



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs N Hayes  
**Respondent:** Coventry City Council  
**Heard at:** Birmingham On: 13 June & 1 July (in chambers) 2022  
**Before:** Employment Judge Flood  
Mrs Hill  
Mr Sharma

## Representation

**Claimant:** Mrs Lawrence-Russell (Trade union representative)  
**Respondent:** Ms Carter (Solicitor)

# RESERVED JUDGMENT ON REMEDY

1. The claimant is awarded (and the respondent is ordered to pay to the claimant) the following amounts as compensation for unfair dismissal:
  - A basic award of £982.89; and
  - A compensatory award of £20,472.58.
2. No recoupment of benefits is necessary under the Employment Protection (Recoupment of Benefits) Regulations 1996.

# REASONS

## The Complaints and preliminary matters

1. The claimant's claim was heard on 9, 10, 11, 13, 16, 17, 18, 19, 20, 23 & 24 November 2020 (by CVP) and 20 & 21 April & 20 May 2021 (in chambers). The hearing was adjourned and a reserved judgment on liability with reasons was sent to the parties on 16 July 2021 ("the Liability Judgment").
2. The claimant succeeded in her complaint of unfair dismissal. Her complaints for direct disability discrimination, disability related harassment and victimisation were dismissed. The parties having been unable to reach agreement on remedy, the cases were listed for a remedy hearing which took place on 13 June 2022. This was a remote hearing which was consented to

by the parties. The form of remote hearing was by video hearing. A face to face hearing was not held because it was not reasonably practicable, no-one requested the same and all issues could be determined in a remote hearing.

3. The tribunal had heard evidence from the claimant (and Mrs Lawrence Russell who gave evidence on her behalf); Mr S Sharkey (“SS”), Ms G Kell (“GK”), Mr P Smith (“PS”), Ms K Eales (“KE”) and Councillor F Abbot (“FE”) on behalf of the respondent at the liability hearing and had been provided with a number of documents in a bundle running to 1274 pages (“Liability Bundle”). At the remedy hearing (which was also by CVP video link) the tribunal heard further evidence from the claimant on issues relevant to remedy in respect of her successful claims. We had before us a bundle of documents relevant to remedy (“Remedy Bundle”) which was numbered A1-A2; B1-B73 and so on. Page numbers below are to page numbers in the Remedy Bundle unless otherwise indicated. The remedy hearing was adjourned at 4.45pm for a reserved decision to be made. The Tribunal met together in chambers on 1 July 2022 to make its decision.
4. The issues to be determined by the Tribunal on remedy were identified at the liability hearing and were as follows:

### **The Issues**

1. **Remedy for unfair dismissal**
  - 1.1 Does the claimant wish to be reinstated to their previous employment?
  - 1.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?
  - 1.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
  - 1.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
  - 1.5 What should the terms of the re-engagement order be?
  - 1.6 If there is a compensatory award, how much should it be? The Tribunal will decide:
    - 1.6.1 What financial losses has the dismissal caused the claimant?
    - 1.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
    - 1.6.3 If not, for what period of loss should the claimant be compensated?

- 1.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
  - 1.6.5 If so, should the claimant's compensation be reduced? By how much?
  - 1.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
  - 1.6.7 Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]?
  - 1.6.8 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
  - 1.6.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
  - 1.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
  - 1.6.11 Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?
- 1.7 What basic award is payable to the claimant, if any?
  - 1.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

### **Findings of fact**

5. The Tribunal made findings of fact at the main hearing of the claimant's claim which are contained in the Liability Judgment. These findings are not repeated here but were relied upon, where relevant, when reaching our conclusions on remedy. The parties are referred to these findings.
6. In addition, we noted that the claimant was employed by the respondent from to 15 June 2015 to 1 March 2018 when she was found to have been unfairly dismissed by the respondent. The effective date of termination of the claimant's employment was 1 March 2018. At this date, the claimant had 2 complete years' service and was aged 49.
7. The claimant does not seek reinstatement or reengagement so the only matter for the Tribunal to consider related to the appropriate level of compensation (Issues 1.6 to 1.8 above).

### **Earnings and mitigation.**

8. At the time of dismissal, it was agreed between the parties that the claimant was paid an annual salary of £46,257 with the respondent. The claimant's Schedule of Loss at pages A1 to A2 indicates that the claimant claims a "*compensatory award for financial loss of earnings from 01 March 2017-01 March 2020 in the sum of £94,000*". *Evidence to follow.*
9. The Tribunal had very limited information and evidence about other benefits. At page 123 of the Liability Bundle, information about the claimant's pension benefit was set out. The claimant was a member of the Local Government Pension Scheme which is a defined benefit scheme and based on Career

Average Revalued Earnings. The claimant's Preliminary Schedule of Loss (page 249-252 Liability Bundle) stating that the claimant claimed pension loss in accordance with her Annual Benefit Statement (2018-21) but stated that the precise amount claimed was "*to follow*". A further Schedule of Loss was provided at pages A1 to A2. This indicated a figure for "*Pension*" as "*£141.17 (approx.)*". The Tribunal understands this to be the monthly valuation of the claimant's pension entitlement as estimated by the claimant. Later on, in that Schedule of Loss at page A2 it is noted that "*The Claimant claims the pension amount up to March 2020. Evidence to follow*". The claimant also relies on pages D6 and D7 which is a copy of her Annual Pension Benefit Statement for 2017. This shows at page D7 a number of figures relating to pension benefit including the sum of £1,694.10 which is the "*Annual Pension Benefit at 31 March 2017*". This figure when divided by 12 amounts to £141.17 which is the amount claimed as pension loss by the claimant. These figures were not challenged by the respondent and no further evidence was adduced to suggest a different figure should be used. Accordingly the Tribunal has used the sum of £141.17 as the ongoing monthly pension loss.

10. The Tribunal was not provided with any further information or figures to value additional benefits. The claimant was entitled to life cover as part of her pension benefit and so it is assumed that as such, this is included within the figures for the valuation of pension benefit. We heard at the liability hearing that the claimant had some form of car benefit provided whilst employed but no valuation has been provided in any way, so we have not considered this further.
11. The claimant was subject to an interim order suspended her from practice as a Social Worker by Social Work England between 18 September 2018 and 26 November 2019 (pages C26-8). During this period the claimant was unable to work as a Social Worker. The claimant then went through the process to be re-registered which she described as being subject to undue delay. On 27 November 2020 the Northern Ireland Social Care Council (NISCC) registered the Claimant to begin to practise again as a social worker subject to 13 conditions. The report prepared by NISCC at this time was shown at pages C29-45 and this refers to the claimant applying to be included on the NISCC register on 5 March 2020 and an initial consideration taking place on 25 June 2020, at which time a decision was deferred pending the outcome of a fitness to practise investigation by Social Work England. It appears that on 9 November 2020 Social Work England registered the Claimant to practise subject to 16 conditions which would apply over a 2 year period (see page C38).
12. The claimant started new employment on 7 December 2020 with Seven Resourcing (now Seven Social Care), an agency which supplies social workers to local authorities on a locum and permanent basis across the UK. The claimant has worked for this agency on a regular basis since this time and at pages E1 to E3 we saw details of contracts she had entered into since 30 November 2020. The claimant earns an hourly pay rate of £30 and generally speaking works around 37.5 hours a week. The claimant is not entitled to sick pay or other benefits such as pension in this contract work. The claimant confirmed that as a result of her earnings since 7 December 2020 she had mitigated her ongoing losses and so only claims compensation for financial loss up to 7 December 2020.

The claimant's health

13. The claimant gave significant evidence in her witness statement about her health in the period up to her dismissal and after this and suggested that her treatment by the respondent contributed to her deteriorating mental ill health and subsequent misconduct. Many of the matters referred to were already subject to detailed fact finding at the liability hearing and our binding findings of fact on these matters are set out in the Liability Judgment. The Remedy Bundle also included a report on the claimant's health prepared by Professor Roy McClelland on behalf of Social Work England dated 26 August 2020 (pages F1-F10). It is not clear why the matters the claimant now sets out in her evidence (or this report) were not included in the evidence before the Tribunal at the liability hearing. The claimant suggested that this was because she was unaware she needed to produce it and it had not been requested. She also said that as it contained information which related to her childhood, she did not see it as something she wished to share (although wanted to do so now to be open and transparent).
  
14. This report indicated that the claimant suffered from post-traumatic stress disorder (PTSD) following the fire at her home in January 2016. It also noted that the claimant had Anxiety symptoms and that she described her "*prevailing mood during 2016 and 2017 as very low, poor sleep and tearfulness*" and of having "*thoughts of life not being worth living in the post dismissal period*". It described the claimant as having marital and other family difficulties throughout the period which "*added significantly to her distress*". The report also noted that the once suspended from work the claimant reported having panic attacks and stopped going out and that she had started drinking. The claimant had been on antidepressant medicine at various times since January 2016 and did not view them to be of benefit to her and stopped this medication in October 2019. The report contained a summary of the claimant's GP records which indicated an intermittent history of mental health issues since 2002, including records of the claimant being prescribed various medication for mental health problems during this period. There was also reference to episodes of issues with alcohol use in 2009, 2014 and in 2016-17. The report noted that the claimant reported an "*overall improvement in her mood and settling of trauma related symptoms during 2019*". The report noted that the claimant's mood state had been normal in recent weeks, with anxiety symptoms within the normal range and that the trauma related symptoms were absent. The report also noted that the claimant has had no issues with alcohol since March 2019.
  
15. The report concluded that the claimant's health issues worsened following her dismissal and that between 2016-2018 that "*mental health difficulties were interfering with her functioning*". It concluded that the claimant was mentally well at the time the report was prepared and although probably at increased risk of episodes of depression, that she had insight into this vulnerability and recognised the early signs. The claimant also told us of the symptoms she was experiencing of poor mental health during this period and that she was having regular panic attacks; she was anxious and stressed; suffering from extreme paranoia; not eating and sleeping properly and felt constantly on high alert.

**Relevant law**

16. Section 119 to 122 of the Employment Rights Act 1996 (“the ERA”) sets out the provisions on calculating an unfair dismissal basic award.

17. Section 122(2) of the ERA provides:

*Where the tribunal considers that any conduct of the complaint before the dismissal (or where the dismissal was with notice before the notice was given), was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.*

18. Section 123 ERA provides that the amount of an unfair dismissal compensatory award shall be: “...such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.”

Section 123(6) of the ERA provides:

*Where the tribunal finds the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*

19. Polkey v A E Dayton Services Ltd [1987] IRLR 503 HL, the chances of whether or not the employee would have been retained must be taken into account when calculating the compensation to be paid to the employee. Tribunals are required to take a common-sense approach when assessing whether a Polkey reduction is appropriate - Software 2000 Limited v Andrews [2007] IRLR 568; the nature of the exercise is necessarily “broad brush” - Croydon Healthcare Services v Beatt [2017] IRLR 274; and the assessment is of what the actual employer would have done had matters been dealt with fairly not how a hypothetical fair employer would have acted (Hill v Governing Body of Great Tey Primary School [2013] IRLR 274).

20. When considering contributory fault the conduct must be “culpable or blameworthy” - Bell v The Governing Body of Grampian Primary School [2007] All ER (D) 148. The Tribunal may take a very broad view of the relevant circumstances when determining the extent of contributory fault - Gibson v British Transport Docks Board [1982] IRLR 228. We were referred to Ladrick Lemonious v Church Commissioners [2013] UKEAT/0253/12, a case involving a procedurally unfair dismissal, where the EAT interpreted the judgment in Ingram v Bristol Street Parts UKEAT/0601/06 to mean that a 100% deduction could be applied to both the basic and compensatory awards, even where there have been procedural failings, provided that the procedural failings did not cause or contribute to the dismissal. This was the case in Lewis v Governing Body of Tai'rgwaith Primary School [2022] EAT where the EAT upheld the tribunal decision to reduce both the basic and compensatory awards by 100% to nil in a procedurally unfair dismissal where the blameworthy conduct of the Claimant was the sole factor resulting in dismissal. Mrs Carter also referred the Tribunal to Nelson v BBC (No.2) [1979] IRLR 346 (CA), the Court of Appeal set out three factors that must be present

for the compensatory award to be reduced for contributory fault:

- The claimant's conduct must be culpable or blameworthy.
- It must have actually caused or contributed to the dismissal.
- The reduction must be just and equitable.

We were also referred to Frew v Springboig St John's School UKEAT 2010 and note that the Tribunal should take into account any mitigating factors when deciding on contributory fault.

21. Mrs Lawrence-Russell referred the Tribunal to a number of authorities, namely, McAdie v Royal Bank of Scotland [2007] EWCA Civ 806 (which largely addressed the circumstances in which an ill health capability dismissal would be unfair where the employer is responsible for ill health); Nally v Freshfield Care Ltd ET/2401774/14 (which considered whether a dismissal of an employee with PTSD was discrimination arising from a disability); Mr Lancelot Lewis v Network Rail Infrastructure Ltd ET/3300540/2019 (which found that a failure to investigate an alleged racial slur made from one employee to another could constitute race related harassment); Austin v Leeds Teaching Hospitals NHS Trust ET/180139/2017 (an Employment Tribunal decision which found that a dismissal had been discriminatory and also unfair and also determined that the claimant's conduct (in repeatedly checking her medical records) was neither blameworthy or culpable in that her behaviours arose from her disability); City of York Council v Grosset [2018] EWCA Civ 1105 - where an employer dismisses a disabled employee for misconduct caused by disability, the dismissal can amount to discrimination arising from disability contrary to section 15 Equality Act 2010 even if the employer did not know that the disability caused the misconduct; Mr S Mohammed v Tesco Stores Limited ET/1303590/2018 (a dismissal was procedurally unfair when an employer dismissed without checking that the employee had received a disciplinary invite letter, but would have been dismissed fairly six weeks later); Mr Kenneth Ball v First Essex Buses Ltd: 3201435/2017 (which found that The dismissal for gross misconduct of a long-serving employee for failing a routine drug test was unfair); and McElroy v Cambridgeshire Community Services NHS Trust ET/3400622/14 (an Employment Tribunal held that an NHS Trust unfairly dismissed an employee who came to work smelling of alcohol, as they did not have evidence that he was actually unfit for work). Many of the above cases addressed matters not of direct relevance to the issues the Tribunal had to determine as part of its determination on remedy (save perhaps for the first instance decision in Austin above), but these have been fully considered by the Tribunal in any event.

## **Conclusions**

22. Our conclusions on each of the issues highlighted above are set out below:

### Compensatory award (Issue 1.6 above)

#### What financial losses has the dismissal caused the claimant (Issue 1.6.1)?

23. On the basis of the findings set out above, we have calculated the financial losses caused by the claimant's dismissal as follows:

Gross annual salary	£46,257
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Gross weekly pay £889.56

Net weekly pay (calculated using online calculator at <https://www.thesalarycalculator.co.uk/salary.php>)

From 2 March 2018 until 5 April 2018 (5 weeks)

Net weekly pay for the tax year 2017/18 (NB estimated using information for following tax year as data for this tax year not readily available) - £669.92

$669.92 \times 5 = £3349.60$

From 6 April 2018 until 5 April 2019 (52 weeks)

Net weekly pay for the tax year 2018/19 - £669.92

$669.92 \times 52 = £34,835.84$

From 6 April 2019 until 5 April 2020 (52 weeks)

Net weekly pay for the tax year 2019/20 - £679.90

$679.90 \times 52 = £35,354.80$

From 6 April 2020 until 7 December 2020 (35 weeks)

Net weekly pay for the tax year 2020/21 - £674.91

$674.91 \times 35 = £23,621.85$

Total net loss of earnings £97,162.09

ADD PENSION LOSS

From 2 March 2018 until 7 December 2020 (144 weeks)

Monthly pension loss of £141.17 x 12 = Annual pension loss of £1694.04/52

Weekly pension loss of £32.58 x 144 weeks

Total pension loss £4691.52

TOTAL FINANCIAL LOSS = £101,853.61

Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job? If not, for what period of loss should the claimant be compensated? (Issues 1.6.2 & 1.6.3)

24. The claimant does not seek an award for any losses beyond 7 December 2020. From 7 December 2020 we note the claimant was earning £30 per hour (gross) and working approximately 37.5 hours per week. This would result in a gross weekly pay of approximately £1125 (which is more than her previous gross weekly pay of £889.56). Even taking into account the loss of additional benefits, job security and the like, the claimant appears to have fully mitigated



her loss from this point onwards and so no award is made for the period from 7 December 2020 onwards.

25. We conclude considering our findings above (in particular in relation to paragraphs 11-15) that the claimant took reasonable steps to replace her lost earnings by firstly seeking to re-instate her registration to work as a Social Worker with Social Work England and NISCC. This was an involved and detailed process and once her registration was complete, she promptly secured alternative employment. We have considered whether it was reasonable in the interim period whilst this was being resolved for the claimant to have sought alternative employment not as a Social Worker in a different line of work. We conclude that given the difficulties with the claimant's mental health during this period that it was reasonable for her to focus on her recovery and regularisation of her status to practice as a Social Worker. Therefore, we do not make any reduction to the period of lost earnings to take account of any failure to mitigate.

Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so, should the claimant's compensation be reduced? By how much? (Issues 1.6.4 and 1.6.5)

26. In the Liability judgment, the Tribunal concluded that the dismissal was procedurally unfair "*because the investigation carried out by the respondent was incomplete and unfair to the claimant in the aspects set out above*" and the "*respondent acted in a procedurally unfair manner in the way that it included as allegations of gross misconduct against the claimant matters already been addressed informally or resolved and because it failed to have full and due regard to its own Addiction and Substance Misuse policy during the investigation process*" (page B58). It was also flagged to the parties at in the Liability Judgment that the question of whether there was a chance that claimant would have been dismissed even if a fair procedure had been carried out would be a highly relevant factor for the Tribunal to determine at the Remedy hearing. Ms Carter for the respondent relies on the Tribunal's finding that the decision to dismiss the claimant was not outside the range of reasonable responses, even despite such procedural failings (page B57) and suggests that the respondent would still have dismissed the claimant for misconduct on 1 March 2018 had the procedural failings not taken place. She also suggests in light of the evidence now available about the claimant's health (paragraphs 14 & 15 above) coupled with her behaviour whilst employed makes it extremely likely that she would have been dismissed on or before 1 March 2018 for conduct or capability in terms of being able to carry out her role as an Independent Reviewing Officer. It relies on her subsequent suspension from practice as evidence that the claimant would have been dismissed from employment as a result of being unable to practice because of her long-term mental health issues. The respondent seeks a 100% reduction in the compensatory award on this basis.

27. Mrs Lawrence-Russell for the claimant contends that the claimant would not have been dismissed at all had a fair process been followed. Firstly, she argues that if allegations of gross misconduct relating to matters that had already been addressed informally or resolved were not considered or taken into account, this would leave only two outstanding allegations of misconduct (the claimant's absence on 23 January 2017 and the incident on 22 June 2017). It is further submitted that had the respondent considered its Addiction

and Substance Misuse policy, that the claimant would not even have been suspended yet alone dismissed for the incident on 22 June 2017. It is argued that the respondent was aware of many issues related to the claimant's mental health at the time of dismissal and that a number of the incidents relied upon as misconduct were arising from such mental health issues. It is submitted that had these been considered properly her dismissal would have been prevented.

28. We conclude having considered these submissions that there was a 70% chance that the claimant would have been dismissed fairly anyway by the respondent by the time of her dismissal on 1 March 2018. We have considered each of the procedural flaws we identified in the Liability judgment and what impact this might have had on the decision to dismiss had it not occurred. Dealing with each in turn:

- *The investigation into many aspects of the conduct alleged did not examine or look for evidence as to how the claimant's ill health could have played a role or be a mitigating factor in any of the incidents that took place.*

We found that the claimant did not raise her health as a potential mitigating factor during the investigation but that she was not asked specifically about this by the respondent either. The respondent did not seek OH advice on these issues. We concluded that this was a significant omission and may have elicited further relevant evidence that could have been considered. We suggested that this may not have changed the outcome but having considered the submissions of both parties, there is at least some chance it could have done so. We do not put this at a particularly high level (given the seriousness of the allegations made and our overall conclusion that dismissal as an outcome was in the range of reasonable responses).

- *Individuals interviewed as part of the investigatory process were permitted to add to their statements providing significant additional information which was then not further examined or investigated.*

This concerned the additional information added to the statement of JW which was highly prejudicial to the claimant and was not subject to further investigation. We concluded that further investigation should have taken place. However, it has subsequently emerged that the incident referred to did take place broadly as reported and perhaps did shed some light on the use of alcohol in the context of mental health problems, further investigation may not have made any significant difference in the outcome.

- *Some of the allegations that were eventually included as allegations of gross misconduct against the claimant appeared to relate to matters that had already been addressed informally or resolved.*

We were concerned here about the inclusion of the incidents about the claimant informing SS that she was not covering case conferences; the events of the return to work meeting on 8 November 2016 and the HCPC registration matter. We ultimately conclude that had these incidents not been included the claimant is likely to have been

dismissed for the remaining matters which appeared in some cases to be of a more substantial and serious nature (in particular allegations made against the claimant about her behaviour during the child protection conference in August 2016 and being intoxicated at work and using abusive language and exhibiting abusive behaviour on 22 June 2017).

- *The respondent failed to adhere to the Addiction and Substance Abuse policy*

Our concerns here related to the incident which took place on 22 June 2017 and the failure of the respondent's managers to consider its own policy on alcohol misuse in an incident which focused almost entirely on behaviour which suggested the claimant was intoxicated at work. The policy anticipated and provided guidance for the respondent to follow in precisely such a situation, but it does not appear to have been given consideration at the relevant time. It is of course the case that the claimant had denied having an alcohol problem or that she had been drinking at all during this incident. However, if the policy had been given consideration and applied specifically, this might have resulted in engagement by the claimant in her ongoing problems and may have influenced the outcome of the process. This may not have changed the outcome but there is at least some chance it could have done so. Again, we do not put this at a particularly high level (given the seriousness of the allegations made and our overall conclusion that dismissal as an outcome was in the range of reasonable responses).

29. Considering the procedural flaws identified above overall and how they impacted the process, we consider that there was a 70% chance that even if they had not taken place the claimant would have been dismissed anyway. We cannot conclude that the chance that the claimant could have avoided dismissal was any higher than 30% when considering this in the round. We note also the submissions of the respondent that even if not dismissed for misconduct, there were concerns about the claimant's ability to perform her role at the time, and it is clear that the claimant's health was deteriorating which may have also led to dismissal for capability reasons. For these reasons we have reduced the claimant's compensatory award by 70% as follows:

£101,853.61 x 70% reduction (x 30/100) = £30,556.08

Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]? If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%? (Issues 1.6.6-1.6.8)

30. We concluded at paragraph 38 of the Liability Judgment that "*the respondent broadly complied with the ACAS Code of Practice in that it investigated the issues, informed the employee in writing of the allegations, conducted a disciplinary hearing and informed the employee of the decision in writing and informed the employee of his right to, and held, an appeal.*" Therefore, the ACAS Code of Practice on Disciplinary and Grievance Procedures did apply but we conclude that the respondent (or the claimant) did not unreasonably

fail to comply with it. No reduction or increase of any award is therefore appropriate.

If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion? (Issues 1.6.9 & 1.6.10)

31. Under section 123(6) ERA the question the Tribunal must consider is whether any conduct (which was blameworthy or culpable) on the part of the claimant cause or contribute to the matters in respect of which an award has been made and so is it just and equitable for a reduction to the award to be made? The respondent contends that the conclusion in reached in finding each of the allegations of misconduct proven was in the range of reasonable responses. It suggests that even considering the potential mitigation cause by the claimant's poor mental health, the claimant made choices in the way she behaved in particular in bullying a colleague during a child protection conference and in the way she behaved on 22 June 2017. It contends that the claimant's behaviour was blameworthy, solely caused her dismissal and so her compensatory award should be reduced by 100%. Mrs Lawrence Russell submits that the claimant's conduct was not blameworthy and in fact it was the respondent's conduct throughout which caused or materially contributed towards the claimant's incapability and consequently prompted her dismissal. The claimant in her evidence sets out how the various incidents that took place during her employment (and during the investigation and disciplinary process caused her mental health to deteriorate). She particularly relies on what SS said in the return to work meeting in November 2016; informing her that a grievance had been raised against her; changing reporting line issues; adjusting her role and her working hours whilst she was off sick; and using a welfare visit against her. She gives evidence that all of this caused or contributed to her actions in the incidents leading to her dismissal because her mental health was deteriorating. In particular, she says that it was the respondent's unreasonable actions which led to the incident on 22 June 2017 taking place.
32. We were unable to conclude based on our Liability Judgment or the findings of fact above that the respondent's actions caused or materially contributed to the claimant's worsening ill health which then consequently led to the incidents which ultimately resulted in dismissal. This is too remote a connection for us to make on the facts as we have found them. The claimant's own medical evidence points to other factors which have also contributed to her poor mental health including a difficult childhood and marital/family problems. As part of the Liability Judgment, we specifically considered as part of the claimant's complaint made under section 15 Equality Act 2010, whether various matters relied upon by the claimant were things that arose from her disability. We concluded that two matters: namely the claimant failing to attend her grievance interview on 16 February 2017; and her inability to attend disciplinary hearings on 29 & 30 January 2018 and 13 & 14 February 2018 were things that arose from the claimant's disability. However, the remaining matters relied upon by the claimant were not shown on the balance of probabilities to be matters arising from disability. This included the claimant being or appearing to be intoxicated at work and other matters which led to allegations of misconduct being upheld (including the behaviour at the child protection conference). Moreover, this is not directly the question we are tasked with which is to consider whether the claimant caused or contributed to

dismissal by blameworthy conduct. In that regard, we do consider that even though the claimant was not able to show that her conduct was caused or was something arising from her disability; the claimant's undoubted poor mental health during the period in question may to an extent mitigate her behaviour in some instances, which is a factor we can consider when determining contributory fault. At paragraphs 14 and 15 above, we acknowledge that the claimant was suffering from deteriorating mental health during this period and her functioning was interfered with. The incidents which led to dismissal fall broadly into three categories, being focused on two events: the claimant's behaviour towards a fellow social worker in August 2016 and the incident taking place on 22 June 2017; and lastly a number of matters relating to non-attendance at work; HCPC renewal problems and similar. The claimant's poor mental health may mean that her conduct is perhaps less blameworthy than it might otherwise have been in particular when it relates to erratic, disorganised and otherwise odd or out of character behaviour. However even taking this into account, the claimant's behaviour towards a colleague which led to a formal complaint by that colleague in August 2016 does not appear to be of this nature and we conclude was blameworthy and unacceptable. We are unable to conclude that this was the sole factor resulting in her dismissal which would suggest a 100% contributory fault reduction, taking into account the procedural failings identified in the Liability Judgment.

33. Taking all of this into account we conclude that it is just and equitable to reduce the claimant's compensatory award by 33%. This reduces the compensatory award as follows:

$$£30,556.08 \times 33\% \text{ reduction (x67/100)} = £20,472.58$$

Does the statutory cap of fifty-two weeks' pay or [£86,444] apply? (Issue 1.6.11)

34. Given the level of the award once reductions have been applied, the statutory cap is not applicable. The final compensatory award is therefore **£20,472.58**.

What basic award is payable to the claimant, if any? (Issue 1.7)

35. In accordance with the statutory formula, given the claimant's age, length of service and weekly wage as at the termination date of 1 March 2018, the basic award for unfair dismissal is calculated as follows:

$$\text{Gross annual salary} - £46257/52 = \text{gross weekly pay} = £889.56$$

Capped at £489 (statutory cap in place as of 1 March 2018)

Claimant was employed for 2 complete years (15/6/15- 1/3/18)  
Aged 49 at dismissal

1.5 weeks' pay for each year worked between 22 and 41

3 weeks' pay at £489 = Basic award is £1467

Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent? (Issue 1.8)

36. Under section 122(2) of the ERA the question for the tribunal is whether any conduct of the claimant before her dismissal was such that it would be just and equitable to reduce the basic award. This gives the tribunal a broad discretion. In all the circumstances we concluded that it was also appropriate to apply a reduction of 33% to the claimant's basic award because of conduct before dismissal for the same reasons as set out above.

£1467 x 33% reduction (x67/100) =**£982.89**

Failure to provide a statement of terms and conditions of employment

37. The claimant has included a sum of £1958.33 representing two weeks salary for an alleged failure to provide a statement of terms and conditions. We did not find such a failure either in our Liability Judgment or otherwise. The claimant was issued with a contract of employment on joining the respondent and this was shown at pages 296-312 of the Liability Bundle. No award is made in this regard.

38. Adding the basic award (£982.89) and compensatory award (£20,472.58) together, this leaves total compensation payable to the claimant by the respondent of £21,455.47.

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Employment Judge **Flood**

Date 27 July 2022

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