Neutral Citation Number: [2022] EAT 81

Case No: EA-2020-000809-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27 May 2022

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

Rentplus UK Limited	**Appellant**
- and -	
Ms Susan Coulson	**Respondent**

- -
- -

Rad Kohanzad (instructed by Peninsula Business Services Ltd) for the **Appellant**
Ms Susan Coulson the **Respondent** in person

Hearing date: 26 April 2022

- -

JUDGMENT

REVISED

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SUMMARY

PRACTICE AND PROCEDURE

Despite the brevity of its reasoning, on a fair reading of the judgment, the employment tribunal concluded that the procedure adopted by the respondent before dismissing the claimant was a total sham. The employment tribunal did not err in awarding an Acas uplift of 25%.

It will often be helpful when considering Acas uplift for an employment tribunal to ask the following questions:

1. Is the claim one which raises a matter to which the Acas Code applies
2. Has there been a failure to comply with the Acas Code in relation to that matter
3. Was the failure to comply with the Acas Code unreasonable
4. Is it just and equitable to award an uplift because of the failure to comply with the Acas Code and, if so, by what percentage, up to 25%

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HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against the judgment of the employment tribunal sitting at Exeter from 17 to 19 August 2020, Employment Judge Housego, sitting with members. The judgment was sent to the parties on 27 August 2020. The judgment determined liability and decided that the "award" was to be uplifted for failure to comply with the Acas Code by the maximum amount of 25%. The remaining remedy issues were determined at a remedy hearing held on 20 November 2020. The uplift was applied to the award of compensation for unfair dismissal. This appeal concerns the circumstances in which the Acas Code applies and the extent to which an employment tribunal is required to explain the basis upon which it determines the amount of any uplift.

The Facts

2. The respondent is a privately funded commercial company that purchases properties which are rented to tenants by housing associations. The rent is shared by the respondent and the housing association. The claimant joined the respondent as Director of Partnerships in 2015, soon after it had been established. The employment tribunal described the claimant's role [11]:

> "Ms Coulson's job description (31-32) set out that she was responsible for managing the consultants retained by the firm, which included PR & Comms, and IT. She was to lead development of consortia arrangements with the others upon whom the business model depended. She was to work with the CEO on developing effective IT systems for the smooth running of the business. She was described as a member of the leadership team, to contribute actively to the strategic development of the business and its decision making and policy formulation"

3. Unbeknown to the claimant, a decision was taken in March 2017 that she would be dismissed. Steven Collins was appointed as a consultant to the respondent in April 2017. The then CEO, Richard Connolly, decided that he would step down in the autumn of 2017. Mr Connolly introduced Mr Collins to members of the Board, with the intention that Mr Collins might succeed him as CEO.

4. Mr Collins was employed as CEO in October 2017. The role had not been advertised. The

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employment tribunal accepted the claimant's case that she was frozen out of her role from October 2017 onwards.

5. From October 2017 the respondent was seeking to find new funding. In February 2018 a new investor injected £11m into the respondent. The respondent instigated a reorganisation. Because more funds were available the total number of posts were to be increased, but nevertheless it was described as a "redundancy" exercise. The claimant attended "consultation" meetings on 16 April 2018 and 10 May 2018. The employment tribunal concluded the consultation exercise was a total sham because the decision to dismiss the claimant had been taken long before.

6. On 15 June 2018, the claimant submitted a grievance. The grievance and appeal were dismissed. The employment tribunal concluded that Mr Collins was the real decision maker, although the grievance had purportedly been conducted by the respondent's employment consultants. Reading the judgment as a whole, it is clear that the employment tribunal concluded that the grievance process was just as much a sham as the redundancy.

The decision

7. The employment tribunal held that:

> "70. This was an unfair dismissal. The reason was not redundancy. It was a desire to remove Ms Coulson from her role, and that was the basis upon which Mr Collins took the role of CEO. …
>
> 84. There has been no criticism of Ms Coulson's work, and this was not a disguised capability dismissal.
>
> 85. The procedure was such that it is not possible to say what might have happened had a fair procedure been followed. Accordingly there is no Polkey reduction."

8. The employment tribunal set out its conclusion on that ACAS uplift very briefly:

> "86. The Tribunal therefore decided that the claim for unfair dismissal succeeds. The failures are so egregious that the Tribunal decides that an uplift in compensation of 25% is required."

9. The employment tribunal found by a majority that there were facts from which it could infer sex discrimination, and that the respondent had not disproved discrimination.

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The Appeal

10. When the appeal was considered on the sift, Eady J concluded that there were no reasonable grounds for bringing the appeal. The Respondent sought a hearing pursuant to Rule 3(10) at which the appeal was allowed to proceed by Heather Williams QC DJHC on one ground, with two components:

> a. That the employment tribunal erred in law in "concluding that an ACAS uplift should apply in this case where the reason for dismissal given by the Respondent was redundancy and the reason found by the ET was sex discrimination".
>
> b. Even if the ACAS uplift applied it was not clear which aspects of the ACAS Code were relied upon in finding that a 25% uplift should be applied. The employment tribunal should have identified the employer's failing for which an uplift is being made by reference to the relevant part of the ACAS Code which the employer is said to be in breach of.

Preparation for the Full Hearing

11. The appellant failed to comply with a number of orders for preparation for the full appeal. The claimant applied for the appeal to be struck out. For reasons set out in the annex, I decided not to strike out the appeal, although I noted that I would have been entitled to do so. The annex may serve as a warning of the consequences that can result from a failure to comply with the orders of the EAT.

The Law

12. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A) provides:

> "207A Effect of failure to comply with Code: adjustment of awards
>
> (1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

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> (2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
>
> (a) the claim to which the proceedings relate **concerns a matter to which a relevant Code of Practice applies**,
>
> (b) the employer has **failed to comply with that Code in relation to that matter**, and
>
> (c) that **failure was unreasonable**,
>
> the employment tribunal **may, if it considers it just and equitable** in all the circumstances to do so, increase any award it makes to the employee **by no more than 25%.** …
>
> (4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes." **[emphasis added]**

13. Section 207A TULR(C)A applies to section 111 of the Employment Rights Act 1996, pursuant to which claims of unfair dismissal are brought.

14. The relevant Acas Code of Practice is the Code of Practice on Disciplinary and Grievance Procedures published on 11 March 2015 ("the Acas Code").

15. The Forward to the Acas Code provides:

> "The Acas statutory Code of Practice on discipline and grievance procedures is set out in paragraphs 1 to 47 below. It provides **basic practical guidance to employers**, employees and their representatives and **sets out principles for handling disciplinary and grievance situations** in the workplace. …
>
> A failure to follow the Code does not, in itself, make a person or organisation liable to proceedings. However, employment tribunals will take the Code into account when considering relevant cases. Tribunals will also be able to adjust any awards made in relevant cases by up to 25 per cent for unreasonable failure to comply with any provision of the Code. This means that if the tribunal feels that an employer has unreasonably failed to follow the guidance set out in the Code they can increase any award they have made by up to 25 per cent. Conversely, if they feel an employee has unreasonably failed to follow the guidance set out in the Code they can reduce any award they have made by up to 25 per cent. …
>
> Many potential disciplinary or grievance issues can be resolved informally. A quiet word is often all that is required to resolve an issue. However, where an issue cannot be resolved informally then it may be pursued formally. **This Code sets out the basic requirements of fairness that will be applicable in most cases; it is intended to provide the standard of reasonable behaviour in most instances**." **[emphasis added]**

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16. The Acas Code sets out some general guidance:

> "1. This Code is designed to help employers, employees and their representatives deal with **disciplinary and grievance situations** in the workplace. **Disciplinary situations include misconduct and/ or poor performance**. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted. Grievances are concerns, problems or complaints that employees raise with their employers. **The Code does not apply to redundancy dismissals or the non-renewal of fixed-term contracts on their expiry**.
>
> 2. **Fairness and transparency are promoted by developing and using rules and procedures for handling disciplinary and grievance situations**. These should be set down in writing, be specific and clear. Employees and, where appropriate, their representatives should be involved in the development of rules and procedures. It is also important to help employees and managers understand what the rules and procedures are, where they can be found and how they are to be used.
>
> 3. Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case. Employment tribunals will take the size and resources of an employer into account when deciding on relevant cases and it may sometimes not be practicable for all employers to take all of the steps set out in this Code.
>
> 4. That said, **whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly**. There are a number of elements to this:
>
> - Employers and employees should raise and deal with issues **promptly** and should not unreasonably delay meetings, decisions or confirmation of those decisions.
> - Employers and employees should act **consistently**.
> - Employers should **carry out any necessary investigations**, to establish the facts of the case.
> - Employers should **inform** employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
> - Employers should allow employees to be **accompanied** at any formal disciplinary or grievance meeting.
> - Employers should allow an employee to **appeal** against any formal decision made." **[emphasis added]**

17. The Acas Code suggests a number of stages to a fair disciplinary procedure.

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- "Establish the facts of each case
- Inform the employee of the problem
- Allow the employee to be accompanied at the meeting
- Decide on appropriate action
- Provide employees with an opportunity to appeal"

18. The Code makes similar provision for grievance procedures.

19. Section 207A TULR(C)A can be broken down into a number of components, although there is, no doubt, some degree of overlap between them, and it is always important to consider a statutory provision as a whole:

a. Is the claim one which raises a matter to which the Acas Code applies

b. Has there been a failure to comply with the Acas Code in relation to that matter

c. Was the failure to comply with the Acas Code unreasonable

d. Is it just and equitable to award an uplift because of the failure to comply with the Acas Code and, if so, by what percentage, up to 25%

Is the claim one which raises a matter to which the Acas Code applies?

20. The language of s.207A TULR(C)A, that determines its application, is a little clumsy. There must be proceedings under one of the statutory provisions set out in Schedule A2, which includes unfair dismissal. It is necessary that it "appears to the employment tribunal that - (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies". It is clear from paragraph 1 that the Acas Code applies to "disciplinary and grievance situations".

21. It is accepted in this case that the claimant submitted a grievance about her treatment. It is not necessary in this appeal to consider precisely what constitutes a "grievance situation" and what is necessary for a concern raised by an employee to constitute a "grievance".

22. It is, however, necessary to consider what constitutes a "disciplinary situation". Paragraph 1

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of the Acas Code provides that "Disciplinary situations **include** misconduct and/ or poor performance" **[emphasis added]**. It is clear that where the employer contemplates action because it considers that there are issues of misconduct or poor performance the Acas Code is engaged. Paragraph 1 of the Acas Code specifically excludes "redundancy" and the expiry of a fixed term contract from giving rise to a disciplinary situation.

23. Paragraph 1 of the Acas Code makes it clear that where the employer considers that there is an issue of poor performance that needs to be addressed, it is a disciplinary situation, even if the matter is to be addressed under the capability procedure and that "the basic principles of fairness set out in this Code should still be followed".

24. In **Holmes v Qinetiq Limited** [2016] ICR 1016 Simler J (President) held that the Acas Code does not apply to incapability because of ill health:

> "In my judgment, the word "disciplinary" is an ordinary English word. A disciplinary situation is a situation where breaches of rules or codes of behaviour or discipline are corrected or punished.
>
> 12. When an employee breaks rules or codes of behaviour, that is generally described as misconduct and gives rise to a disciplinary situation. **Equally, an employer may have expectations about the way in which a job is to be performed and the minimum standards to be maintained. Where those expectations or standards are not met, that also gives rise to a disciplinary situation in respect of the poor or inadequate performance that arises**. … If the employee faces an **allegation** of culpable conduct that may lead to disciplinary action, whether because of misconduct or poor performance or because of something else, the Code applies to the disciplinary procedure under which the allegation is investigated and determined. In other words, the Code applies to all cases where an employee's **alleged actions** or omissions involve culpable conduct or performance on his part that requires correction or punishment. Where there is no conduct or performance on the part of an employee that requires correction or punishment giving rise to a disciplinary situation, and most obviously that will be where no culpability is involved, disciplinary action ought not to be invoked and would be unjustified if it were.
>
> 15. For those reasons, which are, although expressed slightly differently, broadly the reasons given by the Employment Tribunal in this case, properly construed the Code of Practice does not apply to internal procedures operated by an employer concerning an employee's **alleged** incapability to do the job arising from ill health or sickness absence and nothing more. It is limited to internal procedures relating to disciplinary situations that include misconduct or poor performance but may extend beyond that, and are **likely to be concerned with the correction or punishment of culpable behaviour of some form or another**." **[emphasis added]**

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25. Is it necessary that, as a matter of fact, the claimant is guilty of misconduct or is providing poor performance? I consider that cannot be the case. What is necessary is that the employer considers that there is an issue of potential misconduct or poor performance that must be addressed.

26. This point is most easily analysed by considering misconduct. If an employer believes an employee has stolen money, but is wrong, it would be very surprising if that meant that the Acas Code did not apply because as a matter of fact there was not a disciplinary situation. There is a disciplinary situation because the employer believes that there may be misconduct; that is why the employee should have the benefit of the safeguards of a fair procedure that accords with the Acas Code. The protection of the Acas Code is particularly important for innocent employees.

27. Similarly, if an employer believes that an employee is rendering poor performance I consider that the Code applies even if, as a matter of fact the employer is incorrect and the employees performance is satisfactory. That should become apparent if a fair procedure is operated.

28. In **Lund v ST Edmund's School, Canterbury** UKEAT/0514/12/KN Keith J consider that an employee dismissed for alienating his colleagues, which was characterised as being a dismissal for some other substantial reason ("SOSR") within in the meaning of section 98(1)(b) **ERA** had the protection of the Acas Code [12]:

> "So although there are particular situations to which the Code does not apply – dismissals for redundancy and the non-renewal of fixed-term contracts on their expiry – **it is intended to apply to those occasions when an employee faces a complaint which may lead to disciplinary action** or where an employee raises a grievance. **If the employee faces a complaint which may lead to disciplinary action (whether because of his misconduct or his poor performance), the Code applies** to the disciplinary procedure under which the complaint is to be investigated and adjudicated upon. Of course, the outcome of the disciplinary procedure may not result in the employee's dismissal at all. Or it may result in his dismissal which on analysis turns out not to be a dismissal for his misconduct or poor performance but a dismissal for something else. **The important thing is that it is not the ultimate outcome of the process which determines whether the Code applies. It is the initiation of the process which matters. The Code applies where disciplinary proceedings are, or ought to be, invoked against an employee**." **[emphasis added]**

29. In **Phoenix House Ltd v Stockman** [2016] IRLR 849 Mitting J suggested Keith J's comments

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in **Lund** are obiter and that the Acas Code can never apply to a SOSR dismissal. I share the doubts of the Editors of Harvey:

> "[1922.01]The ACAS Code of Practice No 1 on Disciplinary and Grievance Procedures S [1] can apply to a dismissal for 'some other substantial reason' (SOSR), at least where the employee is facing disciplinary measures. At one stage a view gained ground for some reason that it might not be applicable at all to SOSR. This was always highly dubious because the Code itself only excludes two categories of case (redundancy and fixed-term contracts) and so as a simple matter of interpretation it should be applicable to all other categories where there is the necessary culpability/disciplinary connection. In other words, it is a matter of sub-stance, not of the particular category to which the dismissal is ascribed. Subject to one unfortunate aberration, the balance of the case law accepts that. In *Lund v St Edmund's School, Canterbury* UKEAT/0514/12 (8 May 2012, unreported) it was held that there could be an uplift in compensation under TULR(C)A 1992 s 207A in an SOSR case where the employer had not complied with the Code. When the matter arose directly in an SOSR unfair dismissal liability context in *Hussain v Jurys Inn Group* UKEAT/0283/15 (3 February 2016, unreported), the EAT considered that the employer had been wrong to assume that the Code did not apply. This was obiter because the decision was that there had been no breach of the Code on the facts anyway, but Lund was considered and the EAT's view was clearly expressed. Moreover, indirect support is given for this view by the case of *Holmes v QINETIQ* Ltd [2016] IRLR 664, EAT, where it was held that the Lund approach also applies in cases of medical incapability (ie the Code applies if the employee is being disciplined for abuse of sickness procedures, but not in relation to genuine illness/incapacity). However, when the question of the Code's applicability arose again directly in relation to SOSR cases in *Phoenix House Ltd v Stockman* [2016] IRLR 848, [2017] ICR 84, EAT, a different EAT held that the Code does not apply to SOSR cases at all. This was in the context of a s 207A uplift of compensation, which was viewed as penal provision which must be applied strictly, restricting it to misconduct cases per se. It was held that *Hussain* was wrongly decided. However, (1) this EAT did not have Simler P's judgment in Holmes before it and (2) the judgment contains some odd comments about the possibility of some parts of the Code being applicable. A decision of the Court of Appeal on this point is clearly now desirable. In the meantime, it is arguable that the weight of authority is against *Phoenix House*, which itself may be viewed as per incuriam because it was taken in ignorance of the almost contemporaneous decision of the EAT President in Holmes."

30. If an employer considers that an employee is guilty of misconduct or has rendered poor performance, I incline to the view that the Acas Code is applicable even if it said that dismissal is for SOSR because it resulted from the response of fellow employees to the misconduct or poor performance that had led to a breakdown in working relationships. However, it is not necessary to determine the point in this appeal. I consider it is clear that the applicability of the Acas Code is a

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matter of substance rather than form. I do not consider that an employer can sidestep the application of the Acas Code by dressing up a dismissal that results from concerns that an employee is guilty of misconduct, or is rendering poor performance, by pretending that it is for some other reason such as redundancy.

31. What if the employment tribunal concludes that there was unlawful discrimination? I do not consider that would preclude the Acas Code from applying. For direct discrimination to be established it is not necessary that the protected characteristic is the sole, or even principle, reason for the treatment, it need only be a material cause: **Nagarajan v London Regional Transport** [2000] 1 A.C. 501. Accordingly, if an employer considers that there is an issue with the conduct or capability of an employee, but that is to some extent a result of discriminatory assumptions, that would not prevent the code applying, because it would still be what the Acas Code refers to as a disciplinary situation. In a dismissal case, the principle reason for the dismissal could be conduct or capability, but nonetheless direct discrimination would be established if it was a material factor in the treatment. An example of unconscious discrimination is where a person is genuinely thought to be guilty of misconduct or poor performance, but is not given the benefit of the doubt because of a protected characteristic, whereas the benefit of the doubt would have been applied if the person had been more like the decision maker.

Has there been a failure to comply with the ACAS Code in relation to the matter?

32. The employment tribunal has to consider whether there has been a breach of the Acas Code and, if so, to what extent. This will nearly always involve consideration of which provisions of the Acas Code have been breached and which, if any, have been complied with. This is an objective question, and a matter of substance. A similar approach will generally be appropriate to that adopted under the previous uplift provisions set out in section 31(3) of the **Employment Act 2002**; see the approach of Underhill J (president) in **Lawless v Print Plus (Debarred)** UKEAT/0333/09/JOJ

> "(4) The circumstances which will be relevant will inevitably vary from case to case and cannot be itemised, but they will certainly include: (a) whether the procedures were ignored altogether or applied to some extent (see *Virgin Media*

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> *Ltd v Seddington & Eland* UKEAT/0539/08, at paragraph 20); (b) whether the failure to comply with the procedures was deliberate or inadvertent; and (c) whether there are circumstances which may mitigate the blameworthiness of the failure. Those factors are sometimes embraced under the labels of the "culpability" or "seriousness" of the failure.
>
> (5) Provided a tribunal has directed itself appropriately, this Tribunal will be very slow to interfere with its exercise of discretion: *Cex Limited v Lewis* [2007] UKEAT/0013/07."

33. What if the employer goes through the motions of applying a fair procedure, but it is a subterfuge and nothing the employee says could possibly make any difference, because dismissal is predetermined, so that the process is truly a sham? Mr Kohanzad contends that in such circumstances the dismissal would be unfair but there would be no breach of the Acas Code which is all about complying with its basic procedural requirements, not substantive fairness. If an employer seeks to apply a procedure that fully complies with the Acas Code in good faith, but makes such a mess of it that the dismissal is unfair, I can see that it could be appropriate to award no uplift as there is no failure to comply with the terms of the code, the unfairness is compensated by a finding of unfair dismissal. However, if an employer acts in bad faith and pretends to apply an appropriate procedure, I cannot see how that could amount to compliance with the Acas Code. If dismissal is predetermined and the employer will not take any account of anything said by the employee, at a hearing or appeal, it is hard to see how the employee is in a better position than would have been the case if the procedure had not been applied at all, and the meetings had not taken place. That would be my determination on application of first principles and common sense. I consider it is consistent with the authorities.

34. The issue was considered by Underhill LJ in **De Souza v Vinci Construction UK Ltd**, [2017] EWCACiv 879, [2018] ICR 433, in the context of an alleged failure to comply with the grievance provisions of the Acas Code, albeit, obiter:

> "54. I have so far considered only the question of unreasonable delay. It is arguable that some or all of the other complaints admitted by Vinci, set out at para 38 above, also constituted breaches of the code. Some of those complaints are about alleged procedural unfairnesses and others are about the actual outcome. **Although the mere fact that a grievance has been (as a tribunal subsequently finds) procedurally mishandled or wrongly rejected does not**

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> **constitute a breach of the code, there might nevertheless be such a breach if the conduct or decision in question were found to show that the grievance was not considered in good faith. But it is unnecessary for us to decide** whether that is so as regards any of the complaints in question. That will be a matter for the consideration of the employment tribunal on remittal." **[emphasis added]**

35. That approach was approved by Simler J in Mr Q QU v Landis & GYR Limited UKEAT/0016/19/RN:

> "Read fairly, it seems to me that the Tribunal's findings in the Liability Judgment do sufficiently identify the provisions of the ACAS Code with which the Respondent failed to comply and do set out adequately the basis on which the Employment Tribunal concluded that the Respondent had failed to comply with those provisions. These are not findings based on any assessment of the quality of the Respondent's decision-making. They are findings about failings in the process that was adopted, and importantly **include an implicit finding that the Claimant's grievances in relation to the PIP process leading to his dismissal were not considered in good faith. That latter finding is itself a finding of breach and not an assessment of the quality of the Respondent's decision-making (see if necessary, De Souza (above) at paragraph 54)**."

36. Accordingly, I consider that if a disciplinary, capability or grievance procedure, is purportedly applied by an employer acting in bad faith, who takes no account of what the employee says, there is a breach of the Acas Code.

Was the failure to comply with the ACAS Code unreasonable?

37. It is not sufficient for section 207A TULR(C)A to apply that there has been a failure to comply with the Acas Code. It is also necessary that the failure was unreasonable. In **Kuehne and Nagel Ltd v Cosgrove** UKEAT/0165/13/DM HHJ Eady QC stated, albeit obiter:

> 52. Equally, I do not need to say anything about the ACAS uplift point, save that I would add that I would have found an error of law here in the Employment Judge's failure to correctly direct himself that a breach would need to be unreasonable.

Is it just and equitable to award an uplift because of the failure to comply with the Acas Code and, if so, by what percentage, up to 25%

38. The assessment of any uplift was considered by Griffiths J in **Sir Benjamin Slade v Biggs** [2022] IRLR 216 [77]:

> "In future, when considering what should be the effect of an employer's failure to

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comply with a relevant Code under section 207A of TULRCA , tribunals might choose to apply a four-stage test, in order to navigate the various points which I have been considering in this appeal:

i) Is the case such as to make it just and equitable to award any ACAS uplift?

ii) If so, what does the ET consider a just and equitable percentage, not exceeding although possibly equalling, 25%?

> Any uplift must reflect "all the circumstances", including the seriousness and/or motivation for the breach, which the ET will be able to assess against the usual range of cases using its expertise and experience as a specialist tribunal. It is not necessary to apply, in addition to the question of seriousness, a test of exceptionality.

iii) Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what in the ET's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?

> This question must and no doubt will be answered using the ET's common sense and good judgment having regard to the final outcome. It cannot, in the nature of things, be a mathematical exercise. The EAT must be reluctant to second guess the ET's decision either to adjust or not adjust the percentage in this respect, or the amount of any adjustment, because it is quintessentially an exercise of judgment on facts which can never be as fully apparent on appeal as they were to the fact-finding tribunal. The EAT will certainly not substitute its own view for the judgment of the ET in the absence of an obvious error.

iv) Applying a final sense-check, is the sum of money represented by the application of the percentage uplift arrived at by the ET disproportionate in absolute terms and, if so, what further adjustment needs to be made?

> Whilst wholly disproportionate sums must be scaled down, the statutory question is the percentage uplift which is "just and equitable in all the circumstances", and those who pay large sums should not inevitably be given the benefit of a non-statutory ceiling which has no application to smaller claims. Nor should there be reference to past cases in order to identify some numerical threshold beyond which the percentage has to be further modified. That would cramp the broad discretion given to the ET, undesirably complicate assessment of what is "just and equitable" by reference to caselaw, and introduce a new element of capping into the statute which Parliament has not suggested. Indeed, the reduction by Parliament in the range from 50% to 25%, after the decision in Wardle may be taken to be a reconsideration of what is proportionate in the most serious cases, and, therefore, a strong indication on that aspect."

The approach on appeal

39. Appellate courts commonly split statutory provisions into their component parts. It can be a

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very helpful tool of analysis, provided one also considers the scope of the provision as a whole. Hopefully, such guidance is of assistance for employment tribunals when they apply more complex provisions. However, it will not necessarily be an error of law, of itself, to fail to refer to such guidance. It is not always necessary to expressly set out all the components of the statute or to set out how each component has been analysed. Failure to do so may make it more difficult for an appellate court to be satisfied that there was a proper direction and application of the law. However, if it is clear from the judgment, fairly read as a whole, that the correct test has been applied, and a permissible determination reached, a judgment can be upheld, even if the reasoning is a little on the thin side.

Analysis

40. The employment tribunal did not split section 207A TULR(C)A into its components. The analysis that related specifically to the Acas uplift was extremely brief:

> "The Tribunal therefore decided that the claim for unfair dismissal succeeds. The failures are so egregious that the Tribunal decides that an uplift in compensation of 25% is required."

41. The judgment would have benefited considerably from a more detailed analysis. I have considered whether on a fair reading of the judgment as a whole the employment tribunal did consider the component parts.

Is the claim one which raises a matter to which the Acas Code applies

42. It is clear that the employment tribunal considered that the Acas Code did apply in this case. The judgement did not expressly state whether it applied because there was a grievance situation or a disciplinary situation.

43. Ms Coulson asserted that it was a grievance situation because she had raised a grievance about her treatment and the employment tribunal consider that the way in which it had been dealt with was a sham. She considered there could not be a disciplinary situation because there was no valid complaint about her performance or conduct. I consider that Ms Coulson's concern is misplaced, in that it was not necessary that she was actually rendering poor performance, if the employer considered

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that there were issues with the claimant and her performance in her role that led to the decision to get rid of her.

44. The employment tribunal dealt with the Acas uplift in a section of the judgment in which it was considering dismissal rather than the grievance. I consider it is clear that the employment tribunal applied the Acas Code to the dismissal of the claimant.

45. The respondent challenged the applicability of the Acas Code in the grounds of appeal on the specific basis that it could not apply "where the reason for dismissal given by the Respondent was redundancy and the reason found by the ET was sex discrimination". The employment tribunal expressly rejected redundancy as being the reason for dismissal. The majority of the employment tribunal found that the burden of proof had shifted so that the respondent had to establish that the claimants' dismissal was not because of her sex, and that the respondent had failed to discharge that burden. Accordingly, the employment tribunal upheld the claim of sex discrimination. However, that only meant that sex was a factor in the respondent's decision to dismiss the claimant. It did not mean that it was the only reason. Accordingly, the ground of appeal, as specifically advanced, must fail.

46. I also consider it is implicit in the reasoning of the employment tribunal that it considered that the respondent decided to get rid of the claimant because of dissatisfaction with the claimant personally and/or how she was performing her role. It is inherently implausible that the employment tribunal concluded that the respondent admitted to itself that it wanted rid of the claimant because she was a woman, rather than believing that there were problems with her capability and/or conduct, that belief being tainted by sex discrimination. I consider it is implicit in the reasoning of the employment tribunal that the claimant was in a "disciplinary situation" to which a fair capability or disciplinary procedure should have applied.

47. I have been trouble by the passage in the judgment in which it was stated:

> "There has been no criticism of Ms Coulson's work, and this was not a disguised capability dismissal"

48. This is in a passage just before the employment tribunal went on to consider whether there

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should be a **Polkey** reduction. I consider that the passage was infelicitously worded. The employment tribunal was making the point that there was, in fact, no issue with the claimant's capability that would, or might, have resulted in a fair dismissal, if a proper procedure had been applied. I consider on a fair reading of the judgment overall the employment tribunal must have concluded that the respondent had taken against the claimant and that their dissatisfaction with her should have been dealt with under a capability or disciplinary procedure.

Has there been a failure to comply with the ACAS Code in relation to that matter

49. I consider it is clear that the employment tribunal concluded that the dismissal process was a total sham, that dismissal was pre-determined and that there was absolutely nothing that the claimant could say to prevent her dismissal. The employment tribunal concluded that there was a total failure to comply with the code.

Was the failure to comply with the ACAS Code unreasonable

50. The respondent in the appeal has not asserted that there was an error of law in the employment judge failing to expressly direct himself that the failure to comply with the Acas Code must be unreasonable. That may be because the respondent accepts that it is implicit in the reasoning that the employment tribunal appreciated that this was the case. I consider it can be implied from the reasoning overall that the requirement for an unreasonable failure to comply with the Acas Code was appreciated.

51. The employment tribunal referred to the breach as being egregious. Chambers dictionary includes "outrageous" as a definition of egregious. I consider it is clear that the employment tribunal considered that the breach was beyond merely being unreasonable.

Is it just and equitable to award an uplift because of the failure to comply with the ACAS Code and, if so, by what percentage, up to 25%

52. The respondent asserts that the employment tribunal "should have identified the employer's failing for which an uplift is being made by reference to the relevant part of the ACAS Code which the employer is said to be in breach of". Generally that should be done. However, in this case the

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employment tribunal concluded that the process adopted was a complete sham. Nothing that the claimant said could possibly make any difference. On a fair reading of the judgment I consider that the employment tribunal concluded that the respondent acted in bad faith such that there was a total failure to apply any of the protections provided for by the Acas Code. In the circumstances, I can see no error of law in the employment tribunal awarding an uplift of 25%. Accordingly, the appeal is dismissed.

The claimant's grievance

53. Alternatively, even if there had not been a "disciplinary situation", there certainly was a "grievance situation". As the employment tribunal concluded that the handling of the grievance was every bit as much a sham as the dismissal process, had the employment tribunal turned its mind to the issue it would have applied equivalent reasoning and concluded that the Acas Code applied to the claimant's grievance, the process was a sham, as a result of which there was a total failure in compliance and a 25% uplift was appropriate.

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Annex

At the outset of the hearing I considered an application to strike out the appeal on the basis that there had been non-compliance by the appellant (the respondent) with the Orders to prepare for this full appeal hearing. The Orders of the EAT are there to be complied with. Pursuant to rule 26 of the EAT Rules the Appeal Tribunal may strike out an appeal for breach of an Order provided that the party against whom the application has been made is given a reasonable opportunity to make representations. There is no requirement that there be prejudice to a party before an appeal is struck out, although prejudice is generally a significant factor in deciding whether such a draconian step should be taken. In this case there have been a number of failings on the part of the respondent. These include failure to submit amended grounds of appeal within time, failure to provide the hearing bundle on time, which resulted in the claimant producing the bundle, and a delay in the provision of the respondent's skeleton argument. Before this hearing was listed the claimant had booked a holiday from 9 April 2022. The claimant asked whether the respondent would agree to bring forward the exchange of skeleton arguments. One would have hoped that the respondent would have sought to assist her but they were not able to do so. The claimant sought to exchange skeleton arguments on the due date, 12 April 2022. The claimant did not receive a response until the respondent wrote on 14 April 2022 stating that the respondent was now ready to exchange skeleton arguments. The claimant was not sure what she should do in these circumstances because the time limit for exchange of skeleton arguments had expired. It is unfortunate that the respondent did not seek to engage with the claimant, treating her as having refused to exchange skeleton arguments. The respondent could have explained to the claimant that exchange could still take place and that the most important thing was to ensure that the parties were prepared for the hearing. The claimant could still have raised the default with the EAT if relevant. Exchange of skeleton arguments did not take place until 2pm yesterday. In addition the bundle of authorities had not been agreed. The key point in this appeal is whether the ACAS code applied to the dismissal of the claimant so that it was appropriate to award an uplift, and whether there was sufficient reasoning to support the decision to award an uplift of 25%. The appeal

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is of a relatively small compass. The claimant frankly stated that she has been able to prepare properly for the hearing. This is a case in which I could have determined that the appeal should be struck out. The appellant's representatives should be in no doubt that they risk appeals being struck out if they fail to comply with the Orders of the EAT even if there is no prejudice to the other party as a result. However, the absence of significant prejudice is a factor to be considered. In the circumstances of this case, I consider that the default was not so serious that in the absence of real prejudice to the respondent that it would be just to strike out the appeal. Accordingly, I refuse the application to strike out the appeal.

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