EMPLOYMENT TRIBUNALS

Claimant: Dr Annette Plaut

Respondent: University of Exeter

Heard at: Exeter **On:** 20 December 2021

Before: Employment Judge Housego
Tribunal Member Smillie
Tribunal Member Sleeth

Representation

Claimant: Stuart Roberts, of Counsel

Respondent: Rachel Owusu-Agyei

JUDGMENT

The Respondent is ordered to pay to the Claimant the sum of **£100,969.78** as detailed in the Schedule to this judgment.

REASONS

1. The Tribunal decided that Dr Plaut was unfairly dismissed by the University, that she caused or contributed to that dismissal by 25%, that there should be an uplift of 25% in remedy by reason of failure to comply with the Acas code, and that she was subject to unlawful discrimination by being suspended from work by reason of a protected act, which was a comment she made at a return to work meeting on 12 April 2019. This is the remedy judgment.

Reinstatement: law

2. Dr Plaut sought reinstatement, and the Employment Rights Act 1996 provides that this is the first possible remedy to be considered.

3. The Employment Rights Act 1996 provides:

> 112 The remedies: orders and compensation.
>
> (1) This section applies where, on a complaint under section 111, an employment tribunal finds that the grounds of the complaint are well-founded.

(2) The tribunal shall—

(a) explain to the complainant what orders may be made under section 113 and in what circumstances they may be made, and

(b) ask him whether he wishes the tribunal to make such an order.

(3) If the complainant expresses such a wish, the tribunal may make an order under section 113.

(4) If no order is made under section 113, the tribunal shall make an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 126) to be paid by the employer to the employee.

4. The Claimant having expressed the wish to be reinstated, it follows that first we must consider whether to make an order under S113. If we decide not to do so, then I make an order for compensation.

5. S113 states:

The orders.

An order under this section may be—

(a) an order for reinstatement (in accordance with section 114), or

(b) an order for re-engagement (in accordance with section 115),

as the tribunal may decide.

6. An order for reinstatement is sought by the Claimant, and so we consider that first. S114 states:

114 Order for reinstatement.

(1) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed.

(2) On making an order for reinstatement the tribunal shall specify—

(a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement,

(b) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and

(c) the date by which the order must be complied with.

(3) If the complainant would have benefited from an improvement in his terms and conditions of employment had he not been dismissed, an order for reinstatement shall

require him to be treated as if he had benefited from that improvement from the date on which he would have done so but for being dismissed.

(4) In calculating for the purposes of subsection (2)(a) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of reinstatement by way of—

(a) wages in lieu of notice or ex gratia payments paid by the employer, or

(b) remuneration paid in respect of employment with another employer,

and such other benefits as the tribunal thinks appropriate in the circumstances.

7. If we decide that reinstatement is not possible, we could next consider re-engagement, under S115:

115 Order for re-engagement.

(1) An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment.

(2) On making an order for re-engagement the tribunal shall specify the terms on which re-engagement is to take place, including—

(a) the identity of the employer,

(b) the nature of the employment,

(c) the remuneration for the employment,

(d) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of re-engagement,

(e) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and

(f) the date by which the order must be complied with.

(3) In calculating for the purposes of subsection (2)(d) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of re-engagement by way of—

(a) wages in lieu of notice or ex gratia payments paid by the employer, or

(b) remuneration paid in respect of employment with another employer,

and such other benefits as the tribunal thinks appropriate in the circumstances.

8. However, Dr Plaut did not seek re-engagement, understandably as it is hard to see how such an order would not amount to reinstatement.

9. The Employment Rights Act 1996 sets out how the discretion as to remedy is to be exercised, at S116:

> 116 Choice of order and its terms.
>
> (1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—
>
> (a) whether the complainant wishes to be reinstated,
>
> (b) whether it is practicable for the employer to comply with an order for reinstatement, and
>
> (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.
>
> (2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.
>
> (3) In so doing the tribunal shall take into account—
>
> (a) any wish expressed by the complainant as to the nature of the order to be made,
>
> (b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and
>
> (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.
>
> (4) Except in a case where the tribunal takes into account contributory fault under subsection (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement.
>
> (5) Where in any case an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining, for the purposes of subsection (1)(b) or (3)(b), whether it is practicable to comply with an order for reinstatement or re-engagement.
>
> (6) Subsection (5) does not apply where the employer shows—
>
> (a) that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement, or
>
> (b) that—

(i) he engaged the replacement after the lapse of a reasonable period, without having heard from the dismissed employee that he wished to be reinstated or re-engaged, and

(ii) when the employer engaged the replacement it was no longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement.

10. For the sake of completeness, S117 sets out the process to be followed if we decided upon a reinstatement order:

117 Enforcement of order and compensation.

(1) An employment tribunal shall make an award of compensation, to be paid by the employer to the employee, if—

(a) an order under section 113 is made and the complainant is reinstated or re-engaged, but

(b) the terms of the order are not fully complied with.

(2) Subject to section 124 . . ., the amount of the compensation shall be such as the tribunal thinks fit having regard to the loss sustained by the complainant in consequence of the failure to comply fully with the terms of the order.

(2A) There shall be deducted from any award under subsection (1) the amount of any award made under section 112(5) at the time of the order under section 113.

(3) Subject to subsections (1) and (2) . . ., if an order under section 113 is made but the complainant is not reinstated or re-engaged in accordance with the order, the tribunal shall make—

(a) an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 126), and

(b) except where this paragraph does not apply, an additional award of compensation of an amount not less than twenty-six nor more than fifty-two weeks' pay,

to be paid by the employer to the employee.

(4) Subsection (3)(b) does not apply where—

(a) the employer satisfies the tribunal that it was not practicable to comply with the order, . . .

(b). . . . . .

(5). . . . . .

(6). . . . . .

(7) Where in any case an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining for the purposes of subsection (4)(a) whether it was practicable to comply with the order for reinstatement or re-engagement unless the employer shows that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement.

(8) Where in any case an employment tribunal finds that the complainant has unreasonably prevented an order under section 113 from being complied with, in making an award of compensation for unfair dismissal . . . it shall take that conduct into account as a failure on the part of the complainant to mitigate his loss.

11. Neither able Counsel addressed the issue of the effect of a finding of contributory conduct may have on a request for reinstatement. The Tribunal applied its own knowledge of the law, and circulated this judgment to them, in draft, for comment. In the event, this was not the determinative point, which was not whether it was just to make an order for reinstatement, but whether it was practicable to do so.

12. McBride v Scottish Police Authority (Scotland) UKSC 27 at paragraph 37:

> *"37. At the stage when it is considering whether to make a reinstatement order, the tribunal's judgment on the practicability of the employer's compliance with the order is only a provisional determination. It is a prospective assessment of the practicability of compliance, and not a conclusive determination of practicability. This follows from the structure of the statutory scheme, which recognises that the employer may not comply with the order. In that event, section 117 provides for an award of compensation, and also the making of an additional award of compensation, unless the employer satisfies the tribunal that it was not practicable to comply with the order. Practicability of compliance is thus assessed at two separate stages - a provisional determination at the first stage and a conclusive determination, with the burden on the employer, at the second: Timex Corpn v Thomson [1981] IRLR 522, 523-524 per Browne-Wilkinson J and Port of London Authority v Payne [1994] ICR 555, 569 per Neill LJ."*

13. In British Airways Plc v Valencia (Unfair Dismissal : Reinstatement or re-engagement) [2014] UKEAT 0056_14_2606 there is some guidance as to the way the decision whether to exercise the discretion to make such an order should be approached, and it refers with approval to Oasis Community Learning v Wolff (Unfair Dismissal : Reinstatement/re-engagement) [2013] UKEAT 0364_12_1705. These relate mainly to contributary conduct and relationship difficulties caused by the claimant in those cases. Indeed, at para 44 of *Oasis* is the observation that every case depends on its own facts.

14. United Lincolnshire Hospitals NHS Foundation Trust v Farren (Unfair Dismissal: Reinstatement/re-engagement) [2016] UKEAT 0198_16_1411 has guidance relevant to this case:

"22. It is common ground before us that an ET is to determine the question of reasonable practicability as at the date it is considering making a re-employment order; at which stage, it has to form a preliminary or provisional view of practicability (per Baroness Hale at paragraph 37, ***McBride v Scottish Police Authority*** *[2016] IRLR 633 SC). The Respondent has a further opportunity (section 117(4)) to show why a re-engagement order is not practicable if it does not comply with the original order and seeks to defend itself against an award of compensation and/or additional award that might otherwise then be made under section 117(3).*

23. More generally, Mr Ohringer[1] *has helpfully summarised the principles relevant to an ET's approach to a re-engagement order at paragraphs 16 to 23 of his skeleton argument:*

> ***"16. Under s.112 of the Employment Rights Act 1996 … a tribunal must enquire whether an unfairly dismissed claimant seeks orders for reinstatement or reengagement in preference to compensation.***
>
> ***17. In ss. 113 and 116 of the ERA 1996, the tribunal is given a broad discretion as to whether to order reinstatement, reengagement or neither and directed to take into account various factors. In relation to reengagement, those factors are:***
>
> ***(a) any wish expressed by the complaint [sic] as to the nature of the order to be made,***
>
> ***(b) whether it is practicable for the employer … to comply with the order for reengagement, and***
>
> ***(c) where the complainant caused or contributed to some extent to the dismissal, whether to make an order for re-engagement, and if so on what terms.***
>
> ***18. Reinstatement and reengagement are the 'primary remedies' for unfair dismissal (Rao v Civil Aviation Authority [1992] ICR 503, unsuccessfully appealed to the Court of Appeal on other grounds [1994] ICR 495 and Central & North West London NHS Foundation Trust v Abimbola (UKEAT/0542/08), para. 14).***
>
> ***19. A Tribunal has a wide discretion in determining whether to order reinstatement or reengagement. (… Valencia … para. 7)***
>
> ***20. If the employer maintains a genuine (even if unreasonable) belief that the employee has committed serious misconduct, then re-engagement will rarely be practicable. (paras. 10-11 citing Wood Group Heavy Industrial Turbines Ltd v Crossan [1998] IRLR 680).***

[1] This is a quotation from a case, and Mr Ohringer was Counsel appearing in it.

> ***21. However as stated in Timex Corporation v [Thomson] [1981] IRLR 522, cited with approval by the Supreme Court in McBride … the Tribunal need only have 'regard to' whether reengagement is practicable and that is to be considered on a provisional basis only.***
>
> ***22. Simler J stated that contributory conduct is relevant to whether it is just to make an order. She emphasised that contributory fault, even to a high degree, does not necessarily mean it would be impracticable or unjust to reinstate. (Valencia, para. 12, citing United Distillers & Vintners Ltd v Brown (UKEAT/1471/99), para 14).***
>
> ***23. Although the Tribunal is entitled to take into account contributory conduct in deciding whether to order reinstatement or reengagement, the question of whether the Claimant's employment would have been fairly dismissed in any event (applying the Polkey [v A E Dayton Services Ltd [1987] IRLR 503] principle) is irrelevant. This was the conclusion of the EAT in The Manchester College v Hazel & Huggins (UKEAT/0136/12, para. 40) which was upheld by the Court of Appeal [2014] ICR 989, para. 43)."***

24. In this case, the ET's approach to the question of trust and confidence and how this might impact on its discretion to order re-engagement has been key. This has put the focus on the test that an ET is to apply in determining practicability, which was addressed by the EAT when overturning an order for re-engagement in ***Wood Group v Crossan*** *[1998] IRLR 680:*

> ***"10. … we are persuaded in this case that it is not practical to order re-engagement against the background of the finding that the employer genuinely believed in the substance of the allegations. It may seem somewhat incongruous that where a tribunal goes on to categorise the investigations into the belief as unfair or unreasonable, nevertheless, the original belief can found a decision as to remedy and the practicality of re-engagement, but it is inevitable to our way of thinking that when allegations of this sort are made and are investigated against a genuine belief held by the employer, it is difficult to see how the essential bond of trust and confidence that must exist between an employer and employee, inevitably broken by such investigations and allegations can be satisfactorily repaired by re-engagement or upon re-engagement. We consider that the remedy of re-engagement has very limited scope and will only be practical in the rarest cases where there is a breakdown in confidence as between the employer and the employee. Even if the way the matter is handled results in a finding of unfair dismissal, the remedy, in that context, invariably to our minds will be compensation."***

25. Before us, the parties have approached the test of practicability at the first stage as one in respect of which there is a neutral burden of proof. They see the burden shifting to the employer if and when it seeks to avoid the making of an additional award of compensation under section 117 ***ERA****. That said, where an employer is relying on a breakdown in trust and confidence as making it impracticable for an order for re-engagement to be made, the ET will need to be*

satisfied not only that the employer genuinely has a belief that trust and confidence has broken down in fact but also that its belief in that respect is not irrational (see paragraph 14 ***United Distillers v Brown*** *UKEAT/1471/99).*

26. In the case of ***Valencia*** *Simler J revisited the question as to how an ET was to undertake its task on the making of a re-engagement order, giving the following guidance:*

> ***"7. It is accordingly clear that tribunals have a wide discretion in determining whether or not to order reinstatement or re-engagement. It is a question of fact for them. However, whereas an order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed, an order for re-engagement is more flexible and may be made on such terms as the tribunal may decide.***
>
> ***8. The statute requires consideration of reinstatement first. Only if a decision not to make a reinstatement order is made, does the question of re-engagement arise. In making a reinstatement order the tribunal must take into account three factors under s.116(1) ERA: the complainant's wish to be reinstated; whether it is practicable for the employer to comply; and where the complainant caused or contributed to his dismissal whether it would be just to order his reinstatement.***
>
> ***9. Practicable in this context means more than merely possible but 'capable of being carried into effect with success': Coleman v Magnet Joinery Ltd [1974] IRLR 343 at 346 (Stephenson LJ).***
>
> ***10. Loss of the necessary mutual trust and confidence between employer and employee may render re-employment impracticable. For example, where there is a breakdown in trust between the parties and a genuine belief of misconduct by the employee on the part of the employer, reinstatement or re-engagement will rarely be practicable: see Wood Group Heavy Industrial Turbines Ltd v Crossan [1998] IRLR 680 at [10] (Lord Johnston) in the context of misconduct involving drugs and clocking offences:***
>
> > ***'in this case it is not practical to order re-engagement against the background of the finding that the employer genuinely believed in the substance of the allegations … when allegations of this sort are made and are investigated against a genuine belief held by the employer, it is difficult to see how the essential bond of trust and confidence that must exist … can be satisfactorily repaired by re-engagement or upon re-engagement. We consider that the remedy of re-engagement has very limited scope and will only be practical in the rarest cases where there is a breakdown in confidence as between the employer and the employee.'***
>
> ***11. Similarly in ILEA v Gravett [1988] IRLR 497 (albeit on very different facts) the EAT accepted that a genuine belief in the guilt of an employee of misconduct, even if there were no reasonable grounds for it, was a factor that had to be weighed properly in deciding whether to order re-engagement:***
>
> ***'21. The tribunal ordered re-engagement and are criticised by the appellant employer for what they submit is a wholly perverse decision upon all the facts of this case. It is a possible view of that decision, but we do not seek***

> ***nor do we need to go that far. An essential finding in the present case was that the authority had a genuine belief in the guilt of the applicant. It is said with accuracy that this is the largest education authority in the country and that it has a vast area to cover and a vast variety of posts into which the applicant could be fitted. It is, however, a common factor in any of those posts that the applicant would have the care and handling of young children of both sexes. Bearing in mind the duty of care imposed upon the authority and the very real risks should they depart from the highest standard of care, we take the view that this tribunal failed adequately to give weight to those factors in the balancing exercise carried out in order to reach their decision on re-engagement.'***
>
> ***12. So far as contributory conduct is concerned, this is relevant to whether it is just to make either order and in the case of a re-engagement order, on what terms. In cases where the contribution assessment is high, it may be necessary to consider whether the level of contribution is consistent with the employer being able genuinely to trust the employee again: United Distillers & Vintners Ltd v Brown UKEAT/1471/99, unreported, 27 April 2000 at paragraph 14."***

27. Although we have just cited passages from two cases in which different divisions of the EAT overturned ET orders for re-engagement, more generally we note as follows: (1) questions of practicability under section 116 are primarily for the ET and are likely to be difficult to challenge on appeal (see ***Clancy v Cannock Chase Technical College*** *[2001] IRLR 331 EAT); and (2) ETs have a wide discretion in determining whether or not to order reinstatement or re-engagement; it is essentially a question of fact (see* ***Central & North West London NHS Foundation Trust v Abimbola*** *UKEAT/0542/08, at paragraph 15)."*

15. Ms Owusu-Agyei drew the Tribunal's attention to *Amimbola*, and *Coleman*, cited above. Other cases cited were Nothman v LB Barnet (no2) [1980 IRLR 65, Banerjee v Royal Bank of Canada UKEAT/189/19, Cooper Contracting v Lindsey UKEAT/0184/15/JOJ.

Law: uplift for failure to follow Acas code

16. Ms Owusu-Agyei also cited Slade & Hamilton v Biggs, Stewart & Aethelbert Ltd Case No: EA-2019-000687-VP (Previously UKEAT/0296/19/VP) EA-2019-000722-VP (Previously UKEAT/0297/19/VP) (about the application of 25% uplift – that it is necessary to assess quantum before assessing percentage uplift).

17. Ms Owusu-Agyei also submitted that the uplift could be applied only to the compensatory award, because of S124A of the Employment Rights Act 1996, which says:

> "**Adjustments under the Employment Act 2002**
> Where an award of compensation for unfair dismissal falls to be—

(a) reduced or increased under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (effect of failure to comply with Code: adjustment of awards), or

(b) increased under section 38 of that Act (failure to give statement of employment particulars),

the adjustment shall be in the amount awarded under section 118(1)(b) and shall be **applied immediately before any reduction under section 123(6) or (7)**.

18. She then refers to S118(1)(b) of the Employment Rights Act 1996:

"**118 General.**

(1) . . .Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—

(a) a basic award (calculated in accordance with sections 119 to 122 and 126), and

(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126).

19. Because the adjustment is said to be only to S118(1)(b) and that is the compensatory award it was submitted that the Acas adjustment should not be made to the basic award. It was also submitted that the order of adjustments was important, as the increase to the compensatory award was first, then the reduction of 25% to both awards applied.

20. Mr Roberts responded that S207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 dealt with this point, because it is headed "Effect of failure to comply with the Code: adjustment of awards" and expressly states that *any* award may be adjusted:

"Effect of failure to comply with Code: adjustment of awards

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

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."

21. The Tribunal used Bath Publishing's employmentclaimstoolkit.co.uk program to calculate the award, and doubtless this has the right method of calulation of increase and decrease. The Tribunal considered the 25% uplift appropriate after working out the figures: but in any event the case cited by Ms Owusu-Agyei related to sums outwith the capped awards for unfair dismissal. The uplifts will not be disproportionately large for capped unfair dismissal awards.

22. As the program did the arithmetic, the reference to a percentage in the liability decision, whether right or not, is redundant.

23. The Tribunal noted that the submissions were as to the amount of the uplift, and to which elements it applied and did not challenge the principle of an uplift being applied.

Pension contributions

24. Mr Roberts referred the Tribunal to University of Sunderland v Drossou UKEAT/0341/16/RN as authority for the submission that pension contributions were part of remuneration, for the purposes of calculation of (and increasing) the statutory cap (Dr Plaut's salary at £51,034 a year being below the absolute cap). Ms Owusu-Agyei was (understandably) not prepared for the point: it being late in the day by this time, Mr Roberts said he would (and he did) email the case report to the Tribunal and to Ms Owusu-Agyei for any further comment she wished to make. The Tribunal observed that as it was trite law that pensions were deferred remuneration it seemed inevitable that the contributions paid to give rise to the right to that pension were part of the remuneration of the Claimant.

Evidence considered

25. There was a substantial bundle of documents.

26. Dr Plaut gave oral evidence and was cross examined. Professor Harries also gave evidence and was cross examined. Ms Johnston's witness statement was largely concerned with an email from student 1. This the Tribunal declined to take into evidence. It may have been relevant to liability, but that decision was made at the previous hearing. Neither student 1 or student 2 are still at the University, having both achieved their doctorates. The email is said to be prejudicial and to refer to re-instatement: which was not referred to in the liability judgment, nor (it is almost certain) in any of the press coverage of the liability judgment. There is no other documentation about it. It is unlikely to have been a solitary email without any telephone discussion or other email to or from student 1. Ms Owusu-Agyei said that it was a very serious allegation to say that it was in some way not genuine. That is not what is said: but what might be called provenance, or at least context, is relevant. Nor is it relevant. Dr Plaut has always accepted that the matter regarding student 1 was something that was unacceptable. The University decided to give her a final written warning about it, and getting more information about it now it really not appropriate. This is the more so, as the Tribunal's liability judgment pointed out that while it was said that student 1 had suffered with her mental health there was no medical evidence of that, and that if that were the case no evidence to link it to Dr Plaut: student 1 had other issues at the time – see paragraph 63 of the liability judgment:

"RF gave evidence to RS. She said that Student 1 was traumatised and

victimised. There is a real problem with RF's contribution. There was no medical evaluation of Student 1. There is reference to unspecified pre-existing mental health problems. It is not known what they were, or how severe, and whether the way Student 1's presentation to RF was a result of those issues, or whether compounded by being away from her home country. Nor has there been any medically competent assessment of the effect of the incident on Student 1. However, when this was put, very gently, by Dr Plaut's representative RF was adamant that there was such a mental health issue and that Dr Plaut was the source of it (136). This was taken to be so, and that was not fair."

27. Ms Johnson gave oral evidence to be questioned about her statement that *"the University"* did not consider it practicable to reinstate Dr Plaut.

28. The Tribunal heard, and considered to be of no weight a muffled recording, in which Dr Plaut's voice can be heard. It is muffled, and no words can be made out. It was not clear to whom Dr Plaut was talking, when it was, who made the recording, or why, other than a generalised statement (not in the form of a witness statement) that it was recorded by someone in a corridor who heard Dr Plaut from outside the room she was in. Dr Plaut's whole case is that she is loud. The recording proves nothing, and evidentially could be given little weight in any event.

Consideration of reinstatement

29. The Tribunal did not consider that its finding of contribution of 25% was a reason not to consider reinstatement. The case law is clear that an order for reinstatement is not precluded by such a finding. The higher the percentage the less likely it is that it would be just to order reinstatement. Although reinstatement and reengagement orders are seldom made, it is the first order the Tribunal must consider, and if one were coming to it afresh one would naturally think that if it was unfair to dismiss the best way to redress that would be to reinstate the person whose dismissal was unfair.

30. The Tribunal therefore considered whether it was practicable, and just, to make such an order.

Dr Plaut's case

31. Mr Roberts drew attention to paragraph 134 of the liability decision:

"This Student 2 issue was never a sacking matter, whether alone, or on top of an existing final written warning for a later matter. The Tribunal is very well aware that employers always view such a judgment as substituting the Tribunal's own view for that of the employer. It is not. It is the assessment the Tribunal is required to make in applying S98(4) of the Employment Rights Act 1996. This is a very large organisation, of very high reputation, and high professional standards in dealing with the careers of its academics are to be expected. This obligation is the greater when dealing with someone who has spent 30 years working for them."

The University's case

32. One of the matters Prof Harries said in his oral evidence was that Dr Plaut's student satisfaction scores were not as high as others, such that he thought it

wrong to make an order for reinstatement. The Tribunal has a general observation about this, and the approach of the University to this case generally.

33. All the academics are highly qualified physicists. Ms Johnson is a solicitor. Imelda Rogers is Director of Human Resources. Physicists come to conclusions on the basis of evidence. It is a transferable skill. Solicitors know about the burden and standard of proof, particularly those working as case workers in an employment law context. The Director of Human Resources for a large employer must be assumed to have some grasp of the requirements and needs of defending cases in Employment Tribunals. The University' response to the claims states that it has 5,000 employees, 3,500 at the campus in Exeter. It is a big employer, of high status and reputation, and it is to be expected that it will conduct itself to high standards in dealing with employment issues.

34. This observation by Prof Harries was not in his witness statement, which was of 11 short paragraphs. He set out in 5 bullet points in paragraph 9 of his witness statement what he said were the difficulties in allocating work to Dr Plaut. This was not among them. It was a new matter raised by him in oral evidence. There was no documentary evidence to show that there was any difference in student satisfaction scores. These scores are all collected in documentary form – it was not rocket science to put them together, and these are people capable of rocket science. Accordingly the Tribunal discounted this evidence.

35. Having pointed out in the liability judgment that there was an absence of evidence about many matters (see, for example, paragraphs 27, 61, 97, 99, 100) one would have thought the University would have ensured that they had evidence to support what they were to say, and to put it in witness statements and a document bundle. They did not.

36. The same applies to Prof Harries evidence that CW had told him that he was of the view that Dr Plaut's *"boisterous"* manner was not well received by students, and that she was not suitable to work in laboratories. It will not do to say that the Tribunal must take this as situation because it was in Prof Harries' witness statement, and he said his witness statement was true. That is not how evidence works, as those in the University dealing with the case must, or should, know. Prof Harries accepted that CW had not seen his witness statement. There was no reason why CW could not have been asked for a short witness statement if that was his view. The Tribunal does not accept Ms Owusu-Agyei's response that the Tribunal found no difficulty in accepting the report of the favourable things CW was reported (in the bundle of documents for the liability hearing (at page 142)) to have said about Dr Plaut. That was the evidence provided by the University, and was in favour of Dr Plaut, who was entitled to accept it. More, it was an account of what CW had said to an official meeting, recorded in its minutes. That is not the same thing as hearsay, which is the more remarkable as it is contrary to CW's known view earlier. There is no reason apparent to the Tribunal why a *"boisterous"* approach is necessarily a negative. Explanation would be needed as to why that is not a near synonym for enthusiasm, and why it is less desirable than, say, a tendency to bore students.

37. The witness statement of Ms Johnson stated *"the University does not consider it appropriate or practicable for Dr Plaut to return to her role as senior lecturer".* Ms Johnson is a solicitor. The issues with this are not hard to identify:

    37.1. Who is *"the University"* ?

    37.2. Since Ms Johnson has been at the centre of everything involving Dr Plaut for some years, is this simply her view? Ms Johnson accepted that the roles of solicitor advising and case worker making decisions had become entangled to the point of being muddled.

    37.3. When this was put, Ms Johnson said it was Prof Quine, Prof Goodwin and Imelda Rogers who said this. This presents further issues:

        37.3.1. There was no witness statement from any of the three.

        37.3.2. Nor even any email exchanges rationalising this opinion.

        37.3.3. Prof Quine was in receipt of the email from Prof Vukusic which was so unfair (see paragraph 130.8 of the liability decision), and which (on the balance of probabilities) has affected his view.

        37.3.4. Prof Goodwin dismissed the appeal: he was hardly likely to come to a different view later.

        37.3.5. Imelda Rogers was one of the three prime movers in having Dr Plaut dismissed, and necessarily not impartial in her view.

        37.3.6. There is no evidence that any of them have read the judgment so as to consider what it says.

    37.4. This is highly unsatisfactory: it is Alice in Wonderland logic – it must be so because it is said to be so (that the author was a logician does not undermine the analogy to the characters he created). There is no evidence in Ms Johnson's witness statement, only assertion.

38. The Tribunal noted that the three people mentioned would not have any contact with Dr Plaut if she were at work, and nor would Prof Evans. Imelda Rogers is director of human resources and so would not interact with Dr Plaut in a working context. Dr Plaut points out that those most hostile to her would not be part of her working life, and so if they were negative about her that would not mean returning to work was impracticable.

39. The Tribunal therefore had to analyse Prof Harries' evidence with particular care. It was given with care and courtesy but the difficulty he felt he was under was clear. His evidence was of his opinion, and the Tribunal also considered why he had that opinion.

40. Prof Harries manages about 40 staff. He would be Dr Plaut's line manager. It is not realistic to think anyone else could perform this function. The Tribunal noted that at the return to work meeting he was, according to Dr Plaut *"looming"* over her and with body language that was not conciliatory. While he denied that, plainly it was not an easy meeting, and it appears to have been the last meeting they had in a work relationship (when Dr Plaut later moved offices it is not said they interacted). He was not happy with what Dr Plaut

said and reported it to Prof Evans, which is not evidence of a fundamentally broken relationship, at that point. It is this point in time the Tribunal must consider.

41. Prof Harries says:

41.1. It is not practicable to put Dr Plaut back to the courses she taught, because one of them is no longer taught at all. The Tribunal does not accept that as meaning it is not practicable to reinstate Dr Plaut: the evidence was that the curriculum changes through time, and fitting lecturers to courses is a perennially difficult task for any head of department. This is no more than a facet of that task.

41.2. Dr Plaut has not taught any modules for a number of years. That is because she was unfairly dismissed. It is not said that Dr Plaut's knowledge has atrophied or that the subject has moved on so that she is out of date, and even if she were there is no reason why she could not catch up, or prepare lectures in another related topic.

41.3. One of the modules she taught is now taught by another (MP), whose administration duties had reduced and so he was given this module to teach. Plainly Dr Plaut could return to teach it. MP was moved to take up teaching this module, while inconvenient, no doubt, it is not impractical to reallocate teaching of modules.

41.4. Dr Plaut's student satisfaction scores were said to be lower than MP gets for the module, and offering a great student experience is a key aim for the University. This is dealt with above, and was not shown to be so. Dr Plaut had been 30 years at the University with no performance issues of this kind.

41.5. That he cannot allocate her PhD students to supervise because he did not have trust and confidence that she would treat them appropriately. It was plain from his evidence that this is Prof Harries' view. The Tribunal returns to it below.

41.6. That it is not practicable for every interaction to be supervised by another person. It has logistical and resource implications, and since the superviser and the supervised work in proximity spontaneous interactions are likely, and desirable, and could not be supervised. This is a reasoned argument, and has weight.

41.7. There was, in his words, a *"course of conduct"* which meant he now felt there was an attitudinal issue which meant his duty of care to students rendered it impractical to have Dr Plaut back in his teaching team. The course of conduct was students 1 and 2 and a 3rd matter, back in 2008. It does not seem right to link something now 13 years old with matters a decade later and call that a course of conduct. Nevertheless, it is the case that there were PhD students in two successive years who were unhappy at their interaction with Dr Plaut. Dr Plaut's loudness is innate, and while she expresses willingness to have voice coaching, that had been explored before. It was not unreasonable for the University decision makers (whoever they may have been) to have concerns about the future. Student satisfaction scores are important to Universities, as is the

wish to give students a fulfilling experience, and realistically there would be a concern at the future in both aspects.

41.8. It was submitted for the University that as Dr Plaut continued to assert that there was unconscious bias against her by reason of *"intersectionality of race and sex"* which accusation made it very unlikely that relationships could be repaired and would permeate and fatally undermine relationships. While Dr Plaut is clear that she is specific in her criticism, not generic, this is an obstacle to a successful reintegration, because that is how it is (understandably) seen.

42. With regret, the Tribunal decided that reinstatement was not practical. Dr Plaut had no intention of retiring. Her life was centred on the University where she had worked for 30 years. She lives within walking distance of the University. Her social circle was almost totally linked to the University. Academics customarily retain access to University email accounts and facilities even when retired. All this is removed from her by her unfair dismissal.

43. Unfortunately, there is now such hostility to the return of Dr Plaut that it will not prove practical. The views expressed by Prof Vukusic in his email have plainly taken firm root in Prof Harries' mind. There is entrenched bias against Dr Plaut in the human resources department and in the senior echelons of the University (as was made clear in the liability judgment at 101). If there was to be any chance of reinstatement being successful Dr Plaut would need a champion as a manager, but she has someone implacably opposed to it. The Provost, the director of human resources, and at least 2 of the 4 vice chancellors are opposed to it, some colleagues are very negative about Dr Plaut, as is her line manager.

44. The practical issues about how Dr Plaut might be reintegrated into the physics department and interact with her students might, on their own, be capable of resolution with goodwill and effort on all sides, but with such a negative mindset throughout those with power in the University the Tribunal, with regret, decided that it was not practical to order reinstatement.

45. In summary, the position is as set out in the case cited above:

> ***"10 …we are persuaded in this case that it is not practical to order re-engagement against the background of the finding that the employer genuinely believed in the substance of the allegations. It may seem somewhat incongruous that where a tribunal goes on to categorise the investigations into the belief as unfair or unreasonable, nevertheless, the original belief can found a decision as to remedy and the practicality of re-engagement, but it is inevitable to our way of thinking that when allegations of this sort are made and are investigated against a genuine belief held by the employer, it is difficult to see how the essential bond of trust and confidence that must exist between an employer and employee, inevitably broken by such investigations and allegations can be satisfactorily repaired by re-engagement or upon re-engagement. We consider that the remedy of re-engagement has very limited scope and will only be practical in the rarest cases where there is a breakdown in confidence as between the employer and the employee. Even if the way the matter is handled results in a finding of unfair dismissal, the remedy, in that context, invariably to our minds will be compensation."***

Financial award

46. The basic award is arithmetic (and is £14,962.50). The effect of uplifts and reductions is apparent from the table annexed as a schedule (prepared using Bath Publishing's employmentclaimstoolkit.co.uk program.

47. There was no notice, but pay in lieu was paid, and taken into account in the calculation in the Schedule.

48. The University say that Dr Plaut could have obtained other employment and has failed to mitigate her loss. There is a duty to mitigate. If there is said to be a failure to do so, as here, then the burden of proving (on the balance of probabilities) that there has been such a failure is on the University.

49. On Friday 17 December 2021, the working day before the remedy hearing, Ms Johnson asked her paralegal to research what might have been available to Dr Plaut in the time since dismissed. Four jobs were found. They are all at a lower level than Dr Plaut's senior lectureship. Several stress *"pedagogical research"* which appears to mean enhancing curriculum development and delivery. Dr Plaut is an experimental physicist in solid state matter. This is not an area where she has expertise (or interest). She had a particular interest in substances like graphene. There are perhaps 4 Universities which might offer an opportunity to work in that field, and none of those 4 jobs were at such universities. One was a fixed term of 9 months. Another required expertise in energy related physics, in which Dr Plaut has no expertise. None of these were suitable for her.

50. Dr Plaut did not look for any jobs. There were a variety of reasons for not doing so. Most importantly she was (rightly) convinced that her dismissal was unfair, and that her appeal would restore her to the job she loved. She would not want to move away and preclude that.

51. While physics is an international field (shown by the composition of the department, and by the careers of the British citizens who work in it) it was not realistic to expect Dr Plaut to seek work overseas. Her father is 93, and she his only close relation. The pandemic has made international travel problematic and occasionally impossible. It is not reasonable to expect her to leave the country to seek out employment in these circumstances.

52. Dr Plaut asked for associate status to retain her email account and access to University facilities on the basis that she would retire at 60 if her appeal against dismissal or this case did not restore her to her post. The University submit that the reason Dr Plaut did not seek work (which they say she could have got) was because she wanted to retire, not get another job. The Tribunal rejects this submission. The key word is *"if"*. As she reaches 60 next month Dr Plaut may now decide that she will not seek other employment and draw her pension. That is a decision for 2022, not 2020. The Tribunal finds as a fact that Dr Plaut had no intention of retiring, and had no date or age at which she had planned to do so. Many academics, including in the physics department, work into their 70s, and Dr Plaut retains her enthusiasm and energy for her work. She would not have retired for many years, had she not been dismissed. The Tribunal decided that Dr Plaut is highly unlikely to settle for retirement now that she cannot return to the University, and to seek and to

find employment in one form or another (perhaps in addition to drawing her pension).

53. Dr Plaut was dismissed on 30 January 2020. There was lockdown from 24 March 2020. The effect of the pandemic on universities was huge. The Tribunal did not require detailed evidence to accept that hiring freezes, redundancies and large scale furloughs were widespread across academia, although it was provided by Dr Plaut. The odds of getting a job as an experimental solid state physicist in a UK University were at best remote, especially with a gross misconduct dismissal as the reason for looking for employment. There is no point in requiring that a person dismissed searches for something that did not exist at the time.

54. The University did not assist by cutting off Dr Plaut's access to her University email account and University resources. The Tribunal accepts that there is a website available to all – jobs.ac.uk – which she can use.

55. The Tribunal notes that the University has recruited three new staff members to the department, but this emerged only in Prof Harries' oral evidence and the dates were not given, and all three are at a junior level.

56. Dr Plaut's anxiety and depression, caused by the University, also did not assist.

57. If Dr Plaut does not opt to take her pension, with this decision to explain her dismissal, Dr Plaut should be able to obtain employment within 6 months, even given the pandemic, although perhaps not at her present salary level.

58. Dr Plaut was employed at £51,034 per annum. Whichever way the calculation is done the award is going to reach the cap of one year's salary.

59. Dr Plaut had a pension contribution made by her employer of 21.1% of her salary. It is agreed that this was £10,768.17 a year. That brings her total annual remuneration to £61,802.71.

60. The Tribunal does not know whether Dr Plaut's pension is actuarially reduced if drawn at 60, or what the scheme's retirement age is. Unfortunately, this was not information sought by Dr Plaut before the hearing not volunteered by the University. The Tribunal must therefore work on the assumption that there is no lifetime loss of pension resulting from the dismissal, although it is entirely possible that this is not so. It seems (this was a suggestion rather than evidenced) that the usual retirement age is 66.

61. The University say loss of statutory industrial rights does not apply as they say Dr Plaut will not be seeking alternative employment and so will not be in the position of being employed without statutory rights. The Tribunal has noted Dr Plaut's enthusiasm for her subject, and she is energetic. She is likely to seek employment, and so loss of statutory industrial rights is relevant and compenstable.

62. Dr Plaut has not claimed any state benefit, and so the Recoupment Regulations do not apply to the award.

Injury to feelings

63. The Vento bands applicable to the claim are those applicable between 06 April 2019 and 05 April 2020. The lower band is £900-£8,800, and the middle band is £8,800-£26,300. Dr Plaut asks for the top of the middle band. The University asks for £900.

64. The University points out that the witness statement of Dr Plaut goes through the whole disciplinary history and sets out her upset as a result. They point out that one claim only succeeded and insofar as her feelings were injured by other matters that was to be left out of account. They point to Dr Plaut needing surgery for cancer during this time, and say that her anxiety must have been at least in part by reason of that.

65. As to the last point, the Tribunal accepts Dr Plaut's evidence. She knew all along it was cancer, and kept on to the doctors until it was eventually diagnosed, which diagnosis pleased her, because she had always known what it was, and that it was capable of being treated successfully, as had occurred. It was not a cause of any significant anxiety.

66. The Tribunal also accepted that the effect on Dr Plaut was severe such that she has required medication for anxiety and depression. The Tribunal also noted that Dr Plaut was indeed affected by her first disciplinary, to the extent of needing medication, but also that this is clearly separated from the effect of her suspension. This is because once she was given the final written warning she came off all medication. The anxiety of the possibility of losing her job had been removed.

67. Then she was suspended on a pretext, which caused the anxiety to return, and undoubtedly to worsen as she now (with good reason) felt that she was now being targeted.

68. It is difficult to image the depth of humiliation, hurt, stress and worry for Dr Plaut in the period after her suspension. Every aspect of her life and future was at risk, and for no good reason, and unfairly. Because of that suspension she was not permitted to talk to her colleagues, and other friends in the University, and so was also cut off from her social network and all likely support. When she said that occupational health recommended that she have access to two colleagues she found it humiliating to have to name them and seek approval. That suspension, like the first, lasted an inordinate amount of time, from 12 April 2019 until dismissed on 30 January 2020 – over 9 months.

69. The Tribunal has no hesitation in rejecting the derisory sum suggested by the University – which is indicative of its attitude towards Dr Plaut throughout. This is a middle band case.

70. The Tribunal paid careful heed to the guidance in Marsden & HM Prison Service v Johnson [1997] IRLR 162. An award must not be so large as to be unjustified riches, nor so small as to undermine the societal reasons for such awards. The amount it will buy is relevant, and it should not be disproportionate when compared to personal injury awards. The amount must then be *"sense checked"* by standing back and looking at all the circumstances, and the amount to be awarded, to see that it looks and feels appropriate. The severity of the matter found proved decides the band into which the award falls, and the effect on the claimant decides where in that

band it falls. It follows that the robust individual receives less than the more fragile.

71. The effect of the suspension on Dr Plaut was severe and long term. It was severe anxiety and depression, to medical levels, humiliation by being deprived of her work and isolation by being excluded from almost all meaningful aspects of her life. It was long term. It was compounded by the knowledge that it was all a pretext to dismiss her, shown by the allegation for which she was suspended later being dropped. The University does not accept that it has done anything amiss (as was clear from Prof Harries' evidence – he said he noted what the Tribunal had decided, but clearly he did not agree with it) and now offers in its counter schedule an amount so low it is (rightly) insulting to her.

72. Bearing all these things in mind (and being careful to ensure that the Tribunal is considering only the injury to Dr Plaut's feelings and no punitive considerations) the Tribunal sets the award for injury to feelings at £20,000.

Schedule

IN THE EMPLOYMENT TRIBUNALS CASE NO: 1400363/2020 & 1403179/2020 SCHEDULE OF LOSS	**BETWEEN Dr Annette Plaut v University of Exeter**
1. Details	
Date of birth of claimant	19/01/1962
Date started employment	01/10/1990
Effective Date of Termination	30/01/2020
Period of continuous service (years)	29
Age at Effective Date of Termination	58
Date new equivalent job started or expected to start	20/06/2022
Remedy hearing date	20/12/2021
Date by which employer should no longer be liable	20/06/2022
Statutory notice period (weeks)	12
Net weekly pay at EDT	643.92
Gross weekly pay at EDT	981.42
Gross annual pay at EDT	61,802.71

2. Basic award	
Basic award Number of qualifying weeks (28.5) x Gross weekly pay (525.00)	14,962.50
Less contributory fault (basic award) @ 25%	-3,740.62
Total basic award	**11,221.88**
3. Compensatory award (immediate loss)	
Loss of net earnings Number of weeks (98.6) x Net weekly pay (643.92)	63,490.51
Plus loss of statutory rights	500.00
Less payment in lieu	-12,550.95
Total compensation (immediate loss)	**51,439.56**
4. Compensatory award (future loss)	
Loss of future earnings Number of weeks (26) x Net Weekly pay (643.92)	16,741.92
Total compensation (future loss)	**16,741.92**
5. Adjustments to total compensatory award	
Plus failure by employer to follow statutory procedures @ 25%	17,045.37
Less contributory fault (compensation award) @ 25%	-21,306.71
Compensatory award before adjustments	**68,181.48**
Total adjustments to the compensatory award	**-4,261.34**
Compensatory award after adjustments	**63,920.14**
6. Non financial losses	
Injury to feelings	20,000.00
Plus interest @ 8% for 976 days	4,278.36

Total non-financial award	**24,278.36**
7. Summary totals	
Basic award	11,221.88
Compensation award including statutory rights	63,920.14
Non-financial loss	24,278.36
Total	**99,420.38**
8. Grossing up	
Tax free allowance (£30,000 - any redundancy pay)	30,000.00
Basic + additional awards	11,221.88
Balance of tax free allowance	18,778.12
Compensatory award + injury to feelings + wrongful dismissal	88,198.50
Figure to be grossed up	69,420.38
GROSSED UP TOTAL	**145,700.63**
AFTER COMPENSATION CAP OF £61,802.71 (GROSS ANNUAL PAY)	**100,969.78**

Employment Judge Housego
Date: 23 December 2021

Judgment & reasons sent to parties: 12 January 2022

FOR THE TRIBUNAL OFFICE