EMPLOYMENT TRIBUNALS

Claimant: **Mr R Allen**

Respondents: **(1) Allen Brothers (Fittings) Ltd.**
(2) Ms E Adams

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **6 August 2021**
27 September 2021 (Reserved Remedy Decision)

Before: **Employment Judge B Elgot**

Members: **Ms J Houzer**
Mr S Woodhouse

Representation:
For the Claimant: **In person**
For the Respondents: **Mr S Butler, Counsel**

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

The Tribunal having reserved its remedy decision now gives judgment as follows:

JUDGMENT

1. **The Claimant having succeeded in his claim of unfair dismissal against the First Respondent he is entitled to compensation as follows.**

2. **No order for reinstatement or re-engagement is made for the reasons stated below.**

3. **<u>Basic Award under section 119 Employment Rights Act 1996</u>**

   Gross weekly pay £ 519.23 x multiplier of 3 £1557.69

   Less deduction of 50% for Claimant's contributory conduct before dismissal (section 122 (2) Employment Rights Act 1996) £778.84

Net Basic Award **£778.85**

No Polkey deduction can be applied to a basic award.

4. **Compensatory Award under section 124 of the 1996 Act**

The net weekly pay is £ 421.07

The weekly pension loss is £15.58

Total net weekly loss is £ 436.65

Loss of wages from effective date of termination of employment (27 June 2019) to date of assessment (27 September 2021) is assessed as

13 weeks x £436.65 **£ 5676.45**

Add continuing loss for a further 13 weeks until 26 December 2019 at £ 271.65

Assessed by reference to the continuing loss of £436.65 which loss the Tribunal is satisfied could have been mitigated by part time earnings as described in the Reasons below of £165 per week . £ 436.65 -£165 = £271.65

13 weeks at £271.65 **£3531.45**

There is no award for future loss of wages

Add Loss of Statutory Employment Rights **£500**

Total Compensatory Award

£5676.45+3531.45+500 **£9707.90**

The compensatory award is reduced by a 50% Polkey reduction.
£9707.90 x 50% **£4853.95**

The amount of £4853.95 is increased by 20% as a result of the First Respondent's failure to comply with the relevant ACAS Code of Practice on Disciplinary and Grievance Procedures

20% of £4853.95 is £970.79. **Sub-total £ 5824.74**

5. **The Claimant is awarded two weeks' pay as a result of the First Respondent's failure to provide him with a written statement of the changes in his particulars of employment (section 38 Employment Act 2002)**

2 x £519.23= £1038.46 **Sub-total £ 6863.20**

6. **The award of £ 6863.20 is reduced by 50% as a result of the Claimant's contributory fault by reference to section 123(6) of the 1996 Act**
Total £3431.60

7. **The total of £4210.45 payable to the Claimant by the First Respondent within 28 days of the date that this judgment is sent to the parties is £ 3431.60 compensatory award +£778.85 basic award =£4210.45**

8. **No interest is payable on this award to date.**

9. **No part of this award is payable by the Second Respondent.**

10. **The Employment Protection (Recoupment of Benefits) Regulations 1996 (the 1996 Regulations) apply to this award and the necessary information is set out below.**

11. **Reasons for this Judgment are attached.**

REASONS

1. A judgment on liability was sent to the parties on 8 June 2021 with written reasons. The Tribunal decided that the claims of unfair dismissal and of failure to give a statement of changes in employment particulars succeed against the First Respondent. The claim of victimisation did not succeed against either Respondent. The Second Respondent is not liable for any remedy which is awarded in respect of the successful claims. The references below to 'the Respondent' can therefore be taken to mean only the First Respondent unless otherwise stated.

2. A Remedy Hearing took place on 6 August 2021 and the remedy decision was reserved to 27 September 2021.

3. At the Remedy Hearing we heard evidence from the Claimant himself. The First Respondent had three witnesses consisting of the Second Respondent Mrs Elizabeth Adams, Managing Director of the First Respondent, together with Mr Andrew Dallard the Respondent's Production Manager who was the Claimant's line manager during his employment as Production Assistant. We also heard evidence on remedy from Mr Ian Little, Financial Controller for the First Respondent.

4. The Claimant sent two witness statements dated 5 August 2021 from Mrs Lindsay Allen which was too late to comply with the Tribunal's Order dated 10 June 2021 for exchange of remedy witness statements. We decided that we would read these statements but not permit Mrs Allen to give oral evidence or be submitted for cross examination because the Respondent and it's representatives would be prejudiced in being obliged to deal with this late witness and would be un-prepared to question her.

5. There was a Remedy Hearing Bundle and in accordance with the usual practice of the Tribunal we read only those documents in that bundle to which our attention was specifically directed by the parties.

6. The Claimant prepared and sent an updated Schedule of Loss dated 23 June 2021 and the Respondent submitted a Counter Schedule of Loss.

7. Both parties had the opportunity to give written submissions on remedy and we have thus taken account of the Respondent's updated submission dated 20 August 2021 and the Claimant's 'written statement for remedy hearing'.

8. Reinstatement or Re-engagement

The Claimant wishes to be reinstated or re-engaged under sections 114 – 117 Employment Rights Act 1996 ('the 1996 Act')

If not reinstated in to his previous job as Production Assistant he makes it clear that he wishes to be re-engaged into a role of '*similar stature that the Claimant has expertise in. It should also be a roll (sic) that that fairly reflects the roll (sic) and shareholding within the company in that the Claimant was considered to be the primary candidate to succeed the direction of the company as had been identified to him by an external consultant'.* The Claimant explains at paragraph A of his remedy statement that he believes himself to be the inevitable successor to the position of Managing Director of the First Respondent and relies upon an independent management consultancy report authored by Mr Brian Hull a copy of which we have not seen but which he says identifies this succession as the best future course for the business. Mrs Allen maintains that this is not what the report says but we have not seen it.

9. It is the Claimant's case that his long association as an employee, shareholder and family member means that he could and should be reintegrated into the Respondent's organisation and will significantly contribute to its efficiency, profitability and productivity. He denigrates the evidence of Mr Dallard whom he describes as an '*untrustworthy and deceitful character'* whose '*unfairly prejudiced and biased'* opinion from 2017 onwards does not reflect the stance of the Respondent. He similarly invites us to conclude that Mr Little's character is '*inconsistent, untrustworthy and deceitful*' as proven by the fact that he has made alleged errors in the calculation of the Claimant's holiday and sick pay. The Claimant describes Ms Adams as having a vexatious attitude towards the Claimant and 'his side' of the family and the 'other half' of the 50/50 shareholding. He says that she is thus determined to defeat him. He blames her for failing to deal with his grievances or engage in any form of mediation with him.

10. The witness statement of Mrs Lindsay Allen, the other Director of the Respondent, the Claimant's mother with whom he lives and the Production Management Assistant working with Mr Dallard, repeats the Claimant's assertion that '*Mr I Little and Mr A Dallard have both demonstrated over the course of their employment that their character is not trustworthy and unreliable…Both have lied to me in the past'*. This statement underlines, where the Claimant is involved, a serious breakdown in working relationships in the Respondent's organisation at a senior level.

11. S116 of the 1996 Act addresses the choice of order where a Claimant wishes to be reinstated and directs the Tribunal to consider whether it is '*practicable*' for the employer to comply with an order for reinstatement or re-engagement and, '*where the complainant caused or contributed to some extent to the dismissal whether it would be <u>just</u> to order his reinstatement or re-engagement'.*

12. First, the Claimant's intemperate and destructive description of his previous colleagues in his statement, reiterated by Mrs Lindsay Allen, serves to illustrate that it would

not be practicable for him to be reinstated or re-engaged in any position within the Respondent's organisation. He distrusts and deplores the character of three of the most senior staff including the Managing Director and Mr Dallard who is an integral part of the operational side of the Respondent's business. There is a complete breakdown of trust within their past relationship and in any future working relationships and the Claimant has demonstrated that he is impossible to manage in all the circumstances. We accept the evidence given in paragraphs 6 and 7 of Mrs Adams' remedy witness statement that the Claimant was, in her assessment and perception as Managing Director '*simply impossible to work with'* and that there has been an identifiable improvement since he left, as she describes in paragraph 11.

13. In addition we heard evidence that Mr Little's assistant Michelle Faraway found dealing with the Claimant and his pay extremely challenging and Mrs Adams told us that her husband Graham Adams who is the Respondent's International Business Development Manager may not continue working in the business if the Claimant returned. Mr Dallard and Mr Little also said that they may decide to leave the company. The Respondent's witnesses described complaints against the Claimant from 'Steve' 'Jenny' and Wayne Martin. This is almost one third of the workforce.

14. Secondly, we do not agree with the Claimant's assessment of these witnesses whom we found to be truthful, coherent and credible in their description of the difficulties of working with him to the extent that they felt their own health and wellbeing to be undermined. Mrs Adams summarises the stresses and difficulties in paragraph 4 of her witness statement, '*his numerous absences and poor conduct had a very negative impact on me and the rest of the First Respondent's workforce'.*

15. The word used by the Respondent's witnesses to describe the prospect of the Claimant's return to work with them is '*disastrous'.* Mr Dallard gave evidence, which we find to be truthful, to the effect that the Claimant's behaviour towards him as described in paragraphs 2 and 4 of his witness statement made him feel demoralised and worthless leading to a medical diagnosis of stress, anxiety and depression. Mr Dallard says that his relationship with the Claimant is *'broken beyond repair…I would have to consider other options [if he came back] I would not want to compromise my health by going through it all again'.*

16. Mr Little directed our attention to the Claimant's continuing practice of writing repetitive and intimidatory correspondence to him including numerous threats of litigation elsewhere than in this Tribunal (see pages 41, 42-44 and page 47 of the Remedy Hearing Bundle). He said '*I would have to seriously consider my position should Richard rejoin the First Respondent and I would anticipate key members of the Respondent's workforce leaving to take on opportunities elsewhere in order to avoid any further conflict'.* We find that the Claimant has without foundation described Mr Little as acting '*fraudulently*' and '*out of spite'*

17. The Claimant's conduct of these proceedings both in hearings and in correspondence with HMCTS tribunal staff has been discourteous, contemptuous and at times aggressive. The relevance of this comment is only to underline that he apparently finds it difficult to accept authority, to accept or understand any view different from his own,

or to deal with criticism or contradiction. Instead he insisted that 'they *[the Respondent] will all be held to task … its my job to ensure that the company does not go down the toilet because of their unlawful bad behaviour and fraud'.*

18. At the meeting between the Claimant and the Second Respondent on 28 February 2019, when the Claimant was still employed, the tape recording and the transcript show that, despite the Claimant's persistent categorisation of this meeting as an attempt at reconciliation/mediation and a discussion of his return to work, he does in fact engage from the commencement of the meeting in highly accusatory behaviour towards Mrs Adams including threatening her with '*four options'* for litigation and legal challenge. She was shocked and dismayed to be faced with this unexpected challenge and she expresses those emotions on the tape recording.

19. In addition, there is no role for the Claimant to practicably return to. He has not been permanently replaced in the sense envisaged by section 116 (5) of the 1996 Act but there has been a successful restructure of the Respondent's organisation. Mrs Lindsay Allen remains as the Production Management Assistant to Mr Dallard. There is now no Production Assistant. We find that, in accordance with his own evidence, the Claimant would be unwilling to accept a junior role such as Tool Maker or CAD Technologist not commensurate with his previous status or his future ambition. There is no vacancy for a toolmaker and the CAD technologist role is usually occupied by a university student on a temporary internship. There has been an internal promotion of an Operations Manager and the recruitment of a Business Development Manager for the UK. The 'Orchestrate' production planning system devised and partly implemented by the Claimant has been abandoned and he is not needed to run it.

20. In all the circumstances of this case and in view of the consistent tenor of the evidence credibly given by the Respondents' witnesses in this Remedy Hearing we are certain that it would not be practicable to reinstate or re-engage the Claimant in the same job or in any employment comparable to that from which he was dismissed or in any other suitable employment. The Claimant has engaged in conduct which means that the Respondent has no confidence or trust in him and reinstatement or reengagement would not succeed. We are particularly persuaded by the observation of Lord Justice Underhill in the recent case of Kelly v PGA European Tour[2021]EWCA Civ 559 in the Court of Appeal that there must be '*a proper recognition that an employment relationship has got to work in human terms'.* In this case we do not believe it can. Mr Dallard, for example, described having lost his identity and his 'domain' as a result of his treatment by the Claimant.

21. Finally, by reference to section 116 (1) (c) of the 1996 Act we are certain that the Claimant has caused and contributed to his dismissal and it is not just to order his reinstatement or re-engagement. The relevant contributory conduct is set out in our findings of fact in paragraphs 16 -39 of the Liability Judgment and may be summarised as a failure (despite knowledge and understanding of the correct procedures) to properly report or certify his sickness absences or produce fit notes in a comprehensive or timely way, a failure to communicate with the Respondent and/or to formulate his grievances in a way in which he had agreed to do on 28 February 2019. In view of his contributory fault and the fact that we have determined that, in the way set out above, the Claimant substantially contributed to a catastrophic breakdown of his working relationship with several key members of the

Respondent's staff and the Managing Director we conclude that it is not just to give the remedy of reinstatement or re-engagement.

22. Basic Award

It is agreed between the parties that the correct multiplier is 3. We have determined that the correct amount for the Claimant's gross weekly pay is £ 519.23 per week as stated in the Respondent's Counter Schedule. This is because his pay slips, for example at page 40 of the Remedy Bundle, reveal that he was earning £ 13.644 per hour and worked for a contractual 38 hours per week.

3 x £519.23 gives a basic award of £ 1557.69.

The Respondent has used a reliable online calculator to calculate the net weekly pay at £ 421.07 and we also accept this figure.

23. We are satisfied that the basic award must be reduced under section122(2) of the 1996 Act by 50% because there was conduct of the Claimant before the dismissal such that it is just and equitable to reduce the amount of the basic award.

The contributory conduct is described in paragraphs 16-39 of the Liability Judgment and in paragraph 21 above. The wording of section 122 (2) refers to '*any conduct of the complainant before dismissal'* (our emphasis). We therefore wish to emphasise that his conduct in failing to produce relevant fit notes is exacerbated by the fact that his final fit note covering the period from 22 April to 9 July 2019 was not in fact produced until the day after his dismissal. On the date of dismissal 6 June 2019 the Claimant had failed to produce fit notes for the period 16 January to 13 February 2019 and from 7 April 2019 onwards

We find the Claimant's conduct before dismissal to be blameworthy and culpable in this respect. We agree with and adopt the analysis set out in Mr Butler's Closing Submission at paragraph 42 where he says '*the events which triggered the dismissal decision in both the short term (lengthy unauthorised absence and no communication) and the longer term (breakdown in relations) were [the Claimant's] fault.'* Put another way, the Claimant's conduct was central to and causative of the decision to dismiss him.

24. Mitigation of Loss.

The Claimant is under a duty to take reasonable steps to mitigate his loss.

The Claimant contends that he has been too ill to work at all in any capacity since the effective date of termination of his employment because of severe and enduring mental health issues with depression and anxiety which have worsened over '*the last three years'* It is two years three months since he was dismissed.

25. We have asked ourselves whether we can safely rely upon the Claimant's personal evidence alone because he has been an unreliable witness on several occasions and is prone to exaggeration. For example we record such instances at paragraphs 45-47 and paragraphs 54 and 69 of the Liability Judgment. He continued this pattern of evidence in the Remedy Hearing for example in mis-representing the content of his GP's letter dated 28 April 2021 and stating that the owners of all local engineering firms are '*Liz's friends who*

would be unpleasant to me'. He wrongly said that he had handed in fit notes the day before he was dismissed when this did not happen.

26. The Claimant has asserted the unlikely scenario that he could not, despite a history of mental illness, obtain a GP appointment even by telephone for over a year despite making 100s of calls at a rate of twice a day. The nature of his evidence leads us to conclude that we need to see some corroborating medical documentation. This is an approach by the Tribunal with which the Claimant is familiar because he represented himself at a Preliminary Hearing on 10 and 11 February 2021 when we considered whether there was sufficient medical proof of his alleged disability and concluded that there was not.

27. We find that the Claimant has produced no relevant medical evidence to show that he has been unable to apply for any type of job in any location for any of the time since his dismissal or to demonstrate that it would be '*disastrous*' for him to take up new work. The Claimant is unable to corroborate with any medical or other evidence his own assertions that he has been too ill with depression to seek or obtain work. He has not supplied his GP Notes beyond 30 October 2019. The Claimant has not worked since 6 June 2019, he has not applied for any job anywhere whether local or further afield and he has not undertaken any further education or training save that only very recently he has at the behest of his DWP job coach enrolled at Harlow College on an employability skills course commencing October 2021 to equip him to get back to work; he anticipates that his return to work may thereafter be feasible in the summer of 2022. His contacts with the charities named the Shaw Trust and Futures for You are for the purpose of obtaining advice and support; neither of those organisations directly provide work or training.

28. The Claimant has still not produced fit notes for the period 16 January to 13 February 2019 or for the period from 7 to 22 April 2019 (see paragraph 26 of the Liability Judgment). Indeed the fit note covering the period 22 April to 9 July 2019 refers to an '*ankle fracture'* without mention of mental health difficulties.

29. He has disclosed no fit notes since 9 July 2019 until 22 March 2021. His additional documents added to the Remedy Hearing Bundle only cover the period from 22 March 2021 until 'three months from 22 June 2021' which is 21 September 2021. In each case he is certified as unfit to work because of anxiety and depression but it there is no medical evidence that this was the case for the intervening period from 9 July 2019 until 22 March 2021 and even the fit note covering the period from 22 April to 9 July 2019 refers to the physical injury to his ankle whilst skateboarding and not to his mental health.

30. The Claimant has shown no evidence of a referral to or treatment by any consultant, community mental health provision or to any early intervention psychiatric assessment or assistance (IAPT). He has produced no evidence of participation in any kind of counselling for his mental health problems. Despite his alleged difficulties in obtaining a GP appointment or consultation of any kind (not even a remote discussion) during the covid 19 pandemic from March 2020 onwards he has demonstrated no other efforts to obtain medical help and treatment. There is therefore no objective expert information before us about his ability to obtain and engage in any kind of work and earn money to mitigate his financial losses.

31. The Claimant relies upon a letter which he says covers the '*whole period since 2017'* dated 28 April 2021 from his GP Dr Shah Ali who confirms that he has been taking an anti-depressant named Sertraline (the dose is not specified) since February 2019 together with beta blockers for anxiety. The GP describes the likelihood of moderate illness and says that mental illness in the Claimant's case has 'significant' effects for a number of reasons. In no part of that letter does Dr Ali state that the Claimant has a '*long term and continuous sickness due to mental health until at least 21/09/21 to be under review'* as the Claimant describes it in his Schedule of Loss. His GP does not opine in that letter that the Claimant must not live alone, should not move from his home town of Burnham on Crouch, should not commute 'large distances', should not work at all and/or should give himself '*time in order to represent myself in these cases'.* The Claimant's assertion that this advice is '*inherently implied'* does not add up. Dr Ali recommends the therapeutic effect of occasionally taking a holiday with friends but gives no dates.

32. We are unable to agree with the Claimant that this GP letter demonstrates unequivocally that it has been reasonable for him not to engage in any form of work since his dismissal (on notice) and/or not to seek work outside his local area. The precise injunction from a doctor is not clear from the Claimant's evidence. The letter from Dr Ali simply does not state that '*the Claimant was advised not to return to work and was signed off sick due to anxiety and depression since 2019'* as the Claimant says in paragraph C of his remedy statement.

33. The Claimant has a university degree in Mechanical Engineering and three years of commercial experience with the Respondent undertaking a variety of work . He also undertook earlier work experience with the Respondent as a student. He does not, despite his frequent statements to the contrary, have the stigma of a dismissal for gross misconduct. He was dismissed on notice for reasons relating to his conduct. He has been well enough to conduct complex litigation in the Employment Tribunal and to undertake frequent written enquiries for information in his capacity as a shareholder. He is articulate in writing and has been able to compose lengthy analytical letters to HMCTS and the Information Commissioner complaining of data protection and other breaches. This suggests that he could certainly undertake a remote working role even if unable to regularly live or travel away from home or to and from work.

34. We have seen the wide range of engineering job vacancies included in the Remedy Bundle at pages 233-235 which the Second Respondent has discovered and which are within a reasonable travelling distance of the Claimant's home up to 50 miles. There are a number of suitable vacancies notified to the Claimant as a result of his own job searches nationwide for which the Claimant has not even expressed an interest. We do not accept the Claimant's evidence that all of the most local engineering firms identified by the Respondent have close personal contacts with the Second Respondent who might be 'unpleasant' to him and damage his welfare. Mrs Adams denies that this is the case. Indeed it would be to the advantage of the Respondent not to sabotage the Claimant's search for new employment because if he obtains work it reduces the amount of his potential losses in the unfair dismissal case.

35. We are satisfied that it was reasonable for 13 weeks following his dismissal (on notice and paid to 27 June 2021) for the Claimant to recover from the emotional shock and upset of his dismissal from the family firm in which he says he had invested his entire future.

The particular circumstances of this case involve a very personal dimension and family dynamic as described in paragraphs 11 and 12 of the Liability Judgment. The Claimant reasonably needed to re- calibrate his personal and career options and he also decided to embark on complex actual and threatened litigation.

13 weeks x £ 436.65 (£421.07 net weekly wage plus pension loss of £ 15.58 per week) is £ 5676.45

The pension loss has been calculated by reference to the 3% employer's pension contribution paid by the Respondent on gross wages.

36. Thereafter we find that the Claimant even if unable to find or, on his own evidence of his illness, contemplate finding equivalent work to that which he did for the Respondent nevertheless could have obtained some part time work with lower status and wages but which would nonetheless 'tide him over' financially, provide potentially therapeutic activity and reasonably mitigate his financial losses. We mean that he could reasonably have obtained work in the hospitality industry, delivery driving or similar less skilled and less demanding work for around 20 hours per week and have earned at least the adult minimum wage of £ 8.21 as it was fixed in 2019. This would have given him earnings of around £165 weekly (tax unlikely to be payable).

37. We find that there are several small towns quite close to Burnham on Crouch where the Claimant could work. He lives within driving distance of Chelmsford and Southend. Burnham on Crouch is on the commuter rail line to London. The period to which this decision on mitigation of loss refers is June to December 2019. In other words before any widespread recognition of the covid 19 pandemic and its effects and before the lockdown in March 2020. After the end of December 2019 we are satisfied that the Claimant should have fully mitigated his loss and could have obtained new employment at the same or similar level of pay which he received from the Respondent. He has produced no corroborative evidence to support his contention that this was not possible. He has conceded that there are suitable jobs available to him across a broad range of engineering opportunities.

38. His losses would then be reduced as follows:-

£436.65 less £165 =£271.65 weekly loss of wages

We find it reasonable for this level of loss to continue for a further 13 weeks to 26 December 2019. £271.65 x 13 is £ 3531.45

39. The compensatory award is £ 5676.45 plus £ 3531.45 = £9207.90 to which we add the sum of £500 for the loss of the Claimant's statutory employment rights which it will take him two years to regain.

The total, before any reductions, is £9707.90.

40. <u>Polkey Reduction</u>

What is invariably called the 'Polkey reduction' applies to the compensatory award. It is an amount deducted from the compensatory award to reflect what the Tribunal assesses as the percentage chance that although a dismissal was procedurally unfair it would have

happened in any case at a later stage. Of course the relevant time is the date of the dismissal itself on June 2019.

41. We have exercised our discretion to fix that reduction at 50% which means that the compensatory award is reduced to £4853.95. It is just and equitable to reduce the award by this proportion.

42. The Respondent submits that the appropriate Polkey reduction is 75% because the nature of the Claimant's misconduct including an overall failure to communicate with the Respondent taken together with the obvious relationship breakdown between the Claimant and the Second Respondent and with other staff members suggests that the Claimant would not in any event have engaged meaningfully or constructively with a fair formal process. This is a persuasive argument in view of the confrontational nature of the Claimant's approach particularly in the meeting of 28 February 2019 and his apparent subsequent determination not to communicate with either Respondent even after, for example, Ms Adams amended the skills matrix to which the Claimant took such disproportionate exception.

43. We agree with the analysis of Mr Butler at paragraph 35 (c) (iv) of his Submission. There is no evidence even from Mrs Allen directly that she gave any detailed information of any kind to the Respondent about the reasons for the Claimant's absence and his up to date situation. She only says that she *'acquired sick notes from Richard and provided them for anyone who was requesting (our emphasis) them'.* She does not mention the provision of the proper timely information in accordance with company policies of which the Claimant was aware. The Claimant's argument that all his actions and omissions over the relevant period were authorised by Mrs Allen and duly notified remains weak and was unlikely to succeed at a formal disciplinary meeting.

44. However, we have, as we are required to do, considered whether at the relevant time on 6 June 2019 there was actually such a high chance as 75% that the Claimant would be dismissed anyway. We have taken into account the possibility, not cited by counsel for the Respondent, that a family reconciliation (perhaps professionally facilitated by way of an external mediation or similar service) may have rescued the soured personal dynamic between the Claimant and the Second Respondent given that they are close relatives.

45. Secondly, we have taken into account the possibility that the disciplinary and/or an appeal hearing could feasibly have been conducted by someone other than the Second Respondent. One of the advisors to the Board, Messrs Frostrick and Holmes, may have been asked to intervene or the Respondent's Human Resources consultants may have suggested a suitable third party investigator and a separate adjudicator.

46. In those circumstances we conclude that although there is still a 50% chance that the Claimant would have been dismissed in any event there is also a 50% chance that a lesser sanction than dismissal may have been applied, that the Claimant would have been given another opportunity to comply with the conduct and sickness absence rules of the Respondent and that his employment may have survived especially in the context that he had no earlier formal warnings.

47. Uplift for unreasonable failure to follow the ACAS Code on Disciplinary and Grievance Procedures

It is the Claimant's argument that no formal verbal and written warnings under the Respondent's disciplinary or sickness absence policies were sent to him regarding the conduct for which he was eventually dismissed. Certainly there was evidence that considerable forbearance was exercised towards the Claimant's frequent absences between the start of his employment and the beginning of his final period of long term absence in January 2019. This is probably because he was a close family member living with one of the co-Directors who is his mother Lindsay Allen. The Respondent's witnesses gave consistent evidence that he believed that he could come and go as he wished without remonstration or sanction, that his attendance was unreliable and that he was not formally disciplined about this.

48. However following the 28 February 2019 meeting which the Claimant himself describes as his attempt to negotiate a return to work the Respondent promptly wrote to him to initiate and continue a dialogue about his absence, the reasons for it and his failure to properly certify and explain his absence and/or pursue his grievances. Paragraphs 36-38 of the Liability Judgment set out the facts in this respect. That correspondence was consistently and promptly pursued.

49. The Claimant says that he received none of the emails sent by Mrs Adams who '*must have known'* that he would not see them and thus deliberately shut him out of this dialogue. We do not agree with this assertion. The Claimant saw the attachment (the amended skills matrix) appended to the email of 15 March 2019 which his mother Mrs Lindsay Allen showed him. He received a letter dated 26 March 2019 sent by recorded delivery which enquires about the missing fit notes and asks him again if he wishes to pursue his grievances against Mr Dallard and/or the First Respondent.

50. It is not the case therefore that the Respondent made no attempt at dialogue or investigation and initiated no relevant enquiries before dismissing the Claimant. It is not the case that he had no idea what case he had to answer and what serious concerns the Respondent had about his conduct and attendance. He had an opportunity to respond to that case in correspondence but did not do so. An increase in the compensatory award of the maximum 25% is therefore not appropriate. These are not circumstances in which the Respondent did nothing at all to follow the ACAS procedure.

51. However as stated in paragraphs 42-44 of the Liability Judgment there was no attempt to hold a final disciplinary meeting with any senior representative of the Second Respondent as a chance for the Claimant, with or without representation, to explain and/or mitigate his actions and omissions in the context of his ill health as he then experienced it or to produce evidence of his unhappiness and difficulties. We do not agree with the Respondent's submission that the breakdown of the relationship between the Claimant and Mrs Liz Adams meant that such a meeting was futile. The Respondent was at liberty to find and appoint a neutral third party who might carry out the disciplinary hearing; we have suggested the advisors to the Board as a possibility and the Respondent also had professional Human Resources consultants who may have assisted.

52. Put simply, the Claimant was not given a final chance to explain himself and respond to the allegations against him.

53. In addition he was not advised, as the ACAS Code requires, of his right to appeal his dismissal.

There is considerable confusion and contradiction of evidence as to whether he did in fact try to appeal via Mrs Allen but it is not necessary for us to resolve this issue. The obligation of the Respondent is to advise clearly that such a right of appeal exists and state how it is to be exercised.

54. In all the circumstances we conclude that a percentage uplift of 20% is appropriate.

£ 4853.95 uplifted by 20% (£970.79) is £ 5824.74

55. Failure to provide written particulars of a change of terms of employment

This award has already been calculated as two weeks' pay

£519.23 x 2 = £1038. 46

Sub – total is £5824.74 + £1038.46 = £ 6863.20

56. Compensatory Award - Contributory Fault

By reference to section 123 (6) of the 1996 Act we are satisfied that by his actions the Claimant caused and contributed to his dismissal to the extent of 50 % and that the said conduct was culpable and blameworthy. Our detailed findings in this respect are set out in the Liability Judgment and in paragraph 23 above.

£6863.20 x 50 % is £3431.60

Final Total

The compensatory award £3431.60 plus the basic award of £ 778.85 gives a final total of £ 4210.45 payable by the First Respondent to the Claimant within 28 days of the date on which this Judgment and Reasons are sent to the parties.

Recoupment under the 1996 Regulations

The relevant information for use by the Department for Work and Pensions in any recoupment notice is as follows:-

1. The monetary award is £3431.60

2. The prescribed element is £ 3431.60

3. The non-prescribed element is nil. The amount by which the monetary award exceeds the prescribed element is nil.

4. The period to which the prescribed element is attributable is 27 June 2019 to 26 December 2019 (26 weeks)

Employment Judge B Elgot
Date: 11 October 2021