RESERVED

Case Number: 1303700/2019

EMPLOYMENT TRIBUNALS

Claimant: Barry Williams

Respondent: Aldi Stores Limited

HELD AT: Liverpool (by CVP) **ON:** 5 November & 19 November 2021 (in chambers)

BEFORE: Employment Judge Shotter

Members: Ms F Crane
Ms P Owen

REPRESENTATION:

Claimant: Mr L Bronze, counsel
Respondent: Mrs F Powell, solicitor

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

The respondent is ordered to pay to the claimant compensation for unfair dismissal in the sum of £26,180.74 consisting of an agreed basic award of £4304, and a compensatory award in the sum of £21,876.73 (taking into account the claimant's failure to mitigate after 10 July 2020 and a 20 percent deduction for contributory fault).

REASONS

The hearing

1. This has been a remote hearing by video which has been consented to by the parties. The form of remote hearing was Kinley CVP fully remote. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

2. The documents that the Tribunal was referred to are in a main bundle before it at the liability hearing, a supplementary bundle which includes a number of documents submitted in evidence during the final hearing, and a remedy bundle running to 187-pages, Morrison's Adoption Pay Policy, the claimant's witness statement signed and dated 25 January 2021 and supplemental witness statement signed and dated 18 January 2021.

3. Within the remedy bundle there are a number of documents produced from "Glass Door" that includes figures for salaries allegedly paid by various companies to individual unnamed employees. The Tribunal accepts the claimant's evidence that the figures cannot be relied upon, and may not be a true reflection of what people actually earned outside London. The Tribunal concluded that the "Glass Door" figures were unreliable as it could not be determined who was inputting the data and whether the figures allowed for regional variations, such as London weighting. The Tribunal has disregarded this evidence and concentrated on the advertisements relied upon by the respondent, concluding there were a number of vacancies, and the salaries a number of those vacancies attracted were unknown and could only have been established had the claimant sought further information and/or applied, which he did not.

4. The Tribunal also has before it the judgment and reasons running to 53-pages that sets out the oral judgment and reasons given to the parties dismissing a number of claims and finding in the claimant's favour that the first respondent had breached the implied term of trust and confidence sufficiently serious to amount to a fundamental breach. The claimant was unfairly dismissed and his claim for constructive unfair dismissal brought against the first respondent well-founded and adjourned to this remedy hearing. The reasons document has formed the basis of the Tribunal's findings in respect of this remedy hearing, in addition to the oral evidence given by the claimant under affirmation. The Tribunal has set out the relevant paragraphs of the reasons orally given, under the heading "Liability hearing" below.

5. In addition, the Tribunal was provided with separate documents consisting of written submissions and case law from both parties dealing with remedy for which the Tribunal is grateful. It has not reproduced all of this information below, however, the submissions and arguments have been taken into account.

6. The claimant is dyslexic and it was agreed with the parties that his partner Mr Webster would sit next to him in full view of the camera for the duration of this remedy hearing and he would assist the claimant finding the bundle pages and read out any document to which the claimant was referred on the basis that (a) he would not assist the claimant when giving evidence in any other way, and (b) if there is an issue either Ms Powell or Mr Bronze will immediately inform the Tribunal, who can then deal with it without delay. There were no issues.

7. The basic award has been agreed at £5250.00. There is no argument on the figures for loss of pension, loss of sales bonus and loss of productivity bonus. In the detailed

schedule of loss the claimant seeks past and future losses and a compensatory award capped at the statutory maximum. In the counter-schedule of loss the respondent calculates the claimant's compensatory award at £4362.44 on the basis of the claimant's failure to mitigate subject to a further reduction for contributory fault.

8. The Claimant was not entitled to state benefits due to his husband's earnings, and the recoupment regulations do not apply.

9. The issues as raised by the Respondent are under the following broad headings as confirmed by Mr Bronze in his skeleton argument. By agreement, the Tribunal is to decide the following issues:

9.1 What amount of compensatory award should be ordered?

9.2 The Respondent intends to rely on Polkey v AE Dayton Services Ltd [1987] ICR 142. Would the Claimant have been fairly dismissed in any event?

9.3 Contributory Fault

9.4 Failure to mitigate

10. Within the list of issues produced at the liability hearing the adjustment to the compensatory award pursuant to the statutory provision for making adjustments of up to 25 per cent in respect of breaches of the ACAS Code of Practice on Disciplinary and Grievance Procedures was included. This has not been an issue at the remedy hearing, the Tribunal has not heard submissions (either oral or written) and it has not made any findings or order in respect of adjustments made to the compensatory award to in respect of any beaches to the ACAS Code.

11. At the liability hearing the Tribunal found with reference to the claimant's evidence there were instances where the claimant's recollection could not always be relied upon. It has made some observations about the claimant's evidence at this remedy hearing as recorded below.

The liability hearing

12. The Tribunal has taken into account its findings following the liability hearing set out in a 53-page document, including but not exclusively, the following:

10.1 The claimant had worked hard for the first respondent for approximately a period of ten-years before his suspension, progressing to the position of store manager and he "truly loved" his job.

10.2 The claimant worked in a number of stores including the Norris Green store, which opened in June 2015. The claimant became the first store manager at Norris Green, which had a training academy on the same site. The claimant helped other managers open up 5 "flagship" new stores, which he would "formally hand over to the new store manager" once the stores were running smoothly. The Tribunal preferred the claimant's evidence that he was well-regarded by the respondent as a store manager, including assisting under-performing stores in his region as a 'store improvement ambassador" and when refitting in stores took place he acted as a 'store re-fit coordinator.' These were specific roles allocated to the claimant

who appeared to be well-regarded by the respondent, and this state of affairs continued until the performance of the stores for which the claimant was responsible dropped. This evidence is relevant to the claimant's experience and expertise, and this is reflected in the claimant's evidence that Aldi managers are sought by other supermarkets. This is relevant to mitigation.

10.3 It was the first respondent's culture to put a lot of pressure on managers. "Unbearable pressure "was sometimes placed by the store area manager, who were also under similar pressure, on store managers. All were under a "massive pressure" to perform well on the key performance indicators particularly store productivity, inventory and availability which transmuted into sales. This is relevant to the "Polkey no difference rule" ("Polkey") and a fair dismissal.

Smart time records

10.4 On 25 October 2018 Paul Seddon and the claimant had an update meeting and the removal of price cards is discussed. The third meeting dealt with Price Cards. The parties do not dispute that Paul Seddon told the claimant he did not believe his explanation for taking the price cards down, and pressurised the claimant to complete the hand-written statement because he knew the claimant was not telling the truth. The claimant also knew at the time he was not telling the truth. Paul Seddon believed the claimant had lied and the Tribunal found that he had. This is relevant to contributory fault.

10.5 It is undisputed the claimant spoke with Paul Seddon at the end of the day as recorded in the "Diary" when he confessed to telling employees to take price cards down, and the reason he had not told him the truth in the first place was "scared and don't feel safe in my job." This points to two things; first the claimant believed taking price cards was serious enough to put his job in jeopardy, and secondly, he was prepared to lie to an area manager about it, and confess later under the threat of losing his job for lying having signed a statement dated 25 October 2018 to the effect that he had not told the manager to take price cards down. This is relevant to contributory fault.

10.6 As at the 25 October 2018 the claimant admitted taking down price cards to affect the availability score so auditors going around the store would not notice there were price cards with no goods, which adversely affected the availability score for products, one of the important KPI's by which store managers were measured. The claimant promised not to take down price cards again and Paul Seddon agreed that it was the end of the matter. This finding was relevant to Polkey and contributory fault.

10.7 Paul Seddon provided a typed update note of the incorrectly dated 24 October meeting which should read 25 October 2018, setting out the claimant's explanation that "he was fearful for his position and felt pressure to achieve results so he was ensuring his availability scores were better by manipulation." There was no reference to the parties agreeing that once the claimant had admitted to taking down price cards and promised not to do it again, Paul Seddon believed him and the matter would go no further…As far as the claimant was concerned the matter was resolved, but Paul Seddon acted contrary to this because he did include removing price cards as a misconduct allegation within the disciplinary invite letter with the

intention of strengthening the case against the claimant. This finding was relevant to Polkey.

10.8 In oral evidence under cross-examination the claimant described **the" mistakes" he had made as" stupid and silly" [**the Tribunal's emphasis and relevant to contributory fault].

10.9 In cross-examination Paul Seddon explained he had included the removal of cards allegation because the claimant had lied, which was not credible given the agreement reached with the claimant took place after he had admitted lying and promised he would not take down price cards again. The Tribunal found as an agreement had been reached on the removal of price cards, which Paul Seddon reneged on…Tribunal concluded the investigation he carried out was not objective, not independent and slanted against the claimant. This was relevant to Polkey.

10.10 On 3 November 2018 Paul Seddon continued with his investigation into SmartTime hours recorded, and interviewed a third employee who stated her clocking out time had been adjusted by the claimant on 5 September 2018, and a fourth employee confirmed he had been instructed to take down price cards by the claimant, the claimant had changed his clocking in times to avoid a breach in the working time directives and staff "were unhappy following the recent inventories and the lighting strikes due to missing hours."

10.11 Paul Seddon interviewed a fifth employee on the 3 November 2018 who confirmed price cards were taken down on the claimant's instructions and he had adjusted staff clocking out times. **There was…a serious issue concerning recorded working times, unlawful deduction of wages and breach of the Working Time Regulations"** [the Tribunal's emphasis]. This finding was relevant to contributory fault.

10.12 The claimant was subjected to disciplinary proceedings for alleged misconduct that is otherwise widely accepted practice at the First Respondent in respect of the removal of price cards only. The SmartTime records and underpayment of staff were matters that could reasonably proceed to a disciplinary hearing, however the second respondent did not carry out an objective investigation into this allegation.

10.13 The claimant provided little explanation for the SmartTime records during the investigatory meeting, and his explanations of the allegations were ignored, the second respondent instead choosing to build a case against the claimant as evidenced in the email sent to Mathew Lipscombe that "I anticipate BW's explanations to be on the technicalities of SmartTime so I have attempted to provide suitable examples and investigations to counter this."

10.14 The Tribunal found the second respondent had exaggerated the alleged misconduct against Claimant to force the Claimant out either by a gross misconduct dismissal or encouraging the Claimant to resign, for example, the removal of price cards had bene resolved and yet it was raised as a disciplinary allegation.

The claimant's performance

10.15 Mathew Lipscombe in conjunction with Paul Seddon [was] looking to exit the claimant out of the business continued, and the reasons go right back to Mathew Lipscome's belief that the claimant was one of the worst performers in the business and Paul Seddon has found material to substantiate that belief, which included the claimant removing price cards to improve the KPI and allegedly underpaying employees to improve the stores productivity…**One way or another, whether it be through performance management or misconduct the claimant's exit out of the business was inevitable**" [the Tribunal's emphasis].

62.1 On the 9 November 2018 an invitation to disciplinary hearing was sent to the claimant…The letter set out a number of allegations relating to the claimant including "Adjusting employee's hours by editing their clocking out time. This resulted in employees being underpaid for the hours they worked. In our update on 30 October 2018, you were unable to provide satisfactory explanations for these adjustments…" The claimant had "instructed management to manipulate the store's availability by moving price cards to improve results…This is in breach of the Store Manager's job description 4. Objectives To achieve the highest sales possible in their store…due diligence, procedural compliance and accurate accounts." The claimant was alleged to have falsified company documents. This was relevant to Polkey and contributory fault.

63 With reference to the Tribunal's conclusion, the following are relevant, but not exclusively.

63.1 Adjustments to the 'Smart Time' working time records had serious implications on other employees who were underpaid as a result. The first respondent had a contractual obligation to ensure staff were paid correctly and did not suffer an unlawful deduction of wages; it had a duty to investigate, raise the issue with the claimant and invite the claimant to a disciplinary hearing when it became apparent there was a case to answer. There were seven instances of five members of staff. whose hours had been adjusted from 5 September to 21 October 2018 in a small store with less than twenty staff.

63.2 The claimant was under a contractual obligation to accurately record staff hours, as conceded by the claimant when giving oral evidence. As found by the Tribunal, the contractual Rules of Conduct set out within the Employee Handbook included the falsification of hours form" which could result in dismissal. She submitted the claimant had intentionally adjusted the data to make the store more profitable, and the adjustments would have an accumulative effect. This argument was not entirely clear to the Tribunal; however, it is beyond doubt the claimant on his admission adjusted the data to ensure his store would not be seen to be breaching the Working Time Regulations. It is correct that a number of the employees had "clocked out" and the claimant's explanation that he adjusted their hours because they had not clocked out was not supported by the contemporaneous documentation.

63.3 The Tribunal found the allegation was included specifically to bolster the Smart time allegation **which cumulatively would result in dismissal, as the Smart time allegations were insufficient in themselves to result in a summary dismissal.**

In arriving at this decision, the Tribunal took cognisance of the fact that the **first and second respondent ignored the Working Time breaches unearthed when it became apparent one employee's timecard had been changed to avoid a breach of the Regulations, and the claimant promised to add that employee's hours back when the Working Time Regulations were not breached, and had failed to do so** [the Tribunal's emphasis].

63.4 Witnesses giving evidence on behalf of the claimant confirmed removing price cards was not allowed. The Tribunal found on the balance of probabilities that if a store manager was performing well the removal of price cards was ignored, but if there were performance issues and the store was struggling, removing store cards would be used together with other allegations of underperformance/misconduct to either dismiss a store manager or the mechanism by which a confidential compromise agreement would be reached. Store managers are well-paid for the pressure they are put under, "Aldi isn't for everyone being such a demanding job" and if the store manager was struggling the directors employed by the first respondent would raise issues ranging from historic non-performance, absence and sickness levels, stock availability and staff complaints as it had done in the case of the claimant. If a store manager and the store were performing "directors turned a blind eye if the store was performing for them."

63.5 The respondent's contractual disciplinary policy appears to advocate an informal approach first in letter an in spirit but this was evidently not the case with the claimant. He gave assurances that issues with Price Cards would not happen again and at face value the second respondent accepted this only to discipline the claimant on the very act of alleged misconduct the agreement had been reached. Mrs Powell submitted that had the removal of price cards been a stand-alone issue this would have been addressed on an informal basis.

63.6 The Tribunal accepted the second respondent had a reasonable basis to investigate, but once the agreement had been reached on the price card change allegation, the second respondent's decision to renege on that agreement for no good reason, and include the allegation in the disciplainry invite letter, was an attempt to exaggerate the allegations and there was no reference by the second respondent to the informal approach he had taken earlier. This act of the second respondent also amounted to a breach of the implied term of trust and confidence.

63.7 The claimant understood that his defence at the disciplainry would not succeed and he could leave his employment with "nothing" after ten years-service. From the time of the first meeting through to suspension the second respondent acted in a heavy handed and oppressive fashion; Rentokil Ltd v Morgan EAT 703/95.

63.8 The Tribunal did not find the actions of Monica Heeneghan "entirely innocuous" given the claimant was a long-standing employee of ten years (and friend/colleague for five) with an unblemished record who had in the past been regarded a well-performing store manager sufficiently experienced to take the lead when opening new stores.

63.9 At the fourth update meeting the second respondent did not unfairly raise issues with the claimant's adjustments to the 'Smart Time' working time records;

they were serious matters that resulted in a number of unlawful deductions of wages and covering the fact the first respondent had breached the Working Time Regulations…The Tribunal does accept pressure was exerted upon the claimant to accept a severance package **when it was not certain he would be dismissed for the SmartTime allegations alone, the removal of price cards having previously been dealt with informally**. Mr Bronze is correct in his assumption that Monica Heeneghan was tasked to exist the claimant, one way or another, by Mathew Lipscombe and had she been aware the only allegation involved SmartTime (which she was not) dismissal at a disciplinary hearing was not a foregone conclusion [the Tribunal's emphasis].

63.10 The second respondent was justified in informing the Claimant that if he had been dishonest in his statement that he would be dismissed; the claimant had been dishonest and that remained the case until later on the 25 October 2018 when the claimant admitted he had not told the truth and had taken price cards down as alleged.

63.11 The insurmountable problem for the claimant was that he and the stores he managed underperformed for a period of time, and the second respondent genuinely believed he had "embedded a culture of taking sick leave" and he was one of the first respondent's worst performance, having been told as much by the claimant's area manager Kelly Dunne who reported the claimant operated a "mates club" and Mathew Lipscombe who informed the second respondent that the claimant "had been one of the worst performers" in 2017 and 2018 producing supporting figures.

63.12 Had the removal of price cards been an accepted practice as alleged by the claimant there would have no need for him to have lied to cover up the fact he was attempting to manipulate the availability scores. The Tribunal concluded that the claimant was aware removal of price cards was not allowed; he was also aware that the first respondent would turn a blind eye if it suited them to do so.

63.13 The context of the second respondent's actions remain rooted in the claimant's underperformance and conduct issues which the respondents were entitled to raise with an experience manager of ten years.

<u>The issues to be decided at this remedy hearing.</u>

<u>Mitigation</u>

<u>2019</u>

64 The effective date of termination was 26 February 2019 when the claimant resigned without giving notice. The claimant had been employed continuously from 3 September 2008 to 26 February 2019.

65 Approximately 2.5 weeks after his resignation the claimant signed an employment contract with Morrisons on 16 March 2019. His role was trading manager and not store manager, the position he had previously held with the respondent. He had less responsibilities and the contractual hours were reduced to 40 from the 48 per week he

had worked previously for the respondent, which made a difference to his quality in life bearing in mind he intended to start a family. The Morrisons salary was initially £40,000 gross per annum and the contract provided that employees could work and be paid for more hours. The Tribunal heard no evidence what the position was with the claimant and if he worked additional hours and was paid for them. The Tribunal concluded that he had not worked beyond the forty-hours a week as there was no evidence to the contrary.

66 Ms Powell submitted that the claimant's salary with the respondent was based on an average 48-hour week. It is the Respondents position that the claimant has failed to adequately mitigate his loss by obtaining employment at the same level and working the same amount of hours. The problem for the Tribunal is that the claimant was not cross-examined on the whether he could increase the number of hours he worked for Morrisons in line with the contract beyond 40-hours per week, and therefore it is unable to conclude the claimant failed to mitigate his losses by working 8 hours per week extra for Morrisons if those additional hours were available in the first place.

67 In early April 2019 the claimant applied for a store manager position with Lidl on the Wirral, which did not go forward as the position was pulled and the post no longer available. There is no documentary evidence the claimant applied for any other position until 21 February 2020 and the Tribunal finds that he did not.

68 In late 2019 Morrisons were involved in a restructure and the claimant accepted a new role of Meat and Fish manager with effect from 1 July 2020 at a salary of £41,464 backdated to 6 April 2020 on 40-hours a week. The claimant had less responsibility than his role with the respondent. The Tribunal noted that by the 6 April 2020 the claimant was in receipt of a salary close to the original salary he had earned with the respondent on a pro rata reduction of the hours with less responsibility as he was not the store manager, concluding the claimant was satisfied to remain in his new role.

69 In oral evidence the claimant stated he had applied for the role of operations manager as part of the restructure. The Tribunal was taken into account the pack produced by Morrisons, the reference to Manager Preference Forms, selection criteria and interviews that took place during the consultation. The claimant has not produced any documentation confirming he had unsuccessfully applied for the operations manager and there is no document confirming the outcome. The claimant maintains there was no documentation, evidence the Tribunal did not find to be credible on the balance of probabilities given the size of Morrisons and the contents of the Morrison's pack produced in the remedy bundle. The Tribunal also took into account the correspondence sent to the claimant by Morrisons, noting there is no contemporaneous correspondence referencing the claimant was invited to an interview for operations manager and why he was unsuccessful. The Tribunal has difficulty understanding why there was no paper trail, taking into account the existence of comprehensive consultation pack with various forms. It is not credible a large national supermarket going through a restructure would not have a paper trail. At the liability hearing the Tribunal found, despite Mr Bronze's submissions to the contrary, the claimant had not told the truth to his employer, and this raised a question mark over his credibility. Without supporting documents and in light of the claimant's assertion that they were not produced because they did not exist, on the balance of probabilities the Tribunal was not satisfied the claimant applied for the role of operations manager. In support of this, the Tribunal noted that the claimant had applied

for a total of four vacancies since his resignation, the first with Morrisons which was successful, and three with Lidl which were not for various reasons.

2020

70 On the 22 June 2020 a retail manager role was advertised. There was no information about salary or the retail sector. The claimant did not investigate.

71 On 23 June 2020 Morrison's advertised for a store manager on a competitive salary and benefits. The claimant did not apply.

72 On 28 June 2020 a store manager vacancy in Liverpool was advertised for a store manager in a large supermarket. No salary details were given. The claimant did not investigate and did not apply. the claimant's suspicion was that the pay for a store manager may be lower than a comparable position in either the respondent or Lidl. The Tribunal found there was nothing stopping the claimant from applying and establishing the salary.

73 On 8 July 2020 Iceland advertised for a store manager with no salary details. The claimant did not apply. The claimant gave evidence that Iceland paid their store managers less than other supermarkets, but produced no supporting documentation.

Morrison's store manager role 23 June 2020

74 Morrison advertised a store manager role based in Liverpool at a "competitive salary" on 23 June 2020 which the claimant did not apply for. In oral evidence the claimant stated he had lost confidence and did not apply for the role; the Tribunal did not find this explanation credible. The claimant had emphasised to it his experience and track record when giving evidence to the Tribunal at the liability hearing (see above), he had obtained alternative employment with Morrisons in a very short time period following resignation. The Tribunal concluded there was nothing stopping the claimant from applying for the position of store manager, and it was unreasonable the claimant did not apply given his ten years-experience in the industry, coupled with his experience at Morrisons.

75 The claimant in oral evidence indicated that he had had shown interest in Morrison's Pathways Scheme under which he had not been assessed despite having been employee for over 2-years. There was no documentation produced in relation to this or why he had not been assessed in the twelve-month period that lapsed before the Covid pandemic. On the balance of probabilities the Tribunal concluded that the claimant, prior to the pandemic, had not actively applied to be put on the Pathways Scheme, and there was no evidence he had been pursuing it assiduously. The Tribunal notes that the claimant has not even produced any documentation, for example, an email to his line manager confirming his interest in being put on the Pathways Scheme when taking up his employment, on, before or after the reorganisation, after the Covid Pandemic lockdown and before he went off adoption leave.

10 July 2020 Morrison's advertisement.

76 On the 10 July 2020 Morrisons advertised the position of operations manager, which the claimant had not applied for because he was not looking and had not seen it. The Tribunal noted the claimant's evidence that he had previously applied for operations manager role during the restructure and it must follow that the claimant, on his own evidence, was of the view the role was suitable. The claimant had stopped looking for alternative employment for a substantial period of time, and his lack of action was unreasonable and so the Tribunal found The claimant explained in oral evidence he had not been looking because he was concentrating on his new role in the meat and fish department. The Tribunal found on the balance of probabilities that the claimant had decided early on working for Morrison's in a less responsible position suited his lifestyle, with the reasonable pay and substantial reduction of hours against a backdrop of starting a family/adopting a baby for which the claimant was to have the primary responsibility and take adoption leave for a period of 12-months to which he was entitled under Morrison's Adoption Pay Policy.

77 The respondent referred the Tribunal to a job advertised on behalf of Sofology dated 16 June 2020. The Tribunal accepted the claimant's evidence that the role was not suitable for the claimant as he had no experience in retailing furniture.

78 It was unreasonable for the claimant not to apply for the Morrison's store manager position on 23 June 2020, or the Iceland store vacancy on 8 July 2020 which may have not been suitable depending on salary, the claimant's evidence being Iceland Stores paid less than Aldi and Lidl. The claimant did not email to find out the salary, and the Tribunal concluded this was because he was happy working for Morrisons with reduced responsibility and reduced hours. Had the claimant remained employed by the respondent he would have to have put in a full days extra work to meet his contractual obligations.

2021

79 In 21 February 2021 the claimant applied for two vacancies in Lidl at the Bolton and Liverpool stores. The claimant was short listed on the Bolton vacancy, and came a close second to the successful candidate. As the claimant was unsuccessful he was unable to apply to Lidl for a further 6-months, which covered the period when the UK was in full-blown Covid and the limitations that occurred in recruitment as a result. The claimant admitted he stopped looking for alternative employment.

80 With reference to the area manager role vacancy for the Coop advertised on 20 March 2021, the salary figure was between £50,000 to £60,000 which the claimant could have applied for. The Tribunal did not accept the claimant's evidence that he did not have the necessary skills. As found by the Tribunal at liability stage, the claimant worked in a number of stores for the respondent. He was first store manager at Norris Green, which had a training academy on the same site. The claimant helped other managers open up 5 "flagship" new stores, which he would "formally hand over to the new store manager" once the stores were running smoothly. He assisted under-performing stores in his region as a 'store improvement ambassador" and when refitting in stores took place acted as a 'store re-fit coordinator.' The roles allocated to the claimant by the respondent

are key responsibilities over and above those of a store manager. The claimant also had been mentoring new store managers and had come from the same retail industry as the Coop. The advert does not seek applications from applicant who already hold the position of area manager, and the claimant at the liability was keen to tell the Tribunal about his experience and excellent employment record. The Tribunal concluded the claimant did not want the extra responsibility and travel entailed in the role of area manager, and therefore he did not apply.

81 On the 20 March 2021 The Co-Operative Group advertised for an area manager in Wigan and Manchester at a salary of £50,000 – 60,000 plus car and benefits. The claimant did not apply, despite his experience and expertise.

82 Tesco advertised on 19 April 2021 and Iceland advertised on 17 April 2021 for a mid-senior level the claimant did not apply for. The amount of salaries are unknown. The claimant did not apply.

83 On 21 April 2021 Morrisons advertised for retail stores team management, work level 3, and the Tribunal accepted the claimant's evidence that this was the same level as the role he held with Morrisons and it was not suitable.

84 On the 7 May 2021 Lidl advertised for a deputy store manager £30,000 to £38,000 and the Tribunal accepts the claimant's evidence that it was not suitable. However, Lidl then advertised for a store manager on a salary of £41,000 to £53,000 per annum on a 47.5 hour and 40-hour contract. The claimant stated he did not apply because he was on "maternity leave" 7-days before the baby arrived, and the job would have been "ideal." The Tribunal does not think it was not unreasonable for the claimant to stop applying for external jobs due to adoption leave, and it accepts applicants for vacant positions in other companies would find it more difficult to succeed when on maternity/adoption leave compared to applicants who were in the position to take up the role without any delay. In addition, it is undisputed the claimant would also have to repay some of the adoption leave pay, on a sliding scale, if he resigned from Morrisons. However, the same point cannot apply for any Morrison vacancies as he would not be required to repay Morrison back adoption leave pay.

85 Iceland advertised for a store manager on the 10 May 2021; the claimant did not apply.

86 The claimant took adoption leave in May 2021, his daughter arrived on 20 May 2021 and he has taken on the responsibility of looking after her in during the 12-month adoption leave so his partner can continue working. In evidence the claimant confirmed his partner could stay at home for some of the period if required to do so.

Conclusion: applying the law to the facts

87 Section 123 Employment Rights Act 1996 states the following:

> *(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 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) […]

(3) […]

(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…

Polkey "no difference rule."

88 In *Polkey v AE Dayton Services Ltd [1987] IRLR 503*, the House of Lords stated that the compensatory award may be reduced or limited to reflect the chance that the claimant would have been dismissed in any event and that the employer's procedural errors accordingly made no difference to the outcome.

89 Mr Bronze accepted that it is not in dispute the principle of *Polkey* can apply to cases of constructive dismissal; *Gover and others v Propertycare Ltd* [2006] EWCA Civ 286. He argued that case relates really to purely procedural findings, it therefore has no applicability here. The Tribunal did not agree; the Polkey principle can apply to both procedural and substantive unfairness and in many cases it is difficult to see the distinction when carrying out the inquiry into what a particular employer would have done, i.e. the respondent as opposed to a hypothetical employer acting fairly and reasonably.

90 Ms Powell submitted that the issue for the Tribunal was whether if there had been a fair disciplinary hearing the result would still have been a dismissal: *Whitehead v Robertson Partnership [2004] UKEAT/0378/03.* The Tribunal agreed that had there been a disciplinary hearing the result would still have been dismissal as the claimant's dismissal was inevitable which was why he resigned. The issue was whether such a dismissal would have been fair and for the reasons stated above, the Tribunal concluded on the balance of probabilities that it would not have been given the respondent's catalogue of failures and its different attitude towards managers who performed well and those who did not.

91 The legal tests are not in dispute and have been succinctly set out by Mr Bronze in his Skeleton Argument. The test as per *Whitehead v Robertson Partnership* [2004] UKEAT/0378/03 is the Tribunal has to ask itself both if there had been a disciplinary hearing would it be fair but then also, if the hearing had been fair whether the outcome would have been dismissal. All of the evidence is to be examined which naturally includes that of the claimant as per *Ventrac Sheet Metals Ltd v Fairly UKEAT/0064/10*. There must be evidence to support a Polkey reduction and that burden is squarely on the employer as per *Compass Group plc v Ayodele* [2011] IRLR 802.

92 Mr Bronze submitted that in so far as conduct allegations are concerned no reasonable employer could have fairly dismissed the claimant given his disciplinary record and length of service. Accordingly, there is no need to go through the detailed analysis in *Software 2000 Ltd v Andrews and others* UKEAT/0533/06 as advocated by the Respondent. This, it is suggested, is made apparent in *Jagex Ltd v McCambridge* UKEAT/0041/19.

93 Ms Powell relied upon the quote *"The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice".* Mr Bronze argued the quote relied upon by the respondent in no way demonstrate that the sanction of dismissal would have been fair. It is a crass dangerous assumption to equate dismissal with fairness as espoused by the Respondent. This is not least because the claimant had not had an adequate chance to explain his responses to the allegations in full. The respondent thereafter attempts to shift course and try its luck with an argument that the claimant's "capability" would lead to his dismissal. Mr Bronze submitted this is a "far-fetched and highly speculative territory." The Tribunal agreed.

94 Applying the analysis set out in *Software 2000* referred to above, Mr Justice Elias, the then President of the EAT, having reviewed all the authorities on the application of Polkey, summarised the principles to be extracted which included:

94.1 in assessing compensation for unfair dismissal, the employment tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal.

94.2 if the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee (for example, to the effect that he or she intended to retire in the near future)

94.3 **there will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made.** Whether that is the position is a matter of impression and judgement for the tribunal [the Tribunal's emphasis].

94.4 however, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and **it must appreciate that a degree of uncertainty is an inevitable feature of the exercise**. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence [the Tribunal's emphasis].

94.5 a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can effectively be ignored.

95 Taking into account the finding of facts set out above including the "massive pressure to perform," the steps taken by the claimant to avoid a dismissal including not telling the truth to a manager and the respondent's decision to deal with the taking down of price cards informally, the claimant's admission that he had made mistakes described by him

as “stupid and silly” and the Tribunal’s finding that the investigation was “not objective, not independent and slanted against the claimant” this was one of those cases “where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made.”

96 With reference to the Smart-Time hours the Tribunal had found there was “a serious issue concerning recorded working times, unlawful deduction of wages and breach of the Working Time Regulations for employees on minimum wage caused by the claimant’s instructions to adjust staff clocking out times…matters that could reasonably proceed to a disciplinary hearing, however the second respondent did not carry out an objective investigation into this allegation” The claimant provided little explanation for the SmartTime records during the investigatory meeting, and his explanations of the allegations were ignored, the second respondent instead choosing to build a case against the claimant having exaggerated the alleged misconduct against Claimant to force the Claimant out either by a gross misconduct dismissal or encouraging the Claimant to resign, for example, the removal of price cards had been resolved and yet it was raised as a disciplinary allegation.”

97 Elias P in *Software 2000* clarified: ‘The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with **sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice**. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise’ [the Tribunal’s emphasis].

98 The Tribunal, taking into account the guidance set out above, concluded there were limits to the extent to which it can confidently predict had the disciplinary fairly taken place and/or the claimant been subject to a performance improvement plan. There is strong evidence that had the claimant not resigned he would have been dismissed, however, the Tribunal is not satisfied that the claimant would have been fairly dismissed in any event, given the respondent’s agreement to deal with the removal of the price cards outside the disciplinary process, and the lack of importance given to the impact of the changes made to Smart-Time records which resulted in employees being underpaid for the hours worked and breaching the Working Time Regulations without a proper record being kept as found by the Tribunal at the liability hearing. The Tribunal recorded it had taken “cognisance of the fact that the first and second respondent ignored the Working Time breaches unearthed when it became apparent one employee’s timecard had been changed to avoid a breach of the Regulations, and the claimant promised to add that employee’s hours back when the Working Time Regulations were not breached, and had failed to do so.”

99 Mr Bronze contended that in cases of constructive dismissal it will take a peculiar set of facts for a Tribunal to find that both Polkey and Contributory fault can apply. In *Zebrowski v Concentric Birmingham Ltd* UKEAT/0245/16 the Tribunal after finding that that an employee had been constructively dismissed, held that there was a 60% chance that the employee would have been dismissed after a fair procedure. However, the tribunal also limited the employee's compensation to 2 months from the date of his dismissal. The EAT rejected this approach. It held that for a tribunal to decide that an employee would have been dismissed after a specific period the tribunal must be certain (a 100% chance) that the employee would have been dismissed at that point. Once the tribunal had found that there was a 60% chance that the employee would have been dismissed had the employer gone about matters properly, it was not permissible to limit compensation to a fixed period in time.

100 In conclusion, taking into account the evidence before it at the liability hearing that other store managers who had been dismissed/compromised out, faced a raft of other allegations not limited to removing price cards or changing the Smart-Time records, and given the complexity of the situation coupled with the respondent's general attitude to underperforming store managers, while the claimant's dismissal was inevitable, it cannot be said it would be a fair dismissal either on the grounds of misconduct or for poor performance at some unknown future date. However, that is not to say that contributory fault does not apply in this case.

Contributory fault

101 The parties are in agreement the compensatory award may be reduced where the Claimant's conduct has contributed to the dismissal. The basic award may be reduced where the claimant's conduct before the dismissal is such that it would be just and equitable to reduce the award. 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" (section 123(6), ERA 1996).*

102 Ms Powell submitted any conduct on the part of the claimant can be taken into account in determining the extent of contributory fault, providing it is blameworthy and contributed in some way to the dismissal. The contributory conduct does not have to be the principal reason for dismissal as long as it was one of the reasons; *Robert Whiting Designs Ltd v Lamb [1978] ICR 89).*

103 Ms Powell relies on the decision in *Polentarutti v Autokraft Ltd* [1991] I.C.R. 757, the EAT held on a complaint of unfair dismissal, the concepts of constructive dismissal and contributory fault were separate and distinct. Even where no justifiable reason for the dismissal had been established by the employers under s.57(1) and (2) of the Act, there could still be a deduction in the compensatory award under s.74(6). Mr Bronze argued that with reference to the claimant being dismissed on the grounds of capability i.e. managed out of the business, given the claimant's track record, his promotions and the fact he had been employed for ten years there was nothing to suggest he would not be successful in moving forward. The Tribunal agreed that had the claimant been the subject of performance management (which takes time) it cannot be said, one way or another, that the claimant's personal performance would not have improved and other reasons established for the underperformance of the stores he managed e.g. the actions

of deputy managers in his absence. Turning to the allegations of misconduct, the Tribunal on the balance of probabilities preferred Ms Powell's submissions to the effect that there was a causal connection between that i.e. moving around the smart cards, and the claimant contributing towards his constructive unfair dismissal.

104 Ms Powell proposed the basic and compensatory awarded should be reduced to reflect the Claimant's contributory conduct for the following reasons. The claimant is an experienced store manager, he knew removal of price cards and adjusting hours was prohibited and in breach of his contract. Further, it is not the case that the above conduct (specifically the adjustment of hours) is commonplace and in any event as store manager he should lead by example. The claimant is both culpable and blameworthy. The respondent must have trust and confidence in their managers to adhere to their policies and procedures and implement these good practices in store. This is in the benefit of all employees not just the claimant in isolation. The Tribunal agreed as reflected in the findings made following the liability hearing.

105 Mr Bronze submitted that Tribunals should hesitate to reduce compensation by 100% which is tantamount to the position the Respondent advocates. Reference was made to *Frew v Springboig St John's School* UKEATS/0052/10 whereby despite the seriousness of the allegations (namely a teacher assaulting a student) the Tribunal's reduction in award was overturned as it had failed to take account of mitigating factors

106 The Tribunal was referred to the well-known decision in *Nelson v BBC (No.2) [1979] IRLR 346 (CA)* the Court of Appeal set out three factors that must be present for the contributory award to be reduced:

The claimant's conduct must be culpable or blameworthy.

It must have actually caused or contributed to the dismissal.

The reduction must be just and equitable.

107 Any conduct on the part of the claimant can be taken into account in determining the extent of contributory fault, providing it is blameworthy and contributed in some way to the dismissal. The contributory conduct does not have to be the principal reason for dismissal as long as it was one of the reasons- *Robert Whiting Designs Ltd v Lamb [1978] ICR 89.*

108 Ms Powell submitted that any basic and compensatory awarded should be reduced to reflect the Claimant's contributory conduct for the following reasons. The Claimant is an experienced Store Manager, he knew removal of price cards and adjusting hours was prohibited and in breach of his contract. Further, it is not the case that the above conduct (specifically the adjustment of hours) is commonplace and in any event as Store Manager he should lead by example. The Claimant is both culpable and blameworthy. The Respondent must have trust and confidence in their managers to adhere to their policies and procedures and implement these good practices in store. This is in the benefit of all employees not just the Claimant in isolation. The Claimant did not attend his disciplinary in order to put forward his explanation in relation to the allegations. He denied himself the opportunity of an appeal against any disciplinary decision had the allegations been upheld. By failing to attend the disciplinary and any subsequent appeal

it is the Respondent's case that he contributed to his own dismissal because he did not afford himself the opportunity to have his explanations heard.

109 Mr Bronze submitted the test to be applied it is averred is to be found in *Steen v ASP Packaging Ltd* UKEAT/23/11:

109.1 What was the conduct which is said to give rise to possible contributory fault?

109.2 Was that conduct blameworthy, irrespective of the employer's view on the matter?

109.3 For the purposes of s123(6), did the blameworthy conduct cause or contribute to the dismissal?

109.4 If so, to what extent should the award be reduced and to what extent would it be just and equitable to reduce it?

110 Mr Bronze argued that it is plain that the Respondent's argument simply fails to get off of the ground. The Tribunal did not agree that the respondent has failed to demonstrate with any specificity how precisely the conduct which entitled the Claimant to resign is linked to the dismissal as submitted with Mr Bronze relying on *Nixon v Ross Coates Solicitors and another* UKEAT/0108/10 in which the EAT overturned the tribunal who had had erred in failing to consider whether the conduct in question had actually contributed to the dismissal. The tribunal had simply adopted a broad-brush approach to what it thought was just and equitable. In the case of Mr Williams, he was facing disciplinary proceedings where he believed, with good reason, that dismissal for misconduct would follow and he resigned partly because he believed the process would be unfair and he did not want to besmirch his good employment record. The Tribunal's findings of facts records how the conduct which entitled the claimant to resigned was inextricably linked to the dismissal for misconduct which would have inevitably followed had the claimant not resigned.

111 Mr Bronze submitted that given that the Tribunal has determined that the constructive unfair dismissal of the Claimant was caused by the actions of Monica Heenighan leaning on the Claimant to resign it has to follow that he was not constructively dismissed on the grounds of gross misconduct. The Tribunal did not agree, and Mr Bronze appears to be ignoring its findings that on the 9 November 2018 an invitation to disciplinary hearing was sent to the claimant. The letter set out a number of allegations relating to the claimant including "Adjusting employee's hours by editing their clocking out time. This resulted in employees being underpaid for the hours they worked. In our update on 30 October 2018, you were unable to provide satisfactory explanations for these adjustments…" The claimant had "instructed management to manipulate the store's availability by moving price cards to improve results…This is in breach of the Store Manager's job description 4. Objectives To achieve the highest sales possible in their store…due diligence, procedural compliance and accurate accounts." The claimant was alleged to have falsified company documents." Taking into account the guidance set out in *Steen* referred to above, this is the conduct which is said to give rise to possible contributory fault, it is blameworthy, irrespective of the employer's view on the matter and contributed to the dismissal and so the Tribunal found.

112 The Tribunal concluded following the liability hearing that adjustments to the 'Smart Time' working time records had serious implications on other employees who were underpaid as a result. The claimant was under a contractual obligation to accurately record staff hours, as conceded by the claimant when giving oral evidence. As found by the Tribunal, the contractual Rules of Conduct set out within the Employee Handbook included the falsification of hours form "which could result in dismissal". The claimant on his admission adjusted the data to ensure his store would not be seen to be breaching the Working Time Regulations. It is correct that a number of the employees had "clocked out" and the claimant's explanation that he adjusted their hours because they had not clocked out was not supported by the contemporaneous documentation.

113 The Tribunal also found at liability stage that at the fourth update meeting the second respondent did not unfairly raise issues with the claimant's adjustments to the 'Smart Time' working time records; "**they were serious matters that resulted in a number of unlawful deductions of wages and covering the fact the first respondent had breached the Working Time Regulations**" The second respondent was justified in informing the Claimant that if he had been dishonest in his statement that he would be dismissed; the claimant had been dishonest and that remained the case until later on the 25 October 2018 when the claimant admitted he had not told the truth and had taken price cards down as alleged. Had the removal of price cards been an accepted practice as alleged by the claimant there would have no need for him to have lied to cover up the fact he was attempting to manipulate the availability scores. The Tribunal concluded that the claimant was aware removal of price cards was not allowed; he was also aware that the respondent would turn a blind eye if it suited them to do so. The Tribunal found at the liability hearing that the context of the respondent's actions remain rooted in the claimant's underperformance and conduct issues which the respondents were entitled to raise with an experience manager of ten years.

114 Mr Bronze submitted that there is a specific requirement for the "conduct" to meet the threshold of being explicitly culpable or blameworthy which was made plain in *Sanha v Facilicom Cleaning Services Ltd* UKEAT/0250/18 (25 February 2020, unreported). With particular respect to blameworthiness, Ms Powell in written submission relies upon the removal of price cards and adjusting smart time hours. It is well established that there should be no reduction in compensation unless the employee's conduct was at least to some degree blameworthy as per *Morrish v Henlys (Folkestone) Ltd* [1973] IRLR 61. The Respondent's own view is not determinative in this respect. The Tribunal concluded the claimant's conduct with regards to the time cards, adjusting smart time hours and not telling the truth to his line manager with the objective of massaging the figures and hiding the stores (and his own failures) with a view to keeping his job and not being performance managed/compromised out, was both culpable and blameworthy conduct.

115 Mr Bronze argued that it is entirely inappropriate for mitigating factors not to be taken into account as per *Frew v Springboig St John's School* (above). The Tribunal agreed, concluding mitigating factors do not assist the claimant; his ten years of service and considerable experience have worked against him. There were no extenuating circumstances and the claimant was entirely blameworthy when he changed the hours on smart time to hide the fact that employees on minimum wage were breaching the Working time Regulations, which he, as the store manager, was responsible for.

116 Mr Bronze argued as the Respondent has not demonstrated that anyone else was disciplined for removing price cards despite the invitation from the Claimant to do so it follows therefore that the matter cannot reasonably construed as blameworthy misconduct. The Tribunal did not agree. The claimant's own witnesses confirmed the position, and the Tribunal found as recorded in the reasons that the claimant spoke with Paul Seddon at the end of the day as recorded in the "Diary" when he confessed to telling employees to take price cards down, and the reason he had not told him the truth in the first place was "scared and don't feel safe in my job." This points to two things; first the claimant believed taking price cards was serious enough to put his job in jeopardy, and secondly, he was prepared to lie to an area manager about it, and confess later under the threat of losing his job for lying having signed a statement dated 25 October 2018 to the effect that he had not told the manager to take price cards down. In short, the claimant knew taking down price cards was against the rules and he could end up in a disciplinary.

117 The Tribunal preferred Mr Bronze's submissions that the respondent's argument to the effect the Claimant somehow contributed to his constructive unfair dismissal because he purportedly "*denied himself the opportunity of an appeal against any disciplinary decision had the allegations been upheld. By failing to attend the disciplinary and any subsequent appeal it is the Respondent's case that he contributed to his own dismissal because he did not afford himself the opportunity to have his explanations heard*" is misplaced and misconceived. Post-dismissal conduct must not be taken into account. Section 123(6) Employment Rights Act 1996 provides that the compensatory award may be reduced if the dismissal was "to any extent caused or contributed to by any action" of the employee, refers to the employee's conduct prior to the dismissal; *Soros and another v Davison and another* 1994 ICR 590, and *Mullinger v Department for Work and Pensions* UKEAT/0515/05. Further, the Tribunal observers on the respondent's argument any employee who resigns before a disciplinary process is concluded will be deemed to have contributed to his or her dismissal which cannot be the case; employees actions post dismissal are irrelevant. Conduct must be shown to have actually caused or contributed to the employer's decision to dismiss in order for a reduction of the compensatory award on the ground of contributory conduct to be valid.

118 Mr Bronze relied on *Hoover Ltd v Forde* [1980] ICR 247 which held that the employee had no obligation to exercise his right of appeal (notwithstanding encouragement from the employer to do so as 'there was nothing to lose') and as such not doing so did not contribute to the dismissal. It follows therefore that the Claimant's actions after his resignation fall into the same category. S.123(6) requires the Tribunal to focus on the actual conduct of the claimant and whether that conduct, if blameworthy, caused or contributed to the actual dismissal and the Tribunal concluded that it had for the reasons already stated with reference to the claimant's conduct known to the respondent at the time of the resignation, and not by the fact that having resigned he took no part in the disciplinary process.

119 In conclusion, S.123(6) ERA states: "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" [the Tribunal's emphasis]. Having regard to the extent to which the claimant's contributory conduct contributed to the dismissal by his blameworthy conduct the Tribunal decided that a 20 per cent reduction was just and

equitable to the entire compensatory award taking into account its finding that it was the respondent's culture to put "unbearable" and "massive pressure" on him, and he had acted as he did to protect his position in the knowledge that underperforming managers of underperforming stores were forced out of the business one way or another as found by the Tribunal at liability stage. The claimant had been employed for ten years with an excellent employment record until the events which led to his resignation, and he knew that whilst his actions were against the rules, the respondent would chose to ignore them if it suited it i.e. if the claimant and the store he managed were good performers. The Tribunal discussed awarding a higher percentage reduction, which it would have done had it not been for the particular circumstances of this case including the amount of pressure put on the claimant. The respondent was in fundamental breach of he implied term of trust and confidence and a 100 per cent reduction sought by the respondent is inappropriate and was not just and equitable taking into account all of the circumstances.

120 A reduction on the ground of the employee's conduct must be made 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' — S.122(2) ERA. It is unnecessary that the employee's conduct should have caused or contributed to the dismissal for the purposes of making deductions from the basic award. The tribunal a broad discretion to reduce the basic award where it considers it 'just and equitable' to do so, and it concluded that a reduction of 20 percent was applicable for the reasons stated above.

Mitigation

121 Ms Powell submitted that section 123(4) of the ERA 1996 requires the Claimant to mitigate their loss and the Claimant will be expected to explain to the Tribunal what actions they have taken by way of mitigation. She argued that this includes looking for another job and applying for available state benefits (which the Claimant failed to do from 26 February to 25 March 2019).

122 The claimant was not entitled to state benefits.

123 The respondent's position that the claimant has failed to mitigate his loss adequately. He commenced a position as a Trading Assistant reporting to the Store Manager with Morrisons on 25 March 2019 earning £40,000 (subject to annual review) working 40 hours a week and he was also entitled to the colleague bonus scheme and pension scheme. He has therefore failed to mitigate his loss sufficiently by accepting a lower position role with a lower salary and the Respondent should not be expected to compensate the Claimant for his choice. It is the Respondent's position that the Claimant has acted unreasonably in not seeking a position as Store Manager at a commensurate salary. The Tribunal took the view that the claimant could not be criticised for accepting the role of trading assistant within less than a month after his resignation, and it does not accept the respondent's submission that the claimant failed to mitigate from 26 February 2019. It takes time for alternative employment to be found.

124 The respondent accepted it pays above the market rate. The Claimant confirmed he was paid at the very top band of the senior manager pay scale in his current position as

Trading Manager . Ms Powell submitted that because of his level of experience this indicates he could have similarly received a salary in a higher band in an alternative role too. The Tribunal concluded that the claimant would have been aware at the outset that being paid at the top end of the band meant he would need to obtain a higher level position to earn the same or exceed his original earnings with the respondent.

125 Mr Bronze has set out the applicable law in his written submissions which was not disputed by Ms Powell. He referred the Tribunal to *Gardiner-Hill v Roland Berger Technics Ltd 1982 IRLR 498, EAT*, in which the EAT said that where there is a substantial issue as to failure to mitigate, an employment tribunal should ask itself:

(i) what steps were reasonable for the claimant to have to take in order to mitigate his or her loss;

(ii) whether the claimant did take reasonable steps to mitigate loss; and

(iii) to what extent, if any, the claimant would have actually mitigated his or her loss if he or she had taken those steps.

126 The burden of proof is on the employer in respect of all three above.

127 Mr Bronze submitted the Tribunal should not apply too demanding a standard on the claimant, a victim of a wrong and particularly in this case, through no fault of his own: *Waterlow & Sons Ltd v Banco de Portugal* [1932] UKHL 1, *Wilding and Ministry of Defence v Mutton* [1996] ICR 590, *Cooper Contracting Ltd v Lindsey* UKEAT/0184/15 and *Fyfe v Scientific Furnishings Ltd* [1989] ICR 648. As decided by the Tribunal above, it did not accept there was no fault on the part of the claimant, and the Tribunal was satisfied that the respondent had put forward sufficient evidence to prove that the claimant has failed to mitigate by the 10 July 2020 having unreasonably failed to apply for the vacancy in Morrisons advertised on 10 July 2020 and having unreasonably stopped looking for alternative work before that as set out above. The Tribunal found, given the claimant's experience and the value other supermarkets placed on Aldi trained managers, had the claimant not stopped looking and applied for the Morrison's role (or other store/operation managers vacancies) he would, on or before the 10 July 2020 on the balance of probabilities have gained employment at a higher rate of pay. From that point onwards the loss flowing from the constructive unfair dismissal would have been extinguished or reduced.

128 In oral evidence the claimant admitted that there was a period when he did not look for alternative employment up to and including July 2020 for a period of months. His actions were unreasonable in this regard, and it is not just and equitable for the respondent to pay the differential in wages when the claimant was happy to remain in a less demanding role, on substantially reduced hours and not apply for a number of vacant roles recorded above, particularly the role advertised by Morrison's on 10 July 2020 that would have increased the claimant's salary to such an extent that the differential would have been extinguished.

129 The Tribunal is satisfied, rejecting the submissions of Ms Powell, that when the claimant accepted the employment with Morrison's shortly after resigning, and in the aftermath of surviving the reorganisation, there was no failure to mitigate, despite its reservations on

the claimant's evidence concerning what steps he had taken to improve his position and salary, as recorded above in the findings of facts. The Tribunal took into account the claimant's individual circumstances in deciding that he had acted unreasonable in not applying for a store manager/operations manager position in the supermarket retail industry taking into account background of Covid lockdown. It was not unreasonable for the claimant not to apply for vacancies during adoption leave. It is apparent from the evidence produced by the respondent there were a number of vacancies in the supermarket retail industry throughout this period, and the claimant limited his applications despite his considerable experience and qualifications for the roles. The Tribunal took the view that it was highly likely the claimant would have succeeded had he applied given his track record, including the work he had carried out in Morrisons, appreciating it could not categorically state the claimant would have been successful as a matter of certainty. The claimant had transferrable skills, and whilst the Tribunal accepted Sofology was not a suitable position (it offered lower pay) it did not accept the claimant's evidence that he was unable to work in any other area of retail apart from supermarkets, and he had failed not only to apply for vacancies within supermarkets but also other retail jobs and had thus not maximised his earnings.

130 Ms Powell submitted that the claimant has assumed that he will remain in his role as Trading Manager at Morrisons (and therefore fail to fully mitigate his ongoing loss) for a total of five years following the EDT, and to expect the respondent to pay the claimant for five years of losses in these circumstances is wholly unrealistic and unreasonable. The Tribunal agreed and given his experience accepted the claimant should have been able to secure a Store Manager or higher-level position within a reasonable timeframe on a commensurate salary at Morrisons and it would not take the Claimant 5 years' as set out in his Schedule of Loss.

131 Ms Powell referred to Morrison's "fast track to Store Manager" programme which states that if you *"join [Morrisons] as a Senior Manager and take part in our Store Manager development programme and you could find yourself managing a store in just nine months*". For those below senior manager level there is a pathway to a senior manager role which again suggests the promotion pathway is a lot quicker than alleged by the Claimant in his evidence. The LinkedIn profiles, she argued, also support this and show the time to secure a promotion to Store manager can vary between 8 months and 2 years 6 months as follows:

- a trading manager was promoted to store manager within 8 months at Morrisons
- a manager was promoted to store manager within 1 year and 11 months at Morrisons.
- a manager was promoted to store manager within 1 year and 6 months at Morrisons.
- At trading manager was promoted to store manager within 2 years and 6 months at Morrisons
- a trading manager was promoted to operations manager in 13 months and operations manager to store manager in 15 months at Morrisons.

13. Ms Powell in written submissions referred to information from LinkedIn showing at least two external candidates obtained jobs as Store Managers at Morrisons in the Liverpool area in November 2019 from Ikea and August 2020 from Iceland. Therefore, she argued, the Claimant was not precluded from applying for a higher position at Morrisons as Operations Manager or Store Manager. The Tribunal was not happy to rely on Linked in information without further evidence from individuals inputting the data, however the Claimant has shown no evidence that he has applied for these positions or that he is on the fast track scheme (with the exception of some periods during Covid lockdown) which was available to him in order to mitigate his loss.

14. Ms Powell made the point that the Claimant said during his evidence at the substantive hearing in February 2021 that he had obtained his new job very quickly because of his CV and Aldi. That is correct as recorded by the Tribunal. Ms Powell reminded the Tribunal of the claimant's evidence that the manager from Morrisons delivered his contract to his house so that he could start straight away. The Claimant also said because of his experience any other large supermarkets (he referred to Tesco and Asda) were keen to recruit. The Tribunal accepts Ms Powell's argument that it was reasonable to expect the claimant would have been able to secure a Store Manager position at another food retailer within a short timeframe and because of his experience at the higher level of the given pay grade, even taking into account the Covid lockdown.

132 In short, the respondent has met the burden of proof in showing that there were vacancies for the claimant to apply for, and giving the claimant the benefit of the doubt for the period between 26 March 2019 to the 10 July 2020, a period of 67 weeks, following the claimant acted unreasonably in not taking the step of applying for vacancies thereafter up until adoption leave, particularly the Morrisons role advertised on 10 July 2020.

133 In conclusion, the claimant mitigated his loss by accepting work on reduced hours at reduced pay and responsibilities with Morrisons, but he did not behave reasonably in failing to apply for a number of vacancies with other supermarket retailers in a period when the industry was booming as a result of Covid lockdown. On the balance of probabilities the claimant acted unreasonably when he failed to apply for a number of vacancies relied upon by the respondent, he had taken the decision to no longer look for higher paid management positions with a greater number of hours and more responsibility because it suited his lifestyle not to do so. The claimant acted unreasonably when he failed to apply for the management position on 10 July 2020 and his loss of earnings claim crystallised at that point.

<u>The losses</u>

134 The Tribunal has taken into account the schedule of loss and counter-schedule of loss produced by the parties for which it is grateful. The key figures have largely been agree depending pending resolution of the issues referenced above. The claimant earned £53,350 gross when employed by the respondent, £1025.56 per week gross and £844.62 net per week.

135 In addition the claimant was in receipt of a net average weekly sales bonus of £57.05 and productivity bonus of £42.74. These figures have been agreed by the respondent in accordance with the counter-schedule of loss.

136 The claimant was in receipt of pension benefits totalling £42.74 per week as agreed by the respondent in the counter-schedule of loss.

137 The claimant commenced employment with Morrisons in what would have been his ten-week contractual notice period as a Trading Manager on 25 March 2019, with an initial net salary of £633.24 per week (including pension and bonus).

138 Between the effective date of termination and the claimant starting his employment with Morrisons the claimant had losses of £1,016.23 per week (comprising net basic pay, sales and productivity bonus and employer pension contributions), totalling £4,362.44. This figure has been agreed by the respondent.

139 Since starting employment with Morrisons on 25 March 2019 the Claimant's ongoing loss has been £382.99 per week (£1,016.23 minus £633.24) including sales and productivity bonus. Taking into account the claimant's unreasonable failure to mitigate, the ongoing loss of earnings are calculated from 25 March 2019 to 10 July 2020 a period of 67 weeks calculated at £250.77 net per week. Thereafter there are no loss of earnings.

140 From the 26 March 2019 to 10 July 2020, a period of 67 weeks, the claimant has suffered a differential loss in the sum of £250.77 net (844.62 – 593.85) which totals £16,801.59 net.

141 From the 26 March 2019 to 10 July 2020 the claimant has suffered a loss of pension benefit (£71.82 per week @ 67 weeks) in the sum of £4811.94, taking into account the respondent's figures set out in the counter-schedule of loss.

142 From the 26 March 2019 to 10 July 2019 the claimant has suffered a loss of sales and productivity bonus in the sum of £57.05 and £42.74 respectively (£99.79 @ 67 weeks) totalling £6687.93.

143 The loss of statutory rights is agreed at £300.

144 The compensatory award totals £28,601.46 less 20 percent contributory fault of £5720.29 which totals £22,881.17.

145 The basic award is agreed at £5380 (1 x 10 years x £358) less 20 percent contributory fault (£1076) which totals £4304.

146 The basic and compensatory award together totals £27, 185.17.

Schedule

Basic award	5380
Less 20% (1076)	4304

Compensatory award		
Loss of earnings 26 February to 25 March 2019		
(4 weeks @ 844.62 net)	3378.48	
Pension (4 weeks @ 71.82)	287.28	
Sales bonus (4 weeks @ 57.05)	228.20	
Productivity bonus (4 weeks @ 42.74)	170.96	
Loss of earnings 26 March 2019 to 10 July 2020		
(844.62 – 633.24=211.38 @ 67 weeks)	14162.46	
Pension (67 weeks @ 71.82 less		
39.99 Morrisons pension = 31.83	2132.61	
Sales bonus (67 weeks @ 57.05)	3822.35	
Productivity bonus (67 weeks @ 42.74)	2863.58	
Failure to mitigate	300	
Total compensatory award:		27345.92
Less 20% contributory conduct –(5469.18)		21876.73
Total basic and compensatory award		26180.74

147 In conclusion, the respondent is ordered to pay to the claimant compensation for unfair dismissal in the sum of £26,180.74 consisting of an agreed basic award of £4304, and a compensatory award in the sum of £21,876.73 (taking into account the claimant's failure to mitigate after 10 July 2020 and a 20 percent deduction for contributory fault).

7 December 2021
Employment Judge Shotter

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

14 December 2021

FOR THE SECRETARY OF THE TRIBUN

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **1303700/2019**

Name of case: **Mr B Williams** v **Aldi Stores Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: 14 December 2021

"the calculation day" is: 15 December 2021

"the stipulated rate of interest" is: **8%**

Mr S Artingstall
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.