EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Tuhran	**v**	**Poppies (Camden) Limited**

Heard at: London Central
On: 25 and 26 July 2022

Before: Employment Judge Hodgson

Representation

For the Claimant: Mr G Airey, solicitor
For the Respondent: Mr N Singer, counsel

JUDGMENT

1. **The respondent will pay to the claimant damages for wrongful dismissal of £19,897.61.**

2. **The respondent will pay to the clamant holiday pay of £5,149.00.**

3. **For the claim of unfair dismissal, the respondent will pay to the claimant –**
   a. **a basic award of £1,452.60**
   b. **a compensatory ward of £6,617.56**

4. **The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply. For the purposes of those regulations:**
   (i) the grand total is £33,116.77;
   (ii) the prescribed element is £5,720.30;
   (iii) the period of the prescribed element is 16 November 2020 to 16 September 2021; and

(iv) the access of grand total over prescribed element is £27,396.47.

REASONS

Introduction

1. The liability decision was sent to the parties on 7 January 2022

2. The claims of unfair dismissal, wrongful dismissal, and failure to pay holiday accrued at the date of termination, all succeeded. The parties have not been able to reach agreement on remedy. The issues to be decided were considered at the commencement of the remedy hearing.

3. I was told the respondent is now in creditors' voluntary liquidation. However, the company remains on the register and there is no reason why the remedy hearing cannot proceed.

Evidence

4. The claimant relied on his original statement and the original bundle of documents. In addition, several additional documents were filed, and I will refer to them if necessary. Mr Airey relied on a skeleton argument.

5. The claimant gave oral evidence.

6. The respondent relied on the witness statements previously filed. The respondent did not call any further witness evidence, Mr Airey did not apply for the witnesses to be recalled. Much of the respondent's evidence on remedy was, therefore, untested

7. Both parties gave oral submissions. Both were asked to provide further written submissions by 09:00 on the second day.

Concessions

8. There was some agreement, and some concessions were made.

Wrongful dismissal

9. It was accepted that the claimant should receive payment for wrongful dismissal covering the period from dismissal on 14 September 2020 for 9 weeks until 16 November 2020. It was conceded for the purpose of the wrongful dismissal calculation that the claimant should be entitled to payment at the rate of pay which was applicable prior to any variation of contract for furlough.

10. It was agreed gross the sum is £18,088.74 and the agreed net sum was £10,800. There was no agreement as to whether the award should be

made gross or net. There was no agreement as to how grossing up should apply.

11. It follows the remaining dispute before the tribunal was limited, given the respondent's concession.

Holiday pay

12. At the liability hearing, the tribunal calculated the total number of holiday days accrued, but was unable to calculate the daily rate. The parties agreed the holiday pay (gross £5,149 net £3,074.40). At the commencement of the hearing, I confirmed that the correct sum payable is the gross amount, as it is essentially wages and subject to PAYE. No party disputed that interpretation and therefore the holiday pay will be paid gross. As it represents wages, it may be taxed in the usual way for PAYE purposes. No issue of grossing up can apply. It is not part of any termination payment and does not affect the £30,000 exemption.

Unfair dismissal

13. It was agreed that the gross pay, prior to any variation of contract connected with furlough, was £2,009.86 per week with a net pay of £1,200.00 per week.

14. The calculation of the basic award was agreed. The claimant was 51 at the date of the dismissal. He is entitled to £7,263.00 (9 years x 1.5× £538 - maximum weekly wage). The respondent says it should be reduced zero as contributory fault should be set at 100%.

15. While first on furlough, the claimant received £1,754.86 net per month (£404.97 net weekly). As from 1 August 2020, he was on a flexible furlough programme earning £2,444.52 net per month (£564.12 per week).

16. The claimant concedes that he has no ongoing loss after 15 November 2021, being one year after the end of the minimum notice period. He limits his claims to that one-year period.

Pension

17. The pension loss calculation was not disputed. The respondent says it is not payable because the claimant had opted out.

The issues

18. I considered what disputes remained to be resolved.

Wrongful dismissal

19. As the calculation was agreed, there is a question as to whether it should be ordered net or gross. This depends on its treatment for the purpose of tax.

Unfair dismissal

20. The respondent alleges the claimant contributed to his dismissal. If so, should either or both the basic and compensatory awards be adjusted, and if so, should the same reduction we made for each.

21. The calculation of the compensatory award is disputed and in particular the following points arise.

22. Is the claimant entitled pension loss? It is the respondent's position that the claimant contracted out of his pension rights in 2019, and no sum is payable. The claimant acknowledges that he was not paid pension from around August 2020 but alleges that he continued to have a right to receive pension contributions.

23. It being accepted that payment for loss of earnings should not commence until after the nominal period for notice, should compensation be based on the contract of employment, as varied, following the claimant's agreement to be furloughed, or should the calculation be on the basis of his own pre-furlough contract. Both parties rely on the Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020 (the regulations), it being the respondent's case that the weekly wages is only relevant to calculation of the basic award, and it being the claimant's case that the weekly wage, as defined by the regulations, is applicable to the compensatory award.

24. In any event, when would the claimant have returned to work full-time, had he remained employed? It is the respondent's case he would have returned in the early summer of 2021. It is the claimant's case he would have returned no later than October 2020.

25. Did the claimant fail to mitigate his loss? It is the respondent's position that the claimant, by failing to apply for any employment, failed to mitigate his loss and he should have obtained alternative employment, at the same rate, by no later than six months post dismissal.

26. The respondent initially advanced a Polkey argument. The respondent's position was modified during closing submissions. The respondent now concedes that the claimant would not have been dismissed had a fair procedure been followed. This point was clarified during submissions and therefore the respondent now concedes that the claimant would not have been dismissed within a short period after the date of the dismissal, had a fair procedure been followed. The respondent also abandoned the arguments, initially advanced, that the claimant's employment would have been terminated no later than six months after the actual dismissal. It follows the respondent has not sought to advance any argument that his

employment would have ended either by a particular date or by reference to a percentage chance.

27. I noted the parties invite the tribunal to calculate any grossing up. The parties were invited to give further submissions. There are a number of difficulties. The claimant has given limited disclosure of his earnings. It is unclear what he will earn this financial year. It is necessary to estimate his yearly earnings when grossing up. It was unclear how the wrongful dismissal claim would be treated. If it were awarded gross, there is no further grossing up, but it may be subject to tax, and it is necessary to consider how that interacts with any damages which may qualify for termination payment exemption for the first £30,000. The parties were asked to clarify the position. I confirmed that the final decision may be released on a confidential basis to the parties for the purpose of the parties providing extra submissions on the calculation of a grossing up.

28. It is accepted that there should be a payment pursuant to section 38 Employment Act 2002 . The claimant alleges that there should be 4 weeks' pay the respondent argues for 2 weeks. It is agreed that the maximum weekly wage of £538.00 should apply.

29. Both parties agree that there must be an uplift for breach of the ACAS code of practice. The claimant says the relevant uplift should be 25%. The respondent says it should be 10%. The respondent says it is limited to the wrongful dismissal and compensatory elements.

Additional findings of fact

30. I have regard to all the facts already found. The further evidence is limited.

31. I am satisfied that the claimant's has failed to disclose material documentation. The claimant has claimed benefits. He stated he had received universal credit. The period was unclear. He has failed to provide any documentation in support.

32. On 10 November 2019, the claimant signed an opt out agreement. The opt out agreement concerned the 48-hour working week and was expressed as a workplace pension opt out. He agreed to opt out of the workplace pension. I find he signed it and understood it to be an opt out agreement. It does not specify the date from which the opt out will take place.

33. On 11 December 2020, the claimant became a director of Jack the Chipper Ltd (JTC). In addition, he was granted 100 shares, out of a total share issue of 300. He has received payment as an employee of JTC. He has disclosed limited information about the company and his connection with it. He has disclosed some payslips, the first from month 12, dated 24 March 2021, which demonstrates a salary of £1,000. The second was dated 30 April 2021 and shows salary entries totalling £2,000.

There are then further payslips of a salary of £1,000, albeit some deduct £500 for absence. The last payslip I have seen is from 31 October 2021, when the salary was £1000. I have seen no further payslips. The claimant gave no evidence about his current employment. No contract of employment, or any other document evidencing the agreement with JTC has been disclosed.

34. The claimant's evidence about his employment with JTC was unsatisfactory. He referred to receiving “pocket money" from the company of various amounts from £200 to £400. He later suggested that such payments were was part of the payments recorded in the wage slips. That evidence was unsatisfactory. I find on the balance of probability the claimant was receiving payments in addition to those disclosed in the wage slips; that is why he referred to miscellaneous receipts of “pocket money.” The claimant has disclosed no accounts, or other documents demonstrating the income and expenditure of JTC. Those documents would be relevant, and the failure to disclose them is a material failure. I note it may be argued that some or all of the documents evidencing the financial position of JTC were subject to an application for specific disclosure, which was refused by EJ Burns, I understand on the basis of proportionality. The refusal of an application for specific discovery does not necessarily modify any obligation to provide relevant documents by way of normal disclosure. It should have been clear to the claimant and his representatives that all documents relevant to the financial position of JTC and the payments made to he claimant, should be produced.

35. The claimant has not explained why he limits his loss to one year after the notice period. He has not given evidence of his current earnings.

The law

36. Section 38 Employment Act 2002 provides, in so far as it is applicable -

> **(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 5.**
> **…**
>
> **(3) If in the case of proceedings to which this section applies--**
>
> > ***(a)*** **the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and**
> > ***(b)*** **when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996,**
>
> **the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.**
>
> **(4) In subsections (2) and (3)-**

> ***(a)*** **references to the minimum amount are to an amount equal to two weeks' pay, and**
> ***(b)*** **references to the higher amount are to an amount equal to four weeks' pay.**
>
> **(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.**
>
> **(6) The amount of a week's pay of an employee shall--**
>
> ***(a)*** **be calculated for the purposes of this section in accordance with Chapter 2 of Part 14 of the Employment Rights Act 1996 (c 18), and**
> ***(b)*** **not exceed the amount for the time being specified in section 227 of that Act (maximum amount of week's pay).**
>
> **…**

37. The Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020 provides, in so far as it is applicable -

> **Interpretation**
> **2.—(1) In these Regulations—**
>
> **"the Act" means the Employment Rights Act 1996;"Coronavirus Job Retention Scheme" means the scheme of that name established by the first CJRS Direction, as modified by the second CJRS Direction and the third CJRS Direction(1);**
> **...**
> **"the relevant date", in relation to E—**
> **(a) means the calculation date(4), in any case where—**
> **(i)E's working hours under their contract of employment changed, on or after the date on which E became furloughed but before the calculation date, and**
> **(ii)at the time that change was made, its contractual effect was that the change in working hours was to continue when E ceased to be furloughed or flexibly-furloughed, and**
> **(b)in any other case, means the date immediately before the date on which E became furloughed;**
> **...**
> **(2) Except in this paragraph and paragraph (1), any reference in these Regulations to an employee who is, or has been, "furloughed" is to an employee who is, or has been, a furloughed employee or a flexibly-furloughed employee.**
>
> **Calculation of a week's pay in relation to furloughed employees**
> **3.—(1) These Regulations prescribe the manner in which the amount of a week's pay(1) is to be calculated in the case of an employee who is, or has been, furloughed ("E"), subject to paragraph (2), where—**
>
> **...**
> **(b) E is entitled to payment pursuant to section 88 or 89 of the Act as a result of a notice to terminate E's contract of employment given on or after the date on which E became furloughed, for the calculation of that payment under Part 9 of the Act,**
> **...**
> **(e) E is entitled to an award of compensation for unfair dismissal calculated in accordance with sections 118 to 126 of the Act, and the notice to terminate E's contract of employment was given or (if the dismissal was**

without notice) the date of termination was on or after the date on which E became furloughed, for the calculation of that award under Part 10 of the Act,

...
(2) These Regulations only apply—

> **(a)in a case where regulation 4 applies, where the calculation date is on or before 31st October 2020(2),**
> **(b)in a case where regulation 5, 6 or 8 applies, where the relevant period, within the meaning given in regulation 5, 6 or 8 (as the case may be), includes a week when E was furloughed.**

(3) For the purposes of paragraph (1), "the date of termination" means the date on which termination of E's contract of employment takes effect.

4 (1) This regulation applies where E's remuneration fell within the description in section 221(2) of the Act (remuneration for employment in normal working hours which does not vary with the amount of work done) on the relevant date.

(2) The amount of a week's pay is the amount which is payable by the employer under E's contract of employment in force on the calculation date if E works throughout E's normal working hours in a week, and for these purposes—

> **(a)E's normal working hours, in relation to any period during which E is furloughed, include E's furloughed hours, and**
> **(b)the amount which is payable, in relation to any period during which E is furloughed, is to be calculated disregarding any reduction in the amount payable as a result of E being furloughed.**

38. Section 123 Employment Rights Act 1996 provides, in so far as it is applicable –

(1) Subject to the provisions of this section and sections 124 [, 124A and 126] the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include--

> **(*a*) any expenses reasonably incurred by the complainant in consequence of the dismissal, and**
> **(*b*) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.**

…

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.
…

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall

reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

…

39. Section 207A Trade Union and Labour Relations Consolidation Act 1992 provides, in so far as it is applicable -

> **(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.**
> **(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that--**
>
> > **(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,**
> > **(b) the employer has failed to comply with that Code in relation to that matter, and**
> > **(c) that failure was unreasonable,**
>
> **the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.**
> **…**
> **(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.**
> **(5) Where an award falls to be adjusted under this section and under section 38 of the Employment Act 2002, the adjustment under this section shall be made before the adjustment under that section.**
> **…**

Conclusions

Section 38 EA 2002

40. The claimant is entitled to an award under section 38 EA 2002. We may make an award of the minimum amount (two weeks' pay) or a higher amount (equal to 4 weeks' pay). The award is subject to the statutory cap and it forms part of the compensatory award for unfair dismissal (section 38(3) Employment Act 2002). There is discretion. The tribunal may make the award it considers a just and equitable. The claimant's submission says that the failure to provide a written contract caused "scope for confusion as to who the correct respondent was." However, the correct respondent was identified at the hearing, albeit the claimant was unwilling to accept the position. I do not accept any material confusion was caused by the failure to provide the relevant statement of terms. It is not in my view just and equitable to give a higher award. Two weeks will be used in the calculation of the compensatory award.

The Employment Rights Act 1996 (Coronavirus, Calculation of a Weeks Pay) Regulations 2020 (the regulations)

41. It is common ground that the regulations apply. As at the date of the dismissal, the claimant was on flexible furlough. The parties agreed that for the purpose of calculating a week's pay, as referred to at 221 Employment Rights Act 1996 the correct rate payable is set out in the contract prior to furlough (see reg. 2). His gross weekly pay was £2,009.86, with a net weekly pay of £1,200. Whilst on furlough, his average net monthly pay was £1,754.86 (£404.97 per week), being £2,500 per month (gross). In the two months prior to his dismissal, when he returned to work part-time, the average was £2,444.52 net per month.

42. It is accepted that the contractual rate must be used for the purpose of notice pay and the basic award. Given the concession by the parties, I have not made specifc findings on the relationship between the wrongful dismissal and the right to minimum notice pay pursuant to section 86 Employment Rights Act 1996.[1]

43. The maximum applicable weekly wage, for the purposes of section 227 Employment Rights Act 1996 at the effective date of termination was £538.

44. The claimant submits that loss of earnings, as a head of compensation when calculating the section 123 compensatory award, should be assessed using the weekly wage, and compensation should be awarded on the basis of a week's pay as defined by the regulations (i.e., the original contractual amount). It would follow that any calculation of loss of earnings would be based on the original contractual rate and not on the wages being received during the period of flexible furlough.

45. The respondent submits the weekly wage is a statutory construct for limited purposes and is irrelevant to the calculation of just and equitable compensation pursuant to section 123 Employment Rights Act 1996.

46. It is the claimant's submission that regulation 3(1)(e) prescribes the amount of a weeks' pay when the claimant is entitled to an award of compensation "for unfair dismissal calculated in accordance with section 118 - 126 of the act." The effect is that when calculating loss under section 123, the tribunal is constrained to use the 'weekly wage' rather than he actual payment that may have been received whilst on furlough.

47. The respondent says a week's pay, as defined by the Employment Rights Act 1996, is for limited purposes, including the calculation of the basic award. However, it has no relevance to the compensatory award.

[1] Section 86 Employment Rights Act 1996 provides for a minimum notice period. Section 88 confirms liability to pay which is based upon a week's pay. Regulation 3(1)(b) of the regulations specifically includes sections 88 and 89. It is accepted the claimant is entitled to the statutory minimum notice period and that it must be calculated in accordance with the weekly wage. For these purposes it is not capped. The parties accept that wrongful dismissal claim must be calculated in accordance with this.

48. I find the respondent is right. The general position is a tribunal is required to calculate the basic award in the light of the statutory week's pay, but this does not apply to the compensatory award. This is illustrated by the case of **Toni & Guy (St Paul's) Ltd v Georgiou** [2013] ICR 1356, EAT. In that case, where the employer had artificially reduced the claimant's pay level in the run-up to the dismissal, that lower pay had to be used for calculating the basic award, but the tribunal could consider what he should have been paid when calculating the compensatory award. I find there is nothing in the regulations which requires use of the weekly wage when deciding just and equitable compensation pursuant to section 123.

Contributory fault

49. In considering contributory fault, I have regard to the guidance given by Langstaff P in **Steen v ASP Packaging Ltd** [2014] ICR 56, EAT. He suggested four questions — (1) what was the conduct in question? (2) was it blameworthy? (3) (in relation to the compensatory award) did it cause or contribute to the dismissal? (4) to what extent should the award be reduced?

50. I dealt with the reason for dismissal at paragraphs 7.2 - 7.3 of the liability decision as follows:

> **7.2 Has the respondent established the sole or principal reason for dismissal? The reason for dismissal "is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee." It is the respondent's case that Mr Ural Hassan took the decision to dismiss. His reason is that, on or about 11 September 2020, he discovered the photograph in the info inbox when searching for another document. As a result, he asked the claimant to attend a disciplinary hearing. He asked the claimant about the photograph and received a shrug by the way of explanation. He took this to mean that the claimant accepted that it was a true picture. He noted the claimant was wearing a Poppies T-shirt. The photograph appeared to be outside a Poppies restaurant and appeared to be related to the claimant's position as an employee. I accept that he believed all those matters. The fact of that belief has not been challenged.**
>
> **7.3 It is the claimant's case that he was simply told that Mr Ural Hassan no longer wish to work with him. The claimant may have been told that, but I accept that the trigger for Mr Ural Hassan's action on 14 September 2020 was the photograph. I therefore accept the respondent has established the sole or principal reason. It related to conduct**.

51. The claimant submits that there should be no reduction for contributory fault for two reasons. First, the respondent affirmed the contract for the purposes of wrongful dismissal. Second, it is alleged the tribunal found "that it was unreasonable to treat conduct as sufficient reason for dismissing." In oral submissions, it was alleged that the dismissals were outside the range of reasonable responses.

52. The respondent states damages should be reduced by 100%. It submits the tribunal is not constrained when evaluating culpability by the employer's view of the wrongness of the conduct.

53. I should note that the assessment may not be the same for the basic and the compensatory award. In in the case of the compensatory award, there must be a finding the conduct contributed to the dismissal.

54. What was the relevant conduct? In this case, the relevant conduct was the claimant, in anger, exposing penis to a member of the public. At the time he did this, the claimant knew that he was representing the respondent. His reaction was because of the individual's complaints about the actions of the respondent.

55. Was his conduct blameworthy? I made the following finding at paragraph 5.8 of the liability decision -

> **5.8 The resident had concerns and grievances about parking in Camden. In particular, it appears he alleged that employees, and possibly customers, of Poppies were given preferential treatment and parking fines were not imposed. Whatever his motivation, he would interact regularly with the claimant and raise his concerns. This led to a degree of friction. The resident would photograph the claimant. On one occasion, when the claimant was undertaking deliveries, he was feeling stressed. This led to him reacting negatively to the resident. The claimant lowered his trousers and exposed his penis. He did so out of anger; it was a lewd gesture demonstrating annoyance or contempt. The resident took a picture.**

56. Exposing his penis was a lewd gesture arising out of anger and showed contempt. The claimant knew what he was doing. It was blameworthy.

57. Did the conduct contribute to or cause the dismissal? At the liability hearing, the claimant did seek to challenge the respondent reason. His evidence was rejected. I found, as a fact, that the sole or principal reason for dismissal was the lewd gesture as captured by the member of public in the photograph. It was Mr Hassan's belief that the behaviour had occurred. This directly led to the dismissal. It follows that the blameworthy behaviour was the sole or principal reason for dismissal; it clearly contributed.

58. To what extent should the award be reduced. In this, I have a broad discretion. I reject the claimant's submissions. When a contract is affirmed for the purposes of wrongful dismissal, the employer may lose the right to dismiss the claimant by treating the breach as repudiatory. However, that will not necessarily lead to finding that any subsequent dismissal was outside the band of reasonable responses.

59. I did not find that dismissing the claimant for the alleged conduct was necessarily outside the band of reasonable responses. My decision was more nuanced. It appears there must have been consideration by management when the photo was first received in around 2016. Mr Hassan took no steps to check the position. No reasonable employer

would have failed to check. That led to the dismissal being outside the band of reasonable responses.

60. The claimant was in a position of authority and responsibility. He assaulted a member of the public by exposing his penis. It was potentially a criminal act. The claimant should have understood such behaviour would not be acceptable to his employer. The conduct took place in the course of his employment. It is unclear why no action was taken against the claimant in 2016. I simply have no detail. I have accepted it was not brought to Mr Hassan's attention. Given the claimant's position and seniority in the organisation, if there had been a proper investigation in 2006, which had established the facts, I cannot say that the dismissal would have been outside the band of reasonable responses. When he was subsequently dismissed, the conduct itself, despite the delay, might have been within the band of reasonable responses. This may have depended on any investigation into what happened in 2016, and any findings as to the reason for delay. For example, it is possible that there was some deliberate attempt to prevent the information coming to Mr Hassan's knowledge. I simply do not know. It follows that I cannot rule out the possibility that dismissal would have been within the band of reasonable responses had a fair procedure been adopted. I do not accept the submission that I found dismissing for the conduct was, in itself, inevitably outside the band of reasonable responses.

61. I have dealt with the above point at some length because it forms part of the claimant's submission. Contributory fault is not determined by what view the respondent took or whether the dismissal was fair or even how far it caused the dismissal. It is necessary for me to make my own assessment about the serious of the conduct as an exercise of discretion when deciding what is just and equitable. I must reduce compensation by the proportion I consider just and equitable having regard to my finding as to whether the conduct caused or contributed to the dismissal. For the reasons I have given, I find this was serious misconduct and it was seriously blameworthy. It was entirely inconsistent with the claimant's position of responsibility. I consider the right reduction to be 80%.

62. There is no good reason to have different deductions for the basic and compensatory was. Both will be reduced by 80%.

<u>The ACAS uplift</u>

63. It is agreed that the increase applies to wrongful dismissal claim and compensatory award. Pursuant to section 207A, I may increase the award by 25%. I have regard to **Allma Construction Ltd v Laing** UKEATS/0041/11. Lady Smith suggested that a tribunal should approach an uplift systematically and consider the following areas: what is the relevant code; what was the failure to comply with the code; what was the reason for failure; is it just and equitable to increase the award, and if so why; and what is the amount, and why?

64. Similar guidance was given by Griffiths J in **Slade v Biggs** [2022] IRLR 216, EAT. It was emphasised that the circumstances may include overlap with other awards. I should also have regard to the total value of the claim. The award should not be disproportionate.

65. At the liability hearing I drew the parties' attention to the ACAS code of practice and in particular paragraphs 4, 5, 9, 11, 12, 13, and 26 – 29. The claimant's closing submissions do not expressly address the relevant breaches.

66. There were breaches of the ACAS code. I accept that the conduct was not raised promptly with the claimant (paragraph 5). Necessary investigations were not carried out (paragraph 5). There was a failure to adequately inform the claimant prior to the disciplinary interview (paragraph 9). I do not accept the claimant was not given an opportunity to put his case, albeit I considered his opportunity to be limited (paragraph 12). He was not properly informed of his right to have someone present at the meeting (paragraph 13). He was not adequately informed of his right to appeal (paragraph 26).

67. However, the respondent's failure was not total. The circumstances of misconduct were straightforward, even if old. They were raised with the claimant. He had an opportunity to comment. The procedure was inadequate, but it was not totally lacking. There was ignorance of the appropriate procedure, and there was a degree of informality in the respondent's management. It is clear Mr Hassan thought the circumstances spoke for themselves. He was not seeking to wholly circumvent due process.

68. I consider that it is just and equitable to increase the award; however, the failure, in context, did not prevent the claimant from putting forward an explanation, and in the circumstances, I find the correct figure is 10%.

<u>The losses</u>

69. The claimant seeks loss of wages after the nominal end of his notice period. I have extremely limited evidence as to what would have happened to the claimant. Both parties have given limited evidence as to how the business was affected during lockdown. The respondent notes that there was a short reprieve in December, but lockdown continued in January 2021. It was not until 17 May 2020 that the majority of the indoor and outdoor economies opened. By summer 2021, normal business had largely resumed.

70. There is a letter in the bundle dated 15 December 2020 addressed "to whom it may concern". It refers to the claimant and purports to say "I'm writing to inform you that the above employees furlough scheme will end on the end of March 2020 and he will start to work for our restaurant as area manager on 1 April 2021." The rate of pay is said to be £4,200

monthly. I have received very limited evidence on this. It has been suggested that the claimant forged the letter. The respondent denies writing it. The letter is nonsensical. The claimant was not an employee on 15 December 2020. It makes no sense for the respondent to draft it. On the balance of probability, it reflects no agreement between the parties. It does not reflect any intention on the part of the respondent. It therefore tells me nothing about when the claimant would have returned.

71. I have limited evidence. I find the claimant would have continued on enhanced furlough until the beginning of May 2021. Thereafter, he would have returned to his normal contractual pay.

72. Given the respondent's concession, I make no Polkey deduction.

73. I award £500 for loss of statutory rights.

74. I allow nothing for pension. The claimant had opted out of the pension. It is implicit that the pension opt out may be cancelled at any time after the agreement to opt out was signed. Pension payments ceased prior to dismissal, in accordance with the opt out agreement.

75. I find the claimant has sought to mitigate his loss by starting a new business. He was dismissed in a difficult time for seeking new employment. Obtaining paid employment would have been difficult. The claimant has limited his loss to one year, albeit he has not given full frank disclosure, I have accepted that period. The respondent has not proven failure to mitigate.

76. I find on the balance of probabilities the claimant has failed to disclose all earnings since he was dismissed. He has disclosed earnings of £8,457.28. However, given his answers in cross examination, and his references to small sums being paid by way of pocket money, I find on the balance of probabilities, that he has received additional sums. I do not accept the claimant has been entirely frank in his evidence. However, I do not know the exact amount he has received. I must make an award which I consider is just and equitable. Ultimately, such an award allows for some discretion. I am not constrained to follow strict causation of financial loss, particularly when the position is unclear because the claimant has not disclosed all his earnings. The claimant should not be allowed to benefit by misleading the tribunal. As I cannot fully calculate the earnings the claimant has received, I consider the best way to exercise my discretion is to allow losses for a period of 10 months of the 12-month period. Despite the uncertainty I am satisfied there has been a loss and I would not consider it appropriate to refuse to award any loss. I do however consider it just and equitable to deduct the full sum disclosed as earned, and to make a further allowance because of the failure to fully disclose earnings.

<u>Grossing-up</u>

77. In 2018/2019, there was a significant change to the tax regime governing termination payments. The revised legislation is found in ITEPA 2003 sections 402 – 404.

78. I should summarise the main applicable principles. It is necessary to identify the relevant termination award. The termination award is the amount received in connection with the termination of employment, but which is not otherwise chargeable to income tax. (Any sums otherwise chargeable to income tax are not part of the termination award.) Statutory redundancy payments (or equivalent contractual payments) are not part of the relevant termination award.

79. As for notice pay, where there is a relevant express or implied PILON, that payment is treated as earnings under ITEPA 2003, section 62. However, were notice pay was due, but not paid, the effect of the legislation is to designate a post-employment notice pay (PENP) which is then treated as earnings. This involves identifying the rate of basic pay and applying it for the post-employment notice period. The period ends on the day when the employment could have been lawfully terminated. That sum is taxable and does not qualify for the £30,000 tax exemption provided by section 403.

80. When there is a relevant termination award, which does not provide for payment for notice period, the PENP is calculated using the formula provided and it is deducted from the relevant termination payment it is then taxable. The balance of the termination payments (including any relevant redundancy payment) take advantage of the £30,000 exemption. In this case, the parties have calculated the relevant notice period. It has been awarded as a separate wrongful dismissal calculation. That some forms a PENP. It is taxable. In my view it must be awarded gross.

81. The basic award, and the remainder of the compensatory award, benefit from the £30,000 tax exemption.

<u>The order of deductions</u>

82. It is necessary to consider the correct order of deductions. The basic approach, as set out in the **Digital (No 2)** [Court of Appeal ([1998] IRLR 134, is as follows:

> (1) Calculate the loss which the complainant has sustained in consequence of the dismissal, and insofar as the loss is attributable to action taken by the employer.
>
> (2) In assessing that loss, full credit should be given by the employee for all sums paid by the employer as compensation for the dismissal. This can include amounts paid by way of ex gratia payments or payments in lieu of notice (but excluding at this stage any enhanced redundancy payment to the extent that it exceeds the basic award (s 123(7)).

Sums earned by way of mitigation should also be deducted at this stage. So too should a deduction be made to reflect any failure upon the part of the employee to mitigate their loss.

(3) Any Polkey reduction or any reduction for the chance that the employment would have ended anyway for a reason unknown to the employer at the time of the dismissal should then be made..

(4) There should then be an increase or reduction as appropriate for failure by the employer or the employee to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures pursuant to s 207A of the Trade Union and Labour Relations Act 1992.

(5) There may then be an adjustment of two weeks' or four weeks' pay in respect of any failure by the employer to provide a written statement of employment particulars pursuant to s 38 of the Employment Act 2002.

(6) Any reduction for contributory fault is then made in relation to that loss as pursuant to ERA 1996 s 123(6).

(7) From that sum it is necessary, pursuant to ERA 1996 s 123(7), to deduct any redundancy payment to the extent that it exceeds the basic award. Note that s 123(7) only applies to redundancy payments that are contractual or statutory. If there is not a genuine redundancy situation then the payment will be offset instead at stage (2).

(8) The sum may then need to be grossed up for tax purposes. Consideration needs to be given to this where the award (inclusive of the basic award) is in excess of £30,000.

83. The awards made are set out in the schedule below.

Calculation of unfair dismissal payments and other sums payable
Start date - 11 March 2011
Effective date of termination - 14 September 2020
Years of service -nine
Period of notice - nine weeks expiring 16 November 2020
Age at the effective date of termination - 51
Nominal period of loss for purposes of section 123 - 16 November 2020 – 15 November 2021
Gross contractual pay - £2009.86 (week)
Net pay - £1,200 (week)
Furlough pay - at date of dismissal - £2,445.52 net per month (£564.12 per week)

		Subtotal	**Total**
Basic award			
Basic award	9 x 1.5 x £538	7,263.00	
Contributory fault	80%	5,810.40	
Net basic award			**£1,452.60**
Compensatory award			
The net furlough rate of (£564.12) will apply to the period from 16 November 2022 - 3 May 2021 – 24 weeks (period one. The contractual rate of £1,200 will apply for a period of 3 May to 15 September 19.6 week period two.			
Period one	24 x £564.12	£13,538.88	
Period two	19.6 x £1,200.00	£23,520.00	
Subtotal		£37,058.88	
Loss of statutory rights		£500	
Less sums earned (mitigation)		(£8,457.28)	
Polkey deduction		Nil	
Sub total		£29,101.60	
ACAS uplift (207 page)	£29,101.60 x 10%	£2,910.16	
Section 38 increase	2 x capped weekly wage (£538)	£1,076	
Subtotal		33,087.76	
Contributory fault	at 80%	(£26,470.20)	
Subtotal		£6,617.56	
Grossing up	Excess not above 30k	Nil	
TOTAL			**£6,617.56**
Notice pay			
Notice pay	9 weeks	£18,088.74	
ACAS Uplift	10%	£1,808.87	
Total			**£19,897.61**
Holiday Pay			
Agreed holiday pay			**£5,149.00**

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Employment Judge Hodgson

Dated: 29 July 2022

Sent to the parties on:

01/08/20222

For the Tribunal Office