culminated in his line manager writing on 27 July 2016 in which he referred to the effect of the Claimant leaving (*"I feel the Bank will lose valuable intellectual capital")* and said that his position had become "*untenable"* and that his lack of care had led "*to a breakdown of trust."* The Tribunal accepted that he had written that email because that was what he felt. It was significant that the decision to dismiss the Claimant was made 2-3 weeks after that email was written, and some four months after the protected disclosure. It was much closer in time to the decision to dismiss and it was therefore more than arguable that it was the principal reason for the dismissal. The Tribunal concluded that the timekeeping contributed 25% to the dismissal.

66 This was not a case where there was clear evidence that the protected disclosure was the principal reason for the dismissal and the Respondent had decided to pursue its defence regardless of that. The Tribunal did not find the Respondent's witnesses' account of the decision on 16 August credible for the reasons set out at paragraph 59 (above) and drew an inference from that, and the way in which the Respondent investigated the protected disclosure, that the protected disclosure was the principal reason for the dismissal. The fact that a claimant succeeds in his claim does not mean that the response had no reasonable prospect of success. The Claimant lost a large part of his case but succeeded on one part. The fact that the Respondent's appeal got through the sift at the EAT and was allowed to proceed to a full hearing also suggests that it cannot be said that the response had no reasonable prospect of success. The Respondent had an arguable defence and the evidence to support it. I accept what was said on behalf of the Respondent – this was a case that could have gone either way.

67 For all the reasons given above, I do not consider that the response had no reasonable prospect of success or that the Respondent acted unreasonably in defending the case.

68 The Claimant also relied on other matters to support his application for costs on the grounds of the Respondent's unreasonable and disruptive conduct. The first was that the Respondent's witnesses had been untruthful and had colluded to give their evidence. The Claimant relied on two matters in support of this. The first was that the Mr Monaghan, Ms Hurrell and Ms Devitt had colluded in being untruthful to give evidence that the Claimant's breach of his loss limit had been discussed at the meeting on 16 August 2016 and had contributed to his dismissal.

69 It was not in dispute that the Claimant did breach his trading loss limit on 16

August after the meeting. All those at the meeting were made aware of it on that day or the following day. The Respondent's case, as pleaded in its response, was not that the Claimant had dismissed because of the breach of the loss limit. Mr Monaghan did not say in his witness statement that that was the reason for the Claimant's dismissal or that it was discussed at the meeting on 16 August. He said,

> "*I had lost confidence in Mr Banerjee's ability to manage risk and his ability to do his job properly and therefore I wanted him off the platform as soon as possible. I had on more than on occasion had a firm discussion with Mr Banerjee because he had breached the stop-loss limits that I had set for all the FX traders. He did so again only the day before Ms Hurrell communicated the decision to him that his employment was terminated."*

The Claimant had breached the loss limits prior to 16 August 2016. Ms Hurrell and Ms Devitt had said in their witness statements that they had discussed it at the meeting but they corrected their witness statements when they gave their evidence in chief. The Tribunal did not find that they had lied about it. In light of the fact that the Claimant had breached loss limits before, he breached it again very soon after the meeting and the witnesses were aware of it around that time, it is not surprising that there might have been confusion about precisely when they discovered it and discussed. I do not accept that they colluded to be untruthful about it.

70 The second allegation of collusion and untruthfulness was that Ms Hurrell had changed her evidence about the email sent on 17 August setting out what had been decided about dismissing the Claimant. Ms Hurrell's evidence in her witness statement was that she had sent the email on 17 August summarising the decision that had been reached in the meeting on 16 August. In cross-examination she said that she and Ms Morris from HR had drafted the email together and Ms Morris had typed it. She said that no lawyers were involved. Ms Morris had suggested that she put the heading and she had followed that advice. She said that she did not know what the terms "litigation privileged" and "solicitor-client privileged" meant. There is nothing to indicate to me that that evidence was untruthful.

71 The Claimant's second ground for saying that the Respondent had acted unreasonably and disruptively related to disclosure and the destruction of evidence. I do not accept that the Respondent failed to comply with the order for disclosure made by EJ Tayler on 24 April 2018. The witness statement of Ms Odimba-Chapman, the partner with conduct of the matter at Clifford Chance, sets out in detail the steps that were taken to comply with the order. Equally, I do not accept that the Respondent acted unreasonably in responding to the Claimant's different questions about the HR notebooks. I accept that the Respondent did not always respond within a day or two which led to the Claimant repeating the same questions again. It is correct that the Claimant's previous solicitors wrote to the Respondent on 5 September 2016 that he was thinking of appealing against his dismissal and asked that all relevant material relating to the Claimant be preserved. No litigation was intimated or threatened in that letter. Ms Devitt responded that the Bank would take steps to preserve all relevant evidence. The Claimant's appeal was dismissed on 10 November 2016 and the claim form was presented on 2 March 2017. Ms Morris destroyed her notebook in December 2016. I have no basis for concluding that she destroyed it deliberately to conceal evidence that would have assisted the Claimant. Ms Dunlop had destroyed her 2015 notebook before going on maternity leave in November 2017. She had reviewed it in September 2017 in response to the

Claimant's request for specific disclosure. There had been nothing to disclose. I did not consider that the Respondent had acted unreasonably or disruptively in connection with disclosure.

72 In conclusion, I did not consider that the response had had no reasonable prospect of success or that the Respondent had acted unreasonably or disruptively in the conduct of the proceedings.

Employment Judge - Grewal

Date: 23/09/2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

23rd Sept 2021.

FOR THE TRIBUNAL OFFICE