EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103321/2020

Final Hearing Held by Cloud Video Platform on 26 and 27 April 2022, deliberation day on 6 May 2022

Employment Judge A Kemp
Tribunal Member S Singh
Tribunal Member G Doherty

Mr K Ferguson	**Claimant** **Represented by:** **Mr T Cordrey, Barrister** **Instructed by** **Mr T Ellis, Solicitor**
Kintail Trustees Ltd	**First Respondent** **Represented by:** **Ms C Aldridge** **Solicitor**
Agnes Lawrie Addie Shonaig MacPherson	**Second respondent** **Represented by:** **Ms C Aldridge** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is that

(i) The sum of THIRTY FIVE THOUSAND ONE HUNDRED AND SIX POUNDS EIGHTY PENCE (£35,106.80) is awarded to the claimant, payable by the first respondent and second respondent jointly and severally.

(ii) The sum of SIX THOUSAND FIVE HUNDRED AND TWENTY ONE POUNDS NINETY SEVEN PENCE (£6,521.97) is awarded to the claimant, payable by the first respondent alone.

REASONS

Introduction

1. This was a Final Hearing on remedy in respect of the claims made by the claimant following the Judgment on liability issued on 28 July 2021 ("the Judgment"). The Judgment had found that the claimant had been unfairly dismissed, that there had been direct discrimination, that the second respondent was liable for the acts of direct discrimination, and that the claimant had not received a written statement of particulars. A claim of harassment was dismissed.

2. The claimant was again represented by Mr Cordrey. The respondents were again both represented by Ms Aldridge. The hearing took place by Cloud Video Platform remotely. It had been notified externally and a number of observers were present. The hearing was conducted successfully.

Issue

3. The essential issue is - to what remedy is the claimant entitled for each of the claims which succeeded? That includes matters such as the extent of loss incurred, whether there had not been mitigation of loss, the extent of injury to feelings, whether there may have been a fair and lawful dismissal by a different process, whether the award should be increased for the failure to comply with the ACAS Code of Practice, whether the claimant contributed to the dismissal, interest, the award if any for the failure to provide a statement of particulars, and whether the award should be grossed up to account for tax. They are addressed fully below.

4. The claimant had produced a Schedule of Loss which he updated on the morning of the hearing. The respondent had provided a Counter Schedule of Loss.

5. The parties had most helpfully agreed on a List of Issues and in that a number of facts were agreed. It is helpful to set out the terms of that document, in which the claimant and respondents are referred to as C and R respectively:

1. **Basic award**: agreed on figure of £6,300, dispute about whether there should be a reduction for contributory fault and/ or on the basis that it is just and equitable to do so. R relies on the New Evidence.

2. **Compensatory award**:
    a. Agreed that the figures should be net, not gross
    b. Agreed that C's net weekly pre-dismissal earnings were £1,287
    c. Agreed that the duration of past lost is 110 weeks
    d. Agreed that the past loss of pension is £25,919
    e. Agreed that the PILON should be deducted in the net sum of £16,732
    f. Agreed that C's mitigation to date has been £104,702 (net)
    g. Agreed, subject to the following issues, that the past loss, including pension, and deducting the PILON, is £46,055
    h. Agreed that future loss, if any is to be awarded, is to be based on an ongoing weekly loss of £571
    i. Dispute about whether any future loss is due: C claims 12 months' ongoing losses, R argues no award should be made for future loss
    j. Dispute about whether C has reasonably mitigated his losses
    k. Dispute about whether there should be any reduction for *Polkey* and/ or whether just & equitable to reduce the award on the basis C would have been dismissed anyway for: 1) misconduct in light of the New Evidence; 2) based on the evidence from the Merits Hearing regarding C's performance
    l. Dispute about whether there should be any reduction for contributory fault, R relies on C's breach of the conflict policy
    m. ACAS uplift – agreed in principle this is due, dispute over the exact percentage: C says 25%, R says 10%
    n. Agreed that sums above £30k will need to be grossed up

o. Failure to give written particulars of employment – agreed in principle this is due, dispute over the exact sum

3. **Loss of statutory rights:** agreed in principle this is due, dispute over the exact sum.

4. **Financial losses flowing from discrimination** – issues mirror those in relation to the compensatory award, above.

5. **Injury to feelings:** agreed an award is due in principle, disagreement on the amount.

6. **Interest**: will depend upon the award made by the tribunal."

Evidence

6. The parties had prepared an initial Bundle of Documents for the hearing, and had exchanged written witness statements for the claimant, and Ms Cromarty and Mr Batho for the respondents. The documents included what the parties referred to as "new evidence" which had been tendered on the final day of evidence in the Liability Hearing, and which was repeated in the Bundle of Documents. After the exchange of witness statements the claimant produced a supplementary witness statement, and the respondent produced an additional witness statement from a new witness Mr McLaughlin. The receipt of those statements was not opposed. Both parties also produced additional documents. After discussion these documents were accepted with some modifications, in particular the inclusion of two Joint Minutes in Sheriff Court proceedings involving the respondent as defender in each case, but not all the material related to those actions. The claimant amended the supplementary documents to collate press releases issued by the first respondent, without opposition.

7. Oral evidence was given by the claimant first, by agreement, and then by the respondents being Mr Mark Batho, Ms Judy Cromarty, and Mr Gerald McLaughlin. Evidence in chief was given by written witness statement, with cross examination and re-examination together with questions from the Tribunal. The Bundle of Documents and supplementary documents were mostly but not entirely was spoken to in evidence.

8. The Tribunal also took into account the evidence given in the first hearing on liability in so far as relevant to the issue of remedy, as well as the findings in fact made in the Judgment, together with the evidence in the present hearing.

Facts

9. The Tribunal found the following facts, material to the issues before it for the present hearing, to have been established, in addition to those established in the Judgment:

10. The claimant was distressed by the dismissal. He was embarrassed by the fact of it, and that he required to tell professional contact, and organisations of which he was a member through his employment by the first respondent, of the dismissal. A funder asked if he had been guilty of financial misfeasance, as he thought that the speed of the termination of employment suggested fraud. He felt humiliated. His blood pressure remained high. He did not consult his General Practitioner in relation to the effects of the dismissal.

11. He did not have access to his personal possessions, including notebooks and business cards of contacts, for a period of approximately six months. He was not permitted by the first respondent to attend their premises to collect the same. Two other senior employees of the first respondent who had left its employment, being Kenneth Osborne and Gordon Hunt, both of whom had reported to the claimant directly, were permitted to attend the premises to recover their possessions. For a large part of the period to September 2020 restrictions as a result of the Covid-19 pandemic, introduced on 23 March 2020, prevented access to work premises unless reasonably necessary.

12. The claimant's net weekly earnings prior to his dismissal by the first respondent were £1,287. He had an entitlement to pension which had a value of £31,970.40 per annum. He had an entitlement to paid annual leave for 39 days per annum. The first respondent also paid his annual subscription to the Institute of Chartered Accountants OD Scotland in the sum of £495 per annum.

13. The claimant was paid three month's salary by the respondent in lieu of notice at or around the time of his dismissal in the amount of £16,732 net. The first respondent did not at that time provide him with access to his personal belongings in the office at which he had worked. The claimant was not permitted to meet his colleagues to speak to them on his dismissal.

14. The first respondent issued a Web Statement and an internal release at the time of the claimant's dismissal in which it referred to the claimant having "stepped down" from his role as Chief Executive. It referred to his achievements at the first respondent, and wished him well for the future.

15. The claimant received Job Seekers Allowance with effect from 19 March 2020.

16. The United Kingdom went into "lockdown", restricting activities as a result of the Covid 19 pandemic, on 23 March 2020. That reduced the availability of vacancies for work very substantially in the months that followed. The reduced availability gradually eased as the extent of restrictions themselves eased.

17. Following the dismissal the claimant registered with recruitment consultants, including Bruce Tait Associates who he emailed on 6 April 2020 and Aspen People who he emailed on 17 April 2020, and searched online job sites for vacancies. He looked regularly at such sites, and at other sources including the Guardian Newspaper. He sought to find employment primarily in the charity sector, that being the area of his most recent experience. He emailed Mr Andrew Lees of Odgers Berndston seeking assistance, who stated that he could not put the claimant forward for roles as the first respondent was a client. The claimant utilised his network of contacts in so far as he was able to do so without full access to his personal possessions until they were returned to him by the first respondent.

18. The claimant commenced new employment with the Peter Vardy Foundation on 1 July 2020. He was paid a gross salary of £5,000 per month for working three days per week. He had pension contributions on the basis of that salary which had a value of £6,051.28 per annum. His net

monthly earnings from that employment was £2,683.30 initially. His holiday entitlement was to 19 days per annum.

19. The claimant's days of work at the Peter Vardy Foundation increased to four per week during the period from October 2020 to March 2021 after he secured additional funding for the Foundation, and worked overtime. His pay increased during that period, with gross payment of £7,692.31 in October 2020, then payments per month gross of £6,666.67 until March 2021 after which it reverted to £5,000 gross per month in April 2021, and continued at that rate. The claimant also received a bonus of £10,000 in 2021. He has the prospect of further bonuses, which are discretionary.

20. The claimant commenced a position with the Premier Christian Media Trust ("Premier") on 1 July 2020. The claimant commenced a position with the MacLellan Foundation ("MacLellan) on 1 August 2020. The two positions were held through the claimant's limited company, Zetland Associates Limited. That company invoiced those organisations. The company received sums from Premier totalling £3,382.56 in 2020, £3,713.44 in 2021 and £457.14 in 2022. The company received sums from MacLellan totalling £2,450 in 2020, £9,430 in 2021 and £5,800 in 2022. The claimant withdrew those funds by way of dividend, and paid 32.5% tax on that income. The claimant also received speaker's fees totalling £400 in 2021 paid through the company in the same manner.

21. Each of the Peter Vardy Foundation, Premier and MacLellan are organisations supporting and promoting Christian beliefs.

22. A report from Odgers Berndston dated 3 April 2022 provides examples of vacancies that were being advertised for positions in Scotland and beyond and which the claimant might have applied for. The claimant did not see those vacancies, save for one at Zero Waste Scotland advertised in August 2021. He did not apply for that role as the salary was not materially higher than the income he then had.

23. The claimant has sought to commence further consultancy work, and made a series of proposals to third parties for the same thus far without success. Those proposals have included to two organisations and if

successful would lead to work for three years for his said company and an income in each case of £10,000 per annum gross.

24. The Christian Institute provided support to the claimant in his pursuit of the Claim to the Tribunal. It issued a press release in relation to the Claim on 4 December 2020 which included quotations from the claimant. Mr Gerald McLaughlin, the Vice Chair of the first respondent issued a press release in response in December 2020, which included that he was "disappointed at the claim that the Trust's decision to dismiss the former chief executive was based on religious grounds when in fact the decision was taken based on continued, and documented, underperformance." It also referred to a "failure to disclose a conflict of interest when applying Trust resources and offering heavily subsidised rates to the Stirling Free Church of which he is an elder led to disciplinary action against [the claimant] resulting in a final written warning but not his dismissal.".

25. In or around April 2021 further emails and documents involving the claimant came to the attention of the first respondent. They included emails from the claimant dated 30 June 2016, 6 January 2017, 31 January 2017, 1 February 2017, 2 February 2017 and 4 June 2017. All were sent to Elders or members of the Church. All referred to the Barracks development. The documents also included Minutes of the Deacons Court of the Church.

26. A Minute dated 25 April 2016 stated "K Ferguson provided an update on the French Barracks site, …… A variety of rental options were discussed."

27. The claimant had from time to time in 2016 and 2017 updated the Church, and other prospective users of the premises at the Barracks once the development was completed, on the progress with arrangements for the same.

28. The email sent by the claimant on 6 January 2017 referred to other possible premises and stated "Re the Barracks if that goes ahead it would be rental which is much easier to cover."

29. The emails sent by the claimant on 1 February 2017 to Mr Murdo Murchison included a comment on the proposal that the Church lease the

main meeting space from the Trust, with the claimant adding "My initial thinking is that this would be for Sundays only and would could of the order of £250 per day all costs included. Office and other smaller space in the building would be available for let at £10 per square foot pa if a day to day presence was required. I don't think there would be ay need to take the main meeting space for days other than a Sunday, also there would be no hearting, maintenance or electricity cost which I hope would be a very attractive proposition for the church". A later email added "be reassured the church has a friend on the inside!". It was sent at 23.37 to Mr Murchison who was then terminally ill in hospital, and followed messages when Mr Murchison raised concerns over the possible involvement of the Council in the development.

30. The email the claimant sent on 4 June 2017 included a paper with reference to the various options. One was the Barracks, on which the claimant stated "The attractiveness of the Barracks is that you would only rent on Sundays for the space you needed……."

31. The claimant responded to an email from Katie Campbell on 25 October 2017 [referred to in the Judgment] on the same date stating "Thanks much appreciated".

32. On 7 February 2018 Reverend Macaskill emailed Ms Campbell, with a copy sent to the claimant stating "It's great to see the development progressing……We would like to formally enter into an agreement for the use of the area as previously discussed for our Sunday worship and activities. I'd be happy to meet up but Kenneth can provide you with the information you will require". The claimant did not reply to that message to state that he could not do so, or words to that effect.

33. On 23 February 2018 the claimant emailed Reverend Macaskill stating "Fabulous visit, I can imagine you preaching here….!".

34. On 6 March 2018 the claimant emailed Reverend Macaskill regarding a link to a Vimeo presentation on the Barracks to use at a Church meeting. The reply suggested that the claimant act as assistant to him in a Finance role. The claimant replied "OK".

35. On 23 April 2019 the claimant was sent the draft Licence by officers of the Church and replied “Gents, apologies, I have to recuse myself on this. It is our standard licence to rent space.”

36. The claimant was invited by a Trustee Mr Mark Batho to visit Abertay University to explore potential funding to it. Mr Batho was Vice Principal at that University (the time of the visit was not given in evidence). Mr Batho did not declare his interest in respect of that visit. The potential for funding did not progress. Another Trustee Mr Gerald McLaughlin did not disclose his interest in the NHS to which space was rented by the first respondent. Another Trustee Mr Gary Coutts did not declare an interest in the free provision of space by the first respondent to UHI (understood to be the University of Highland and Islands in which he had a role). An external committee member Ben Ferugia did not disclose interest in rentals of the Barracks by Social Work Scotland.

37. The second respondent did not declare an interest in payment to the Lyceum Theatre for a stage craft course for final year Robertson Scholars in Autumn 2018. She was Chair of that Theatre.

38. The first respondent was sued in Glasgow Sheriff Court by the Stirling Free Church on a date not given in evidence. That action was in due course settled between the parties with terms that included a payment of £20,000 for legal expenses. In the course of the action a Joint Minute was entered into providing, inter alia,

> “The Trustees applied a settled funding policy, which places restrictions upon the activities to which the Trustees may advance charitable funding, to the termination of the contracts [with the said Church] in the belief that it applied to the hire of the Property {the Barracks]. The now regret and fully accept that in so doing they inadvertently failed to meet their duties to the Free Church in terns of the Equality Act 2010, and they therefore inadvertently acted unlawfully. The Trustees apologise to the Free Church.”

39. The first respondent was also sued in Glasgow Sheriff Court by the Billy Graham Evangelistic Association. That action was in due course settled between the parties on terms equivalent to those with the Church. In the

course of the action a Joint Minute was entered into in materially the same terms.

40. Both said actions concerned the termination by the first respondent of agreements to use the Barracks premises.

41. On or around 4 December 2020 the Christian Institute issued a press release with regard to the hearing in the present claim to commence on 14 December 2020. The first respondent published a press release in response shortly thereafter.

42. Shortly after the Judgment dated was issued by the Tribunal to parties on 28 July 2021, in respect of liability, the Christian Institute issued a press release with regard to the same. The first respondent issued a press release in response to it shortly afterwards.

43. In the summer of 2021 the claimant recorded an interview for the Christian Institute with regard to the Employment Tribunal Claim against the respondents, which was released online.

44. In February 2022 the claimant applied for a post with the EY Foundation. It was a Foundation run by an international firm of Chartered Accountants. He was not offered an interview.

45. At the time of his dismissal the Board of Trustees had growing concerns with regard to the claimant's performance, including the quality of his engagement with the Board and what they considered was an inadequate level of discussions on a new strategy it had decided upon. At a board meeting on 31 January 2020 it was agreed that the second respondent address concerns over his performance with the claimant. At a board meeting on 10 March 2020 it was agreed that the second respondent meet the claimant more formally to discuss his performance and position with the first respondent.

46. The difference between the claimant's net income with the first respondent, including pension, less his income after dismissal from all sources including pension and the payment in lieu of notice, for the period between the dismissal and the date of the hearing on remedy is a total of £46,055

47. The difference between the claimant's net income with the first respondent, and his net income as at 27 April 2022, is £571 net per week.

Submissions for claimant

48. The claimant's written submission was supplemented orally, and the following again is a basic summary of the submission given by Mr Cordrey. He argued that the claimant's basic award should not be reduced given the circumstances including his long good service. The conflict of interest issue was an isolated blemish. It was not just and equitable to pay heed to the new evidence, as it was only discovered by the first respondent's admitted discrimination. On the calculation of the compensatory award reference was made to ***Digital Equipment Co Ltd v Clements (No. 2) [1998] IRLR 134.***

49. The claimant had mitigated his loss. It was for the respondents to prove that it was unreasonable for the claimant to have failed to take a particular step under reference to ***Wilding v BT plc [2002] IRLR 521***. If there was an absence of mitigation there should be a finding of what income would have been earned and when under reference to ***Hakim v Scottish Trades Union Congress UKEATS/0047/19.*** The respondents had not come near to discharging the burden.

50. Future loss of one year was moderate compensation to seek. There should be no reductions for either the ***Polkey*** principle or for contribution. The burden was on the respondents. The new evidence should not be considered. If the respondents had acted fairly the new evidence would not have been found. In any event it had only been provided on or around 10 May 2021. It was not now possible to reconstitute a disciplinary hearing that did not take place, on the basis of emails now six years old. In any event, its content adds very little and would not have materially altered the sanction. The Tribunal should be sceptical of the respondent's evidence as to that. There was no likelihood of the claimant being dismissed for performance reasons. There had been no formal process or warning.

51. There had been serious breaches of the ACAS Code of Practice, running to the core of the process, and the maximum uplift of 25% should be awarded. No particulars of employment had been provided and the

maximum award of four weeks' pay should be made. There should be no reduction for contribution. The respondents had taken the position that the dismissal was for performance, not the conflict of interest. The awards would require to be grossed up (although the calculation had not used Scottish tax rates). There should be an award of loss of statutory rights at £1,050 being two weeks' pay at the statutory maximum.

52. On injury to feelings the award submitted to be appropriate was £36,000 being in the upper band of ***Vento***. There had been multiple acts of discrimination being the meeting on 7 February 2020, the letter of 12 March 2020 and the dismissal. The brutal and undignified loss of a highly prized career was hard to value. The respondents had not apologised, but continued to smear the claimant perpetuating the injury to feelings. There had been serious public humiliation for the claimant.

Submissions for respondent

53. The respondent's written submission was also supplemented orally by Ms Aldridge. The following is a very basic summary

54. There should be no award in respect of the statement of particulars, under section 38(5) of the 2002 Act. Exceptional circumstances applied, as the claimant was the Chief Executive and had been offered a contract of employment but did not pursue that. The basic award should be reduced for his contribution, which was material. The new evidence demonstrated an even more material breach of the conflict of interest policy. Reference was made to ***Phoenix House Ltd v Stockman [2019] IRLR 960.*** Only in an exceptional case should deductions for contribution not be the same for the basic and compensatory awards – ***Frew v Springboig St John's School UKEATS/0052/10.***

55. The first respondent had not done anything to damage the claimant's reputation, and there should be no award for future loss. There had been a failure to mitigate. It was unreasonable for the claimant not to have taken further steps than he did. He should have made greater efforts, looked at roles more widely than he did, including the role at Hanover Scotland in September 2020 which he could have succeeded in obtaining. There should be deductions for contribution and under the ***Polkey*** principle, as

well as on the basis that it is just and equitable to reduce the compensatory award. That includes where there was misconduct discovered after dismissal. The claimant would have been dismissed in any event, either on the ground of his performance or when the new evidence came to light.

56. It was accepted that there had been a breach of the ACAS Code but the increase should be 10% having regard to the steps that were taken and that the breach was not total. On the issue of injury to feelings under reference to three Tribunal decisions. It was submitted that an award in the low ***Vento*** band was appropriate.

Law

(i) Unfair dismissal

57. The claimant did not seek an order for re-instatement or for re-engagement under the Employment Rights Act 1996. The Tribunal requires to consider a basic and compensatory award if no order of re-instatement or re-engagement is made, which may be made under sections 119 and 122 of the Employment Rights Act 1996, the latter reflecting the losses sustained by the claimant as a result of the dismissal. The amount of the compensatory award is determined under section 123 and is "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". The Tribunal may increase the award in the event of any failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. Awards are calculated initially on the basis of net earnings, but if the award exceeds £30,000 may require to be grossed up to account for the incidence of tax. The Tribunal may separately reduce the basic and compensatory awards under sections 122(2) and 123(6) of the Act respectively in the event of contributory conduct by the claimant.

58. Guidance on the amount of compensation was given in ***Norton Tool Co Ltd v Tewson [1972] IRLR 86.*** The losses require to be grossed up for the incidence of tax where the award exceeds £30,000.

59. There is a duty to mitigate, being to take reasonable steps to keep losses to a reasonable minimum. The onus of proof in that regard falls on the employer - ***Fyfe v Scientific Furnishings Ltd [1989] IRLR 331*** reaffirmed in ***Ministry of Defence v Hunt [1996] IRLR 139*****,** (which was upheld on other grounds at the Court of Appeal, reported as ***Ministry of Defence v Wheeler [1998] IRLR 23***). How to address mitigation issues was addressed in ***Cooper Contracting Ltd v Lindsey UKEAT/0184/15.*** As was there stated, not too exacting a standard must be applied to the claimant.

60. In respect of the assessment of the compensatory award it may be appropriate to make a deduction under the principle derived from the case of ***Polkey v AE Dayton Services Ltd [1988] AC 344.*** if it is held that the dismissal was procedurally unfair but that a fair dismissal would have taken place had the procedure followed been fair. That principle was considered in ***Silifant v Powell 1983 IRLR 91***, and in ***Software 2000 Ltd v Andrews 2007 IRLR 568,*** although the latter case was decided on the statutory dismissal procedures that were later repealed.

61. In ***Nelson v BBC (No. 2) [1979] IRLR 346*** it was held that in order for there to be contribution to the dismissal in respect of conduct justifying a deduction, the conduct required to be culpable or blameworthy and included “perverse, foolish or if I may use a colloquialism, bloody minded as well as some, but not all, sorts of unreasonable conduct.” Guidance on the assessment of level of contribution was given by the Court of Appeal in ***Hollier v Plysu Ltd [1983] IRLR 260***, which referred to taking a broad, common sense view of the situation, in deciding what part the claimant’s conduct played in the dismissal. At the EAT level the Tribunal proposed contribution levels of 100%, 75%, 50% and 25%. That was not however specifically endorsed by the Court of Appeal. Guidance on the process to follow was given in ***Steen v ASP Packaging Ltd UKEAT/023/13.*** The contributory conduct did not need to amount to gross misconduct to be taken into account – ***Jagex Ltd v McCambridge UKEAT/0041/19***

62. A Tribunal should consider whether there is an overlap between the ***Polkey*** principle and the issue of contribution (***Lenlyn UK Ltd v Kular UKEAT/0108/16).*** There are limits to the compensatory award under

section 124, which are applied after any appropriate adjustments and grossing up of an award in relation to tax – ***Hardie Grant London Ltd v Aspden UKEAT/0242/11.***

63. In the event of an unreasonable failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures, the Tribunal may adjust the level of compensation upwards or downwards by up to 25%. It has a discretion on whether or not to do so.

64. There is a limit to the award of compensation for unfair dismissal under section 124(IZA) of the Employment Rights Act 1996, which is of "52 multiplied by a week's pay"

Discrimination

65. In the context of a breach of the 2010 Act compensation is considered under section 124, which states:

> "**124 Remedies: general**
>
> (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
>
> (2) The tribunal may—
>
> (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
>
> (b) order the respondent to pay compensation to the complainant;
>
> (c) make an appropriate recommendation.
>
> (3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect [on the complainant] of any matter to which the proceedings relate …
>
> (4) Subsection (5) applies if the tribunal—
>
> (a) finds that a contravention is established by virtue of section 19, but

(b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.

(5) It must not make an order under subsection (2)(*b*) unless it first considers whether to act under subsection (2)(*a*) or (*c*).

(6) The amount of compensation which may be awarded under subsection (2)(*b*) corresponds to the amount which could be awarded by the county court or the sheriff under section 119…….

66. Section 119 states:

"**Remedies**

……

(3) The sheriff has the power to make any order which could be made by the Court of Session –

(a) in proceedings for reparation

(b) on a petition for judicial review.

(4) An award of damages may include compensation for injured feelings(whether or not it includes compensation on any other basis)….."

67. An issue to address in any award is injury to feelings. Three bands were set out for injury to feelings in ***Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102*** in which the Court of Appeal gave guidance on the level of award that may be made. The three bands were referred to in that authority as being lower, middle and upper, with the following explanation:

"i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.

ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.

> iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings."

68. In ***Da'Bell v NSPCC [2010] IRLR 19,*** the EAT held that the levels of award for injury to feelings needed to be increased to reflect inflation. The top of the lower band would go up to £6,000; of the middle to £18,000; and of the upper band to £30,000.

69. In ***De Souza v Vinci Construction (UK) Ltd [2017] IRLR 844***, the Court of Appeal suggested that it might be helpful for guidance to be provided by the President of Employment Tribunals (England and Wales) and/or the President of the Employment Appeal Tribunal as to how any inflationary uplift should be calculated in future cases. The Presidents of the Employment Tribunals in England and Wales and in Scotland thereafter issued joint Presidential Guidance updating the Vento bands for awards for injury to feelings, which is regularly updated. In respect of claims presented on or after 6 April 2020, the Vento bands include a lower band of £900 to £9,000, a middle band of £9,000 to £27,000 and a higher band of £27,000 to £45,000. That included an uplift from English authority which a Tribunal may disapply if it gives reasons (this Tribunal did not consider that such disapplication was required in this case, and used the bands set out above as guidance).

70. The higher band applies to "the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment", the middle band "for serious cases which do not merit an award in the highest band" and the lower band "for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence".

71. Consideration may also be given to an award in respect of financial losses sustained as a result of the discrimination. This is addressed in ***Abbey National plc and another v Chagger [2010] ICR 397***. The question is "what would have occurred if there had been no discriminatory dismissal ……. If there were a chance that dismissal would have

occurred in any event, even if there had been no discrimination, then in the normal way that must be factored into the calculation of loss." The test under the 2010 Act is not what is just and equitable – ***Hurley v Mustoe (No. 2) [1983] ICR 427***.

72. There is a duty of mitigation, being to take reasonable steps to keep losses sustained by the dismissal to a reasonable minimum. That is a question of fact and degree. It is for the respondent to discharge the burden of proof – ***Ministry of Defence v Hunt and others [1996] ICR 554***.

73. In ***Chapman v Simon [1994] IRLR 124***, the Court of Appeal emphasised the importance for tribunals to consider only the act of which complaint is made. The Editors of Harvey on Industrial Relations and Employment Law consider that "the same principle must apply to any assessment of compensation for discrimination—the loss must be attributable to the specific act that has been held to constitute discrimination, and not to other acts showing discrimination of which complaint has not been made."

74. Where loss has been caused by a combination of factors, including some which are not discriminatory, the award may be discounted by such percentage as reflects the apportionment of that responsibility - ***Olayemi v Athena Medical Centre [2016] ICR 1074***. The employment tribunal should focus on the divisibility of the harm. In ***BAE Systems (Operations) Ltd v Konczak [2017] IRLR 893***: the Court of Appeal held that "the question is whether the tribunal can identify, however broadly, a particular part of the suffering which is due to the wrong".

75. The concept of contribution to discrimination was addressed by the EAT in ***Way v Crouch [2005] ICR 1362***, which held that "compensation in a sex discrimination case (and by analogy in other discrimination claims) is subject to the [1945] Act" In ***First Greater Western Ltd (2) Mr J Linley v Miss R Waiyego UKEAT/0056/18*** however the EAT held that the Act referred to, the Law Reform (Contributory Negligence) Act 1945, can apply to some discrimination claims, but that reduction of an award for contributory negligence would rarely, if ever, be justified because of the difficulties in applying the concept of "fault" to the victim of a discrimination claim and the fact that the discriminator may have acted without "fault" in

the sense of the 1945 Act. It considered that ***Way*** expressed a view that was too broad. It suggested that compensation can be addressed as an issue of mitigation.

76. Interest may be awarded in discrimination cases under the Industrial Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. No interest is due on future losses.

77. Where the awards exceed £30,000 they require to be grossed up to account for the incidence of taxation under the Income Tax (Earnings and Pensions) Act 2003 sections 401 and 403 and ***Shove v Downs Surgical plc [1984] IRLR 17***.

(ii) Statement of terms

78. The award may be between two and four weeks' pay under section 38 of the Employment Act 2002, unless there are exceptional circumstances which apply.

Observations on the evidence

79. The Tribunal's assessment of each of the witnesses who gave oral evidence is as follows

Mr Kenneth Ferguson

80. The Tribunal commented in the Judgment on its assessment of the claimant's evidence in the hearing on liability. The Tribunal had continuing concerns at some aspects of the claimant's evidence. He continued to have a tendency not to answer a question directly. He gave the impression of seeking to present the evidence in a light favourable to him rather than answer some questions candidly. He at best exaggerated his evidence on occasion. An example is in his second witness statement where he stated "On being sacked I had to resign as Convenor of the Scottish Grant Makers". In cross examination he initially said that he had required to resign immediately, but then accepted that he had remained in post until November 2020. The evidence that he had resigned immediately was untrue. He also sought to characterise matters in a manner that the Tribunal did not find convincing. One example was an email that the

claimant had sent an elder of the Stirling Free Church in 2017, part of what the first respondent described as new evidence. In that he said "be reassured that the church has a friend on the inside" was a reference to being inside the development process. The Tribunal did not consider that that was what that had been a reference to, but inside was inside the first respondent itself, having regard to the evidence it heard as a whole. The phrase was directly redolent of a conflict of interest. It is true that the email was sent very late at night and to an elder in hospital in the latter stages of terminal cancer, but that does not detract from it being further evidence of the claimant having known of and still acting in breach of the provisions on conflict of interest. The conflict of interest is also shown in the email that the claimant sent his Church colleagues with his initial thoughts on terms. One cannot know from that email whether his thoughts were from the perspective of the Church position, or that of the first respondent. That no terms were at that stage concluded, and when they were both he was not involved and they were not similar to his initial thoughts, does not avoid there having been a conflict in the Tribunal's view. The claimant throughout refused to accept that he had done anything wrong, which the Tribunal considered revealed a lack of insight into the issue on his part, and which did support to an extent the allegation made of him by the first and second respondents that he did not accept any degree of criticism. The Tribunal should also note that the second written witness statement had referred to earnings with the first respondent and then after dismissal on a gross basis, set out in a Schedule of Loss to which the statement referred, which was later accepted not to be the correct manner to calculate loss, and a revised Schedule of Loss was tendered.

Mr Mark Batho

81. Mr Batho had recently assumed the role of Chair of the first respondent. His written witness statement concluded with the proposition that the claimant ought to have mitigated loss by applying for roles, and had he done so he would have secured a post at the same level of remuneration as with the first respondent within a year. In oral evidence he said that the report by Odgers Berndston did not set out roles that the claimant should have applied for but was indicative of the roles being advertised which he

could have applied for. That there were roles being advertised the Tribunal accepted. But that if far from saying that the claimant failed to mitigate loss. For some of them the claimant had little realistic prospect of being appointed, such as that for the Law Society of Scotland with a materially higher salary and very different role to that held with the first respondent. Others did not have much if any higher remuneration than he was receiving. Whilst the Tribunal accepted that Mr Batho sought to give honest evidence, it was of little direct assistance to the issues before the Tribunal.

Ms Judy Cromarty

82. The Tribunal had heard from Ms Cromarty in the initial hearing. The Tribunal considered that she was generally a credible and reliable witness. There were criticisms of her position from the claimant in submission, which included that it was self-serving and unreliable, but we did not accept that although we did not agree that the possibility of dismissal from knowledge of the new evidence was accurately described as “high”. It was present, but we have assessed it as set out below.

Mr Gerald McLaughlin

83. Mr McLaughlin’s evidence was not subject to cross examination and was accepted by the Tribunal.

Discussion

84. We were once again substantially assisted by both representatives, whose final submissions were of high quality. The Tribunal considered matters having regard to all the evidence it heard over both hearings, and took account of the findings of fact from the Judgment, and those set out above.

85. The position that the Tribunal required to consider was a complex one, as had been the position as to liability. There were a large number of issues disputed between the parties, where the evidence was not always as clear as it might have been. The witness statement of the claimant for example was somewhat lacking in specific detail as to what he had done, when, and took a rather general approach to his losses. Total figures for loss to

date, including for mitigation, were given. That did not allow easy assessment if the period of loss was less than that. There were issues over what has been described as new evidence, and the exact source of that was not explained in the evidence for the respondents.

86. The parties again took somewhat polar opposite positions. The claimant's position was that he should be compensated in full, without any deductions, for a period of over three years from the date of dismissal. He did not accept any ground for criticism of how he had acted in any respect. The respondents' position was that the deductions should be material, including in one respect 100%, and that there would have been a fair dismissal either because of performance or because of the discovery of new evidence on the conflict of interest issue which had already attracted a final written warning on more limited evidence, current for 12 months from December 2019. The claimant sought an uplift of 25% for the breach of the ACAS Code, the maximum of four weeks' pay for the lack of a statement of terms, and a total award of around £190,000 including £36,000 for injury to feelings, which after grossing up would have been the equivalent of over £270,000. The respondents did not provide a specific figure for the award, but argued that the basic award should be reduced, the compensatory award should be nil, and that the injury to feelings award should be in the lower band of ***Vento,*** therefore below £9,000. They argued that there were exceptional circumstances justifying no award for the failure to provide particulars, and that the uplift should be 10%. On every point therefore the dispute was a substantial one.

87. These issues are also not entirely severable ones. They include, to summarise them very generally, what losses flowed from the dismissal, what would have happened in the absence of the unfair dismissal and of the unlawful dismissal, could there have been a fair dismissal and if so when and for what reason, on which there was more than one argument for the respondents, did the claimant contribute to the dismissal, in the assessment of what is just and equitable what if any new evidence can be taken into account, what effect did that have, and when would that have been, and in the general issue of assessing what is just and equitable avoiding deductions which have an undue effect by a form of double-

counting of the same matter under two or more questions. There are therefore a series of different but partly related issues and the Tribunal did not consider that a purely mechanical exercise of addressing each one independently in turn was the only manner to do so.

88. Matters are further complicated by there being remedies for discrimination and for unfair dismissal which address the same potential losses, but apply what may be different legal tests, and include where discrimination was not the only factor leading to dismissal. The Tribunal considered whether the losses assessed for the unfair dismissal claim were any different to those from the discrimination claim. The latter is not capped, and the Tribunal addressed initially the discrimination losses accordingly, which is consistent with ***D'Souza v London Borough of Lambeth 1997IRLR 677***.

89. The Tribunal has addressed the issues before it as follows:

(i) What period of loss did the claimant suffer as a result of the unfair and discriminatory dismissal?

90. The dismissal has two different elements, its unfairness, and its unlawfulness. In respect of the former, the respondent has an argument under the ***Polkey*** principle which is addressed below. In respect of the latter it has an argument that there would have been a lawful performance dismissal which is similar to such an argument. The respondent argued that the claimant's performance had not been adequate, he would have continued to perform inadequately, a formal performance management process would have been commenced, and that was likely to have ended in his dismissal after a period of six to twelve months from his dismissal that did occur, such that the employment would have ended by 16 March 2021 at the latest. The claimant argued that he would have acted on any issues raised, and no fair and lawful dismissal would have taken place accordingly. The claimant alleges loss for the period to the date of the hearing, and future loss for a period of one year thereafter.

91. The Tribunal considered from all the evidence before it that there was a strong probability but not a certainty that a dismissal would have taken place, and that that would have been fair and lawful. Performance

management had been ongoing for a material period, albeit informally. That was set out in the Judgment and further findings on matters relevant to remedy in this context were made. It was notable that the concerns over performance had arisen before any concern over conflict of interest became known to the first respondent. The second respondent had a view that the performance of the claimant was substantially inadequate, but she was not alone in that. Some of the other Trustees who gave evidence before us at the Liability Hearing had similar concerns, and they were summarised in the evidence of Mr Coutts. On that matter the Tribunal accepted his evidence. The claimant firstly did not accept that he had done anything wrong in respect of the conflict of interest, and secondly did not accept that his performance was at all inadequate. The Tribunal did not accept his evidence on those points. That for conflict of interest was addressed in the Judgment, and is further addressed below. The Tribunal did consider that there were legitimate reasons for concerns over performance to be raised with the claimant, that they had been on-going for a lengthy period even if not raised as a formal disciplinary matter, and that the claimant's performance had not substantially improved as a result of the informal processes that had been undertaken that would have been likely to forestall commencement of a formal process.

92. There was a related issue which the Tribunal considered, which was that the claimant had a lack of understanding of what performance issues there were. He focussed for example in much of his evidence on the views of his staff, and had a tendency to ignore the views of the Board. There was a sense from his evidence that he believed that he was or should be the ultimate decision maker for the Trust, not the Board, which was the ultimate decision maker. The Tribunal did not consider that he engaged adequately with the board and that the concerns with regard to his performance, and engagement in particular, were justified. Those concerns were not sufficient for a fair dismissal at the time that the dismissal took place, partly because of the absence of any formal process or warnings, but there was evidence that it had existed for a material period, and was not improving. The Tribunal concluded that the claimant did not appear fully to appreciate that he was given instructions by the Board which it was his role to fulfil, particularly if the instruction was

different to his own views. He did not appear to understand the concerns over his relationship with the board, as exemplified by his evidence on the issue of engagement with the Trustees. His witness statement for the remedy hearing referred to there having been over 50 meetings being held with them, as if that was sufficient of itself. That was not the point, which was about the quality of the engagement, not its quantity. He did not address that quality issue at all in his witness statement, which we concluded was as he did not properly understand it. That difference of impression was also exemplified by his own view on Project Tynecastle referred to in the Judgment, which was entirely at odds with those of the Trustee board. Other aspects of the evidence before us showed an increasing gulf between the claimant's views on the one hand and those of the board on the other.

93. On the other hand the first respondent had not articulated its concerns over performance clearly with the claimant. He had not been told where his performance required to be improved, how it would be measured, or what help he might be given to achieve what was desired.

94. The Tribunal concluded that if a formal process with regard to the claimant's performance had been commenced, it would have taken a material period of time to reach the first stage. There would have been an investigation of the issues, and that would have taken itself a material time as there were a number of discrete issues. The claimant in that investigation process is likely to have defended his position forcefully, providing substantial documentation in doing so, likely to have involved further investigation. There would likely then have been a disciplinary hearing with regard to the performance, which again the claimant would have defended, and led to either a first warning or a form of final written warning. The terms of the ACAS Code of Practice on Disciplinary and Grievance Hearings is relevant in that context. It is a Code which the Tribunal would take into account, as referred to in the Judgment. Paragraph 19 states:

> "19. Where misconduct is confirmed or the employee is found to be performing unsatisfactorily it is usual to give the employee a written warning. A further act of misconduct or failure to improve

performance within a set period would normally result in a final written warning."

95. Whether the warning would be first or final depends on the circumstances. There may usually be both, but that is not necessarily the case. In the present case, it is more likely that the warning would have been a final one issued at the first disciplinary hearing. The process of investigation and discipline to the stage of a first or final written was likely to have taken something of the order of three months.

96. A final written warning would have required to specify the areas where performance was considered to be inadequate, why that was, what performance was required of him, and over what period of time. The Tribunal considered that the period of time in relation to the warning was likely to have been of 12 months' duration, being that for the final written warning given to him in relation to conflict of interest after the appeal to Professor Crerar. It is likely that the claimant would have appealed that decision, but that the decision would have been to refuse that appeal. That process is likely to have taken about a month.

97. The Tribunal considered that it was likely that following the warning being issued and the failure of the appeal that the claimant would have attempted to achieve the performance requirements but that some at least of the performance issues were likely to have persisted, and that towards the end of the period of the warning a new investigation process would have commenced. It is likely to have been towards the end of that period as the claimant's performance would initially have improved, and he required in light of considerations of fairness to have a reasonable opportunity to act on the terms of the warning. The investigation and disciplinary process would again have been reasonably lengthy for the same reasons as above, and taken a further period of about three months. Thereafter it is likely that a fair dismissal, unconnected to any issue of his religion or belief so as not to be discriminatory, for the reason of capability based on inadequate performance as assessed by the Board, would have taken place.

98. The timing of that process leading to dismissal is difficult to estimate as it involves a number of factors involving both the claimant and first respondent. It could have been during the latter stages of 2020. It was possible, but it was not certain. It might have taken far longer, up to March 2022. That lack of certainty as to timing requires to be reflected in our decision. The Tribunal noted that there had been no formal disciplinary process, and that for a Chief Executive, who had had reasonably lengthy service which had until the later period been considered good at the least, that a reasonably lengthy period to allow for a first disciplinary process, a reasonable opportunity to improve, and then at least one further disciplinary process which included a reasonable investigation then a reasonable hearing, was required to enable the process to be fair.

99. The Tribunal concluded, from all of the evidence before it, that the period of loss caused by the dismissal is to be assessed for the period of 18 months from the date of dismissal, which is to say until 16 September 2021.

(ii) What is the amount of the pecuniary loss?

100. We considered that the losses should be calculated on the basis of firstly the loss of income, net, secondly the loss of pension, thirdly the loss of the ICAS benefit and finally for loss of statutory rights. The net loss of income and pension the Tribunal calculated pro rata from the agreed figure for the period of 110 weeks from dismissal to the Tribunal, against the period of 18 months or 78 weeks for the period of loss set out above. It takes account of the payment in lieu of notice, and the earnings the claimant received. The Tribunal did not have fully detailed information of net earnings each month, of when dividends were taken from the limited company, and could not calculate an exact sum for the period of loss set out above. It concluded that using a pro rata calculation from the parties' agreed figures was appropriate. The agreed sum was £46,055, and using the formula 78/110 gives a sum of £32,657.18.

101. The claimant also sought compensation for having fewer holidays than with the first respondent. His argument was that he had 39 days with them, but 19 with his current employer, and he sought compensation on the

basis of the difference of 20 days per annum. The Tribunal did not consider that that was an appropriate head of loss. The claimant was paid a salary for both positions. The differential in salary is part of the loss he claims for. The difference in holidays is partly as he works three days per week with his current employer, and the entitlement he has is a pro rata one because of that. This was not, however, a financial loss beyond the differential in salary, the Tribunal concluded.

102. It was not clear from the evidence when the ICAS payment was made, but taking a pragmatic approach the Tribunal awarded two years of contributions for that amounting to £990.

103. There was a difference on the amount for loss of statutory rights. The Tribunal considered that in all the circumstances given both the claimant's service and age that an award of £750 was just and equitable.

104. The total loss for income, the ICAS payments and loss of statutory rights is the sum of £34,397.18.

(iii) Has the claimant mitigated his loss?

105. The Tribunal considered that the claimant had not been proved to have failed in his duty to mitigate loss. The claimant had obtained new employment at a time when the market was very difficult. That market then improved once the restrictions due to the Covid-19 pandemic were gradually eased. There was some evidence of his seeking better employment thereafter, but it was limited to the claimant's witness statement and did not have vouching. He had applied for a post with the EY Foundation in February 2022, which is outwith the period of loss we have identified above but does at least indicate that he was both seeking new positions and doing so in a secular role not restricted solely to those which shared his beliefs. He had not been aware of all but one of those set out in the Odgers Berndston report. That is surprising if he was conducting the searches he claims that he was, but in order for him to have a sufficient benefit to move from the existing arrangements a salary level of well over £100,000 per annum was in his mind required. He also sought to be within reasonable commuting distance of his home, and looked in the approximate areas between Glasgow, Edinburgh and Perth.

106. We did not consider that he was unreasonable in restricting the search to posts offering a sufficient salary to improve the position financially and to look within the geographical area he did. Whilst he could well have done more than he did, that is not the test. He was not acting unreasonably in all the circumstances. Separately, it is not known what prospects he had to be appointed if he had applied for posts, such as the Hanover Scotland vacancy in September 2020 on which the respondents particularly founded. Insufficient evidence was placed before the Tribunal on whether any application had material prospects of success. There was for example no expert report on the likelihood of the claimant succeeding in that or other posts, on timeframe, or on full remuneration particulars. The author of the Odgers Berndston report did not give evidence, and Mr Batho's evidence was limited in the manner commented upon above.

(iv) What award for injury to feelings is appropriate?

107. The Tribunal considered that the claimant's circumstances fell within the middle band of ***Vento***. That view took into account that the claim of harassment had not been successful, that although there was more than one incident such that it was not a one-off case the matters that were discriminatory were in a reasonably short timeframe, and focussed on the dismissal itself, as well as the claimant's evidence on the effect of the dismissal on him, and the circumstances of that. The dismissal was peremptorily undertaken, when he was absent ill, and he was not permitted to say farewell to colleagues. The dismissal did involve something of a shock, and a loss of face. It was in the context of long service, with the majority of it involving performance that was in general good, with supportive comments from the second respondent's predecessors. There was an expectation on the claimant's part that he would remain in that post until retirement. The evidence was somewhat limited however, and we considered that there was a degree of exaggeration. His own witness statement did not provide substantial detail. It did for example refer to his being under "enormous physical and mental pressure" and that he had been sustained by his faith, but the detail of how the pressure impacted on him was not given, save that his blood pressure remained high. No witness from his household gave evidence.

He accepted that he had not contacted his General Practitioner as a result of the dismissal or the effect on him. There was no medical evidence that the high blood pressure had been caused or exacerbated by the dismissal and events leading directly to it found to be acts of discrimination. He had found new employment starting on 1 July 2020. He had been able to undertake that senior role, and had been successful in it, leading to four days a week working for a period, and a bonus. He had referred to being required to leave other roles, but in cross examination accepted that that had not happened immediately in one case, and that the reasons included other matters unrelated to the dismissal by the first respondent. That part of the evidence was we concluded further evidence of a tendency to exaggerate on the part of the claimant.

108. The announcement of the dismissal was not accurate, as he had not "stepped down" as that term is normally understood, being as a resignation or mutual agreement to terminate the role, but the Tribunal did not accept that the internal announcement or web statement about the dismissal undermined him or materially damaged his reputation. The announcement was balanced, and worded in a manner that did not state in terms that the claimant had been dismissed for capability or performance. The choice of words appeared to the Tribunal to have been made so as not to damage the claimant's reputation and not to do that, as he alleged. In fact the claimant did find that new employment, and it was in a similar role to that with the first respondent but for three days per week and involving materially lesser sums for funding. It is understandable that others asking him if there had been financial impropriety would have been difficult for him, and that the humiliation he referred to in his witness statement was understandable, but there was only one example of that and he was able to explain the position to that person.

109. The later press releases by the first respondent were not in entirely accurate terms, but were in response to ones from the Christian Institute who were funding the claimant in the claim, which included quotations from him. He was therefore a participant in that press release, and it is not surprising that the first respondent responded to it, and the later one. The claimant's evidence on the effect of the press releases on him or his career

was not accepted. In any event, the claim as pled focussed on the dismissal, and the effects of the dismissal. There was no pled case that the claimant had been victimised by the first respondent in the press releases it issued in a manner contrary to section 27 of the Equality Act 2010. The Tribunal did not accordingly consider that it had the ability to consider such a case, particularly as the press releases were all at least six months after the dismissal.

110. Taking all of the evidence before us into account, the Tribunal considered that an award of £15,000 was appropriate.

(v) Should the "new evidence" be considered?

111. The Tribunal agreed that the new evidence should be considered in this context. No clear evidence was before the Tribunal on how it had come to light. That was surprising as that evidence was uniquely in the hands of the respondents. Those of their witnesses who were asked about the point did not know. It may have been directly or indirectly as a result of the civil court proceedings. But the evidence was almost all on the servers of the first respondent. The emails were sent to and from the claimant's email with them. They were available throughout if the first respondent had properly looked for them. It did its own internal investigation prior to the dismissal. It had legal advice both then and for the purposes of the present claim. The claimant had not however referred to those emails himself in his evidence at the Liability Hearing. In his witness statement for that hearing he stated

> "During 2019 the church was outgrowing the 100-seater lecture theatre it was renting from the Stirling Smith Art Gallery and Museum. The SFC Minister asked me about the possibility of renting space in the Barracks Lecture Theatre once the site was open….."

112. The claimant's witness statement did not refer to any extent to discussions and communications earlier than 2019 in this regard. He did not refer to them during the investigation or disciplinary process that the first respondent conducted. There was at the least a lack of candour by him in not doing so, particularly in his witness statement.

113. The Tribunal did not consider it necessary or appropriate to exclude the evidence as they may have resulted from a court process which was instigated by an unlawful decision to terminate leases to the Church and Association, as the claimant argued. The emails were ones sent by the claimant largely, although some were sent to him. He used the first respondent's email account to do so. They pre-dated the grant of the Licence to the Church. The equivalent agreement with the Association was not before the Tribunal but was likely to have been no earlier in time than that to the Church. The fundamental purpose of having a conflict of interest policy is to have those whose circumstances are within its terms to state that fact to the organisation, so that a view may be taken. For the claimant, as the Tribunal found in the Judgment, he quite simply ought to have informed his line manager the second respondent, whom failing one of the Trustees. The terms of the policy are to the effect that that should be done once the potential for conflict emerges. The new evidence shows the claimant taking an active role in discussions both with the Church and for the Church. It shows that he made comments as to why the Barracks may be suitable for the Church, and about outline terms for discussion. His comments were not solely from the standpoint of the benefit to the first respondent, but included the benefit to the second respondent. They were relevant to the issue of conflict of interest. Had the claimant disclosed the conflict of interest when and to whom he should, it is likely that matters would have taken a different course. The issue of what arrangement if any should be made with the Church or Association would have been raised within the Board of Trustees. A different view of the use to which the first respondent's premises was permitted in any agreement was likely to have been taken at the least. That was because of promotion of religion or belief, which the Trust did not wish to do, either for religious views of the Church, or any religion, or for political beliefs. The Tribunal considered that had the issue been a Licence to an organisation that wished to use the premises to promote, for example, arguments for or against independence, the Board would not have approved that, but if the organisation were to seek use for a food bank, approval would have been provided. Whether the documents were in fact found because of the civil proceedings which were on the basis of what the first respondent later

accepted had been an unlawful decision does not require us to exclude them as the claimant argues, however ingenious such an argument is.

(vi) Should any deduction be made on the basis of the effect, if any, of that new evidence*?*

114. The deduction is considered on the basis of assessing the risk of a fair and lawful dismissal had the new evidence been found, and considered. Ms Cromarty did not suggest that the dismissal would have been certain, and was right to do so. The evidence did add somewhat to the understanding of what had happened when. The involvement of the claimant had been for a longer period than she had been aware of at the time of the disciplinary hearing, and the role of the claimant in how matters had developed was more significant than she had understood at the time.

115. The evidence to be considered is a mix of that considered in the Judgment, and that before this hearing. The emails of 22 February 2019 are of importance for two reasons. Firstly the claimant asked Ms Campbell to progress to a formal rental agreement with the Church for Sunday rental of the Barracks. That indicates both knowledge of the purpose of the rental, and his approval to it proceeding. That is how Ms Campbell took it, as addressed in the Judgment. She then replied asking if the second respondent knew and stating “Assume she’d be fine with it?” That was a question, which the claimant did not answer directly, and we concluded deliberately. She then added “Leave it with me and I’ll get in touch with Iain to try and nudge forward.” That does not negate the question in our view, although it does make the position less clear. In our view that final sentence refers to the paragraph on the terms of the rental.

116. The fundamental point was still that the claimant did not formally and properly disclose the conflict of interest he had, Ms Cromarty did not dismiss for that but imposed the next level of disciplinary penalty of a final written warning, and Professor Crerar agreed but reduced the penalty from 18 months’ duration to 12 months. That is nevertheless a serious penalty to impose and particularly so for the most senior employee in the organisation.

117. The new evidence builds on that, and shows that the claimant did take an active role in promoting the arrangement, suggesting outline terms (though different to those finally concluded) and having involvement in the discussions both at the Church and the Trust. The factors to take into account in respect of the new evidence included that the communication undertaken was at a very early stage of matters, before the Barracks had been developed and could be occupied. Those premises were also but one option for the Church.

118. The claimant in his witness statement referred to other circumstances where it was alleged that Trustees had not declared an interest, but the relevance of that is limited firstly as the circumstances were significantly different, and secondly as those individuals were not employees, which the claimant was.

119. A further matter to take into account is that the documents were discovered in May 2021, over a year after the dismissal. If the dismissal had not taken place, and the claimant had remained in post, and if the documents were then discovered, the question is whether the first respondent would have re-convened the disciplinary hearing to address them, if so how long that would have taken, and what the outcome would be likely to be.

120. Taking all the evidence before it into account, the Tribunal considered that there should be no deduction in this respect. That is because the period of time is restricted to between about June and September 2021, when the losses would have ended in any event as referred to above, and because the effect of the new evidence is properly assessed under the issue of contribution below. To include it in this context would be an element of double-counting that would be unjust.

(vii) Should there be an increase in the level of the compensation for discrimination and the compensatory award because of a failure to follow the ACAS Code of Practice?

121. Having regard to all the circumstances of the case the majority concluded that an increase of 15% was just and equitable taking into account all the circumstances. The default by the first respondent was material. There

had been no fair notice of the allegations and the evidence said to support them, the hearing had not taken place when the claimant was fit to attend, the decision was taken by someone not impartial, in respect of whom a grievance was to be taken and who had stated that she would stand aside from the process, but then returned to make the decision, and the appeal was conducted by someone not impartial. There had not been complete failure to comply, however, and account of the overall effect of the increase did require to be taken. We accepted that the increase from the ACAS Code issue did apply to the discrimination claim. Mr Cordrey referred us to ***Catanzano v Studio London Ltd UKEAT/0487/11.*** Here the second respondent was the person responsible for the acts of discrimination. We considered that it was appropriate to apply the increase to the discrimination remedy, and noted the terms of Schedule A2 to the 1992 Act permitted that.

(viii) What if any deduction should be made for the claimant's contribution?

122. Contribution is a matter that arises directly under section 123 of the 1996 Act, but the issue is more controversial under section 124 of the 2010 Act. There are two EAT authorities on that matter, referred to above, that are not easily reconcilable. The suggestion that contribution may be addressed in respect of mitigation does not, we concluded, apply in this case. The duty to mitigate arises in respect of loss once it is sustained, or starts to be sustained, which in this case is at the point of dismissal onwards. The conduct which is contributory was prior to dismissal.

123. The Tribunal considered that it was appropriate to examine the position from first principles. Section 124 refers to what a sheriff may award under section 119, and that latter section refers to proceedings for reparation. That includes a claim for personal injury, where the contribution by a pursuer may be taken into account under the 1945 Act. Section 1 of that Act provides:

> *"1* **Apportionment of liability in case of contributory negligence**
>
> (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

124. The circumstances of the present case are very different to those in either of the EAT cases cited. Here, there was blameworthy conduct by both the claimant and first respondent, as well as the second respondent. The blameworthy conduct of the claimant can be described as fault, or at least akin to fault in the terms of the 1945 Act. The dismissal was not solely caused by the discriminatory act. It was a significant factor, but far from the only factor as explained in the Judgment. The Tribunal considered that it would not be just, given the circumstances of the present case, to fail to have regard to the principle of contribution to the loss being compensated under section 124 of the 2010 Act in light of all the circumstances. It considered that the analysis in ***Crouch*** was more appliable to the circumstances of the present case, and that this was one of those cases in which it was possible to identify what can be described as fault on the part of the claimant for the purposes of the 1945 Act. It also noted that the parties' agreement included that the issues in respect of compensation for discrimination "mirrored" those in respect of unfair dismissal. There was no submission before us that contribution should or could not be assessed in relation to discrimination, or that it should be assessed differently to contribution to the unfair dismissal, the submissions were on the merits or otherwise, and if appropriate the extent, of doing so. The Tribunal therefore considered the issue of the amount, if any, of the deduction for contribution in respect of the discrimination claim. It treated the assessment of loss for that, and for the compensatory award for unfair dismissal, as not materially different. It did so in relation to the issue of the conflict of interest which is the basis on which the respondents founded their arguments.

125. On that, the Tribunal considered that there were a number of factors to take into account. The first is that both the claimant and first respondent can be described as being blameworthy. The position of the respondents was dealt with in the Judgment. That of the claimant was partly addressed in the Judgment. The claimant was we found in breach of the conflict of interest policy. That view was fortified during the remedy hearing. The terms of the policy refer to the "possibility" of a clash of interest, and of an effect on impartiality. There is no need for an actual conflict of interest between the first respondent and the Church, which appeared to be what the claimant's submission amounted to. The conflict of interest is for the claimant and arises as he had roles in two organisations, being his employer and his Church. It existed as soon as the possibility of an arrangement between them realistically arose.

126. That conflict was also at an earlier stage than he had contended. We concluded that it is evidenced by the email on 1 February 2017 when the claimant made suggestions on terms. In doing so there was a conflict between his interest as Elder of the Church, and as Chief Executive of the first respondent. That each party could benefit from any arrangement is not the point. He was in the most senior employed position with the first respondent. He knew or ought to have known that conflict of interest was a matter that was a serious one for any employer in relation to its Chief Executive, and was one liable to affect trust and confidence in him. Not only did he not report the matter to his line manager the second respondent at all, as he ought to, the Tribunal concluded that that was a deliberate choice by him and that that was taken because he had a concern that she would not wish the first respondent to lease the premises to the Church for use for religious services. Given his role as an Elder in the Church, and the new evidence included Minutes of meetings he was present at concerning the Church, he was aware of what the Church was considering. There was reference to use of the premises on Sundays, and Ms Campbell's email also referred to that. The Tribunal considered it very likely that the claimant knew that the Trust's premises were to be used by the Church for a religious service. That use was one that, at the least, might cause the Trustees concern given their desire to be neutral on matters of religion or politics. It was a use very different to those that might

be regarded as more neutral in that context, such as for operating a Food Bank, or a nursery or the like (a matter commented on above). The use was directly for a religious purpose, which might have included a degree of evangelism. The dispute that did later emerge was focussed on the fact that the Church used the premises for religious services. That potential purpose was, we concluded, known to the claimant throughout, and he knew that there was a risk of that purpose being thought by the Trustees or some of them to be in conflict with the Trust's position on a form of neutrality.

127. It is true that the claimant did to an extent distance himself, or recuse himself as he put it in an email, and did not directly take part in the negotiations on terms which were conducted by Ms Campbell and with advice from the first respondent's solicitors, but he did not avoid involvement completely. He was involved in discussions to an extent, as evidenced by emails to him from Ms Campbell keeping him informed. He had sent an email to Ms Campbell using language that she took as authority to proceed. She was reasonable to do so. The terms of the email from the claimant do infer his approval to the proposal. He did not therefore fully recuse himself. Ms Campbell asked in an email if the second respondent was aware and approved, or words to that effect, and he did not engage with that. The act of her asking him tends to support the view that he was engaged to an extent. The pattern of that includes the earlier emails from 2016 and 2017, including his reference to being a "friend" inside. The Tribunal did not accept his evidence on that, and considered that it was a reference to his being inside the first respondent, highlighting the conflict of interest breach as it found it to be. The claimant did not do as he claimed, of not taking any part in matters. He did take a part, and it was to an extent beyond what might be termed de minimis.

128. Matters are considered in the context of the findings on liability, that the dismissal was both discriminatory and unfair. The discrimination was not however the sole reason for dismissal, nor the principal reason. It was one of a number of significant factors. Another was the concerns that the first respondent had over performance. To an extent there was a basis for them, as referred to above.

129. The Tribunal concluded, having regard to all the circumstances, that the level of contribution by the claimant to his dismissal should be assessed at 50%.

(ix) Are those deductions reasonable in all the circumstances?

130. There is we consider no material double-counting of matters given the manner in which we have addressed matters above. There is an element of doing so in relation to performance, partly as contribution to dismissal and partly in relation to the assessment of the period of loss, but not in what we consider a significant or unjust manner. No adjustment we consider is therefore required.

(x) What is the appropriate basic award?

131. The starting point is the agreement that, subject to the issue of contribution, the award should be £6,300. The issue of contribution in general is addressed above. The Tribunal has a discretion on whether to reduce the basic award, and if so by what amount. Whilst normally the deduction is the same as for the compensatory award, or the award for discrimination, there is no necessity that it be the same. The claimant argued that there should be no deduction at all, and that the award reflects the unfairness of the dismissal. The respondent argued that the deduction should be the same as for the compensatory award. The Tribunal considered that having regard to all of the circumstances, in light of the several and material breaches of the Code of Practice, it was just and equitable to reduce the award by a lesser amount than for the compensatory award, in what are considered to be exceptional circumstances of the present case, and that the reduction should be 25%.

(xi) Is the sum then awarded an amount that is just?

132. Having made the calculations it did the Tribunal considered whether the overall outcome was just having regard to all the circumstances. That was undertaken as the calculations are unusually complex, there are various factors to consider at each stage, and there may be some form of connection between those factors that are not simple to set out in a purely arithmetical manner. In short, a cross check was undertaken. The Tribunal

considered that the sum resulting from the process did accord with the statutory provisions.

(xii) Is any limit to the compensatory award to be imposed?

133. This does not arise. The award under the 2010 Act in this regard subsumes that under the 1996 Act, and no separate compensatory award is appropriate.

134. As the financial losses are awarded under the Equality Act 2010, the recoupment provisions as to benefits do not apply. The benefits received were taken into account in the calculations of losses above.

(xiii) What interest if any should be awarded?

135. Interest is due on the injury to feelings award from the date of dismissal to the date of this Judgment. Interest is also due on the past element of pecuniary loss for the discrimination element of the claim (which is all of the award in this case), which is taken from the mid-point of the period of loss. We calculated that as in the table below.

(xiv) What award should be made for the failure to provide a statement of terms and conditions?

136. It was accepted that no statement of terms and conditions required by section 1 of the Employment Rights Act 1996 had been provided to the claimant. The first respondent argued that there were exceptional circumstances justifying no or a lesser award. We did not accept that. The claimant was entitled to the statement of terms, as was any other employee. It was not his function to provide them, nor indeed did he require to ask for them. The duty to do so lay on the first respondent. There was however evidence that that issue was discussed with him by the first respondent, and he did not pursue the issue with them when he could have done. He did have a letter of appointment with some details. In the circumstances we considered that the award should be two weeks' pay, which is £1,050 given the agreement on figures reached between parties. We might add that we did have regard to the authority of ***Clements***, to which we were referred by the claimant in submission, on the order in which to take these issues, and we largely followed the structure that the

claimant's submission proposed. ***Clements*** concerned in essence how to take account of a redundancy payment made in excess of the statutory minimum. The claims before us included both discrimination and unfair dismissal issues, were more complex than those in ***Clements***, and we did not consider that it was correct to include the element of the award under the 2002 Act within the compensatory award under section 123 of the 1996 Act or the award under section 124 of the 2010 Act, as the claimant's submission with regard to that case proposed. These are different heads of loss from different statutory provisions. If it were to be assessed under either of those Acts, there would then be a deduction for contribution that relates to acts or omissions of the claimant wholly unrelated to the matter of the statement of terms. The statement ought to have been issued within 8 weeks of the commencement of employment, and there was no suggestion of any inadequate performance or conduct then. The award under the 2002 Act is we consider one that must be assessed on its terms separately and independently to the provisions of the 1996 or 2010 Acts.

(xv) Is any grossing up for tax required?

137. Given the awards, the sum in excess of £30,000 does require to be grossed up to account for the incidence of taxation. The claimant has earnings from his current employment that means that any award to him will be subject to higher rate tax, which in Scotland is at the rate of 41%. The calculation is set out in the table below.

(xvi) What award is to be made against the first respondent, and what award made jointly and severally against both respondents?

138. The awards are set out in the table below. In light of the terms of the Judgment we do require to make a joint and several award, but there was no suggestion that the first respondent would not in fact make payment of the sums awarded to the claimant.

Penalty

139. The Tribunal considered whether or not to impose a penalty on the first respondent under the terms of section 12A of the Employment Tribunals Act 1996. Whilst there were concerns that there had been a number of

breaches of the ACAS Code of Practice, and the circumstances did come close to having the necessary aggravating features to justify such a penalty, in all the circumstances it concluded that it was not appropriate to do so.

Conclusion

140. The following calculations arise from our decisions:

(i) **Award for breach of Equality Act 2010**

(a) Compensation for financial loss	£34,397.18
(b) Injury to Feelings	£15,000.00
Total	£49,397.18

(ii) **Deduction for *Polkey* principle** 0

(iii) **Uplift for breach of ACAS Code** – 15% £7,409.57

Total £56,806.75

(iv) **Deduction for contribution** 50% £28,403.37

Total £28,403.38

(v) **Basic award** £6,300.00

Deduction 25% £1,575.00

Sub total £4,725.00

Total £33,128.37

(vi) **Compensatory award s. 123 1996 Act** 0.

(vii) **Interest**

(a) Injury to feelings at 8% p.a. from dismissal -	£2,538.46	
(b) Financial loss at mid point at 8% p.a.	£2,826.76	
Sub total	£5,365.21	
Less deduction as above at 50%	£2,682.60	
Sub total		£2,682.61
Total		£35,810.98

(viii) **Award under Employment Act 2002** £1,050.00

Total £36,860.98

(ix) **Grossing up**

£30,000 tax free.

£6,860.98 to be received net of tax at 41%,

Divide amount by (100-41=59%)

gross amount £11,628.77

Less net sum 6,860.98

Tax due £4,767.79

(x) **TOTAL AWARD** **£41,628.77**

141. The total sum is then to be apportioned between the discrimination elements payable by the respondents jointly and severally, also taking account of interest on those elements, a total of £31,085.98 and those that are not and are payable by the first respondent alone (being the basic award and the award under the 2002 Act), a total of £5,775.00 excluding the tax for grossing up. It is then necessary to apportion the tax payable for grossing up pro rata between them, which is £4,020.82 and £746.97 respectively. The two sets of figures are added together, and the totals are as follows:

(i) Total awards for discrimination £35,106.80

(ii) Total awards for remaining claims £6,521.97.

Employment Judge: **A Kemp**
Date of Judgment: **19 May 2022**
Entered in register: **20 May 2022**
and copied to parties