Case number: 2600563/2019 Reserved

EMPLOYMENT TRIBUNALS

BETWEEN:

Claimant	**Respondent**
	And
Mr N Barnatt	Network Rail Infrastructure Limited

AT A STAGE 1 REMEDY HEARING

Held: At Nottingham

On: 29 April 2022
and in chambers on 22 May 2022

Before: Employment Judge R Clark.
Mrs J Bonser
Ms H Andrews

REPRESENTATION
For the Claimant: Mr J Heard of Counsel
For the Respondent: Mr J Braier of Counsel

JUDGMENT

The decision of the tribunal is that: -

1. The claim of unfair dismissal having succeeded, the respondent shall pay the claimant compensation in a sum to be determined at a stage 2 remedy hearing, if not agreed. Such sum shall be assessed applying the principles determined below.

2. By a unanimous determination, that: -

    a. The respondent has not established, the burden being on it, that Mr Barnatt has failed to mitigate his loss.

b. No adjustment shall be made for conduct under section 122 or contributory conduct under section 123(6) of the Employment Rights Act 1996.
c. The potential adjustment under Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 does not apply to the circumstances of this dismissal.
d. Pension loss shall be calculated on the simple / contribution basis and not the complex basis.

And, by a majority determination, that:-

e. But for the unfairness found, there was a 50% chance that the claimant would have been fairly dismissed in any event.

REASONS

1. Introduction

1.1. At the liability hearing, Mr Barnatt succeeded in a claim of ordinary unfair dismissal. The claims of automatic unfair dismissal and detriment for making a protected qualifying disclosure failed. We have had regard to our earlier findings of fact at the liability stage so far as we consider aspects have relevance to the remedy questions before us at this hearing.

1.2. We endorsed the position agreed between Counsel that we should adopt a two-stage approach to the question of remedy. The main reason was that there are a number of matters of principle which, once resolved, are likely to mean the parties can resolve the arithmetic between themselves or at least, in the case of pension loss, will inform the next steps the parties take on evidencing loss.

2. The Issues of Principle

2.1. We agreed that there were five questions of principle for us to determine at this first stage. They are: -

a. Whether the claimant has failed to mitigate his loss.

b. Whether there should be an adjustment for (contributory) conduct under section 122(2) and/or section 123(6) of the Employment Rights Act 1996 and if so in what percentage.

c. Whether there should be a “Polkey” reduction under section 123(1) of the Employment Rights Act 1996 and if so in what percentage.

d. Whether section 207A of the trade Union and Labour Relations (Consolidation) Act 1992 applies to this dismissal and if so the adjustment to be made.

e. Whether we apply the complex or contribution approach to quantifying pension loss.

3. Evidence

3.1. The only additional evidence before us came from Mr Barnatt. He produced a schedule of loss seeking £716,686 in compensation, although he accepts that his compensation has to be subject to the statutory cap set by section 124 of the Employment Rights Act 1996. He also adopted a witness statement on oath. We have to say the content of the witness statement was unusual and, frankly, most of it was not really a witness statement. A witness statement should contain matters of fact that the witness can attest to. This statement contains little in the way of fact relevant to remedy. Instead, it contains matters of opinion and is made up almost entirely of Mr Barnatt's view of the chances that various potential alternative outcomes that might have been would have happened.

3.2. Nevertheless, we permitted the claimant to give oral evidence on matters relating to the issues before us and as arose from the claims for losses in his schedule of loss. He was in any event questioned further on the schedule of loss, his mitigation documentation contained in the remedy bundle along with other relevant matters.

3.3. We also had before us the witness statements from the liability hearing and were taken to various of our earlier findings of fact in the submissions both counsel made on remedy.

4. Has Mr Barnatt failed to mitigate his loss?

Law

4.1. Section 123(4) imports the common law principles of mitigation of loss into the statutory regime for compensating unfair dismissals. A claimant seeking compensation under part X of the 1996 Act is required to take reasonable steps to mitigate their loss. They are required to act reasonably in doing so, in the assessment of which we are bound to have regard to all relevant factors and reach our own conclusion. It is often said that a claimant should act in the way a reasonable person would act when they had no expectation of recovering compensation from a third party.

4.2. We remind ourselves that despite those tests of what it means to mitigate loss, this is not something the claimant has to satisfy us of. He only has to prove losses flowing from the unlawful act. The burden of establishing the claimant has unreasonably failed to mitigate that loss rests with the respondent. Loss which flows from the dismissal will fall to be met by the respondent until such a time as the loss is mitigated or the tribunal otherwise concludes it is just and equitable that those losses should no longer fall to the employer to make good. On this, we were referred to **Cooper Contracting Ltd v Lindsey [2015] (UKEAT/0184/15)** and the helpful summary of the principles of law set out in **Singh v Glass Express Midlands Ltd [2018] (UKEAT/71/18).** They are: -

a. The burden of proving a failure to mitigate is on the wrongdoer; a Claimant does not have to prove they have mitigated their loss.

b. It is not some broad assessment on which the burden of proof is neutral; if evidence as to mitigation is not put before the ET by the wrongdoer, it has no

obligation to find it. That is the way in which the burden of proof generally works; providing information is the task of the employer.

c. What has to be proved is that the Claimant acted unreasonably; the Claimant does not have to show that what they did was reasonable.

d. There is a difference between acting reasonably and not acting unreasonably.

e. What is reasonable or unreasonable is a matter of fact.

f. That question is to be determined taking into account the views and wishes of the Claimant as one of the circumstances but it is the ET's assessment of reasonableness - and not the Claimant's - that counts.

g. The ET is not to apply too demanding a standard to the victim; after all, they are the victim of a wrong and are not to be put on trial as if the losses were their fault; the central cause is the act of the wrongdoer.

h. The test may be summarised by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.

i. In cases in which it might be perfectly reasonable for a Claimant to have taken on a better paid job, that fact does not necessarily satisfy the test; it would be important evidence that may assist the ET to conclude that the employee has acted unreasonably, but is not, in itself, sufficient.

Facts

4.3. We focus only on the facts necessary to determine the issues before us and make the following findings of fact on the balance of probabilities.

4.4. At the date of his dismissal, 13 December 2018, Mr Barnatt was 58 years of age. He was dismissed from a very senior role earning £107,428 per annum plus the prospect of bonus. Even the lower grade at which he had previously been employed paid in excess of £70,000 per annum. He had a degree of status and reputation in the industry, at least in respect of his technical knowledge and experience in matters of safety and compliance. It is no surprise to us that he has taken steps to find new employment in a way that sought to preserve that career legacy during the final years of his professional career and with a view to resurrecting that sense of professional pride. That much is, we find, not an unreasonable decision in itself for this claimant. Of course, the reasonableness of all decisions of this nature may need reviewing over time if new employment cannot be secured in a reasonable period.

4.5. We find that opportunities for senior roles towards the top of any organisational are, by definition, fewer and farther between.

4.6. We find Mr Barnatt has made significant efforts to find alternative work in the year or so immediately following his dismissal. He has demonstrated he has made 89 job

applications during 2019 alone. He has had varying degrees of initial success but, clearly, had been repeatedly unsuccessful in the final selection choice.

4.7. In 2019, Mr Barnatt engaged with Aegis on a contracting basis although we accept no work came of that. That was a reasonable step towards mitigating his loss. There is no basis to conclude the fact that no paid work came of it was in anyway due to any failings on Mr Barnatt's part.

4.8. The rate of applications he made reduced somewhat in 2020 although we are satisfied Mr Barnatt continued to make reasonable attempts to find appropriate employment as opportunities arose. He made a further 31 applications in total before eventually securing that new employment in September 2021. Around 15 of those further applications were during 2020. We are less concerned about that lower number than we might otherwise have been for four reasons. First, it is clear that the claimant continued to make applications for potentially suitable jobs. Secondly, we are satisfied that he was widening the scope of the applications albeit remaining with his general area of experience and was acting reasonably in doing so. Thirdly, this period largely coincided with the initial national response to Covid 19 and the subsequent lockdowns and other restrictions on the economy. Whilst industry and the economy responded reasonably successfully to those challenges, we accept there was an initial period of all sectors freezing what they were doing, particularly in respect of recruitment, until they could assess the impact. Some sectors, such as hospitality, did not recover at all throughout the period we are concerned with but we do not consider those relevant to the sectors Mr Barnatt was applying to. We find the implications of this and the associated legal measures imposed on the Country outside periods of lockdown only served to add further to the difficulties of finding new employment and the vacancies being there in the first place. Fourthly, Mr Barnatt became concerned about the currency of some of his qualifications, particularly I.T. related, and he enrolled on a full-time course with Birmingham University from late 2020 to early 2021 to improve his prospects. We accept the qualification he obtained allowed him to apply for wider roles and, more generally, with greater confidence of success. Indeed, we accept the role he eventually secured does draw on aspects of that updated training. We find it was not unreasonable for someone of his age and professional seniority to recognise that his I.T. skills may appear out of date to a prospective employer, particularly against the background of the lack of success he had experienced in his applications during 2019 and the reduction in the number of available vacancies as a result of covid-19.

4.9. We have no evidence before us of any other senior, technical vacancies in Mr Barnatt's field of expertise that he might have been suitable for but for which he did not take reasonable steps to apply for. We have to conclude he applied for everything that came to his attention and the number of vacancies that were applied for show he took more than reasonable steps to source potential opportunities. The respondent's central argument on failure to mitigate is that there comes a time after repeated rejections when a claimant has to say to accept they need to set their sights lower and, ultimately, that they need to apply for anything available to obtain paid work. Mr Barnatt says he has done just that, albeit within his sector and his technical area. The respondent's argument goes further than merely

stretching the boundaries of salary and seniority in a chosen sector, and includes taking any paid work at any level. Based on our own knowledge of the employment sectors in the region, we accept that low paid work was available throughout that period in sectors such as retail. We agree that such work is likely to have been readily available and in a relatively convenient location.

4.10. Mr Barnatt found new employment from 27 September 2021. He is now earning in the region of £73,000. The benefits of this employment are broadly comparable with what would have been available had he continued to work for the respondent in the band 2 role. In any event, we find he is making a commitment to this role and this employer and is not seeking to apply for new employment outside this organisation. We accept his rationale that he is trying to rebuild a track record within this organisation. At the date of the hearing, we find he had been successful in the first selection round for an internal promotion. We find that has mitigated his loss with this new employment.

Discussion and conclusions

4.11. There is no dispute that the claimant took reasonable steps to mitigated his loss during 2019 and, but for that concession, we would have concluded as much on the evidence. In fact, we were a little surprised that there were so many opportunities across his field and conclude from the number of applications made that Mr Barnatt did in fact stretch the boundaries of what might have been the sort of role he would have applied for under normal circumstances. Of course, the more one has to stretch one's skills and experience to meet the criteria of what a prospective employer is looking for in a particular vacancy, the less likely the application is to be successful. Whilst it was perfectly reasonable to make such applications, we also take the view that the lack of success is not necessarily indicative of what it might have been had he been applying for new work from the position of his previous employment.

4.12. The central question for us is whether there was a failure in the 20 months or so before September 2021 when he was eventually successful in finding new employment.

4.13. We are satisfied that the steps he took were reasonable despite what is clearly an extended time frame. The real focus is whether the respondent has established that the claimant has not acted reasonably during that time. The only real challenge to this is that from 2020 he has not taken any of the available low paid work to earn something. That would be something he could have done but we are not satisfied that in his situation it was unreasonable for him to focus on the type and level of work he was qualified for, at least up to September 2021. Put another way, there is a real prospect that had he taken work in, say, a supermarket, whilst he may have been able to earn sums at or slightly above the national minimum wage, that could have been more difficult to explain to a prospective employer than unemployment during covid and certainly a period of full-time university study would have been. It may even have had a negative effect on the view taken of the application for the sort of employment he has now found. Were that to happen, and were he not then to secure the sort of role he has in fact now secured, the net effect on his remaining 5 years or so of working life might well have meant there was a greater loss for the respondent to compensate

for than in fact there is. Taking a different approach could have had more of a permanent effect on the remaining years of his working life. Of course, we cannot quantify or measure the extent to which any of that would have happened but, taking an objective view of the situation, it was not unreasonable for someone of Mr Barnatt's age, seniority and level of technical specialism to want to retain his focus on the sort of work he had done in the past. Similarly, it was not unreasonably to embark on the studies at Birmingham University. In taking that course, the claimant was both implementing a considered plan to restore his career and also responding to the reduction in available vacancies during covid. It was not a step we regard as being unreasonable in his circumstances even though it had the effect of extending the period of loss.

4.14. That period of nearly three years, when viewed in isolation, does cause us concern and has required us to look carefully at what has been happening. We have concluded, however, that despite the significant period of time the decisions that were taken during it were not unreasonable and reasonable steps have been taken along that time line towards securing suitable employment. The reasonableness of Mr Barnatt's decisions has, to some degree, been vindicated by the ultimate success in securing such senior and well remunerated employment which is likely to have had a greater effect on reducing the losses for which the respondent is liable than might have been the case if low paid work had been taken at an earlier stage. We should add that we agree with the general thrust of the respondent's submission on this point but we disagree in the specific circumstances of this case, unfolding as it did at this time, that the time had already passed when Mr Barnatt should have reassessed his options to the extent of taking any paid employment. We do not accept that his not doing so was an unreasonable step to take. That said, the time when that might have been so may well have been looming on the horizon by the time we get to September 2021.

4.15. That new work at a senior level is on a salary commensurate with that which he might have earned had he remained employed on the Band 2 role. There appears scope for further promotion. We have concluded that the respondent is not liable for any losses after 27 September 2021.

5. Whether there should be an adjustment for (contributory) conduct under 122/123(6) of the Employment Rights Act 1996.

Law

5.1. In relation to a basic award, section 122(2) of the Employment Rights Act 1996 provides: -

> ***(2)Where the tribunal considers that any conduct of the complainant 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***

5.2. Similarly, in relation to any compensatory award, section 123(6) provides: -

> ***(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.***

5.3. The two subsections are subtly different. The latter calls for a finding of causation which the former does not. Both involve a consideration of what is just and equitable. In **Steen v ASP Packaging Ltd [2014] ICR 56** the EAT set out the following four stage approach to the questions posed by both sections: -

a. First, identify the conduct which is said to give rise to possible contributory fault.

b. Second, consider whether that conduct is blameworthy.

c. Third, the tribunal must ask for the purposes of section 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did not do so to any extent, there can be no reduction on the footing of section 123(6), no matter how blameworthy in other respects the tribunal might think the conduct to have been. If it did cause or contribute to the dismissal to any extent, then the tribunal moves to the next question,

d. Fourth, is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. A separate question arises in respect of section 122 where the tribunal has to ask whether it is just and equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so.

5.4. As to what conduct can properly be characterised as culpable, this is illustrated in the observations of Brandon LJ in **Nelson v BBC(No 2) [1979] IRLR 346**, at paragraph 44: -

> ***"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody minded."***

5.5. In **Steen**, the EAT also offered guidance on the assessment of the conduct and its relationship to the reason for dismissal: -

> ***It should be noted in answering this second question that in unfair dismissal cases the focus of a tribunal on questions of liability is on the employer's behaviour, centrally its reasons for dismissal. It does not matter if the employer dismissed an employee for something which the employee did not actually do, so long as the employer genuinely thought that he had done so. But the inquiry in respect of contributory fault is a different one. The question is not what the employer did. The focus is on what the employee did. It is not on the employer's assessment of how wrongful that act was; the answer depends on what the employee actually did or failed to do, which is a matter of fact for the employment tribunal to establish and which, once established, it is for the employment tribunal to evaluate. The tribunal is not constrained in the least when doing so by the employer's view of the wrongfulness of the conduct. It is the tribunal's view alone which matters.***

5.6. We were also referred to **Sutton Gates (Luton) Limited v Boxall [1978] IRLR 486** and **Finnie v Top Hat Frozen Foods [1985] IRLR 365** as authorities for the proposition that the concept of contributory conduct can apply to capability related dismissals (and by analogy to appropriate "Some other substantial reason" dismissals) if there are elements of the conduct of the individual's actions which satisfies the test.

5.7. We have had regard to **Soll (Vale) v Jaggers [2017] (UKEAT/0218/16/DA)** for the proposition that the analysis of culpable or blameworthy conduct is solely focused on the claimant, and not the conduct of the employer .

5.8. We were taken to **Hollier v Plysu Ltd [1983] IRLR 260** for the Court of Appeal's guidance on the broad level of adjustment to make in different circumstances.

Facts

5.9. The factual areas asserted to amount to culpable conduct are: -

a. Mr Barnatt's inadequate performance in the band 1 role.

b. That the scale of his inadequate performance led to the lowest appraisal rating available.

c. That his response to the performance assessment was to raise a grievance against Ms Samuels.

d. That his response to the SPIR was to raise a grievance against Ms Samuels.

e. That he rejected alternatives to keep him employed.

f. That there was a breakdown in relations with Ms Samuels.

5.10. So far as we need to make, or restate, findings of fact, we accepted that Mr Barnatt was not meeting the performance expectations of a band 1 director role. We have accepted that the assessments were genuinely held views of his performance in the role. He clearly did, as a matter of fact, raise the grievances that he did and there clearly was, as a matter of fact, a break down in working relations with Ms Samuels. We found in our liability judgment that for a period when the two were working in a direct line management relationship, Mr Barnatt had stopped communicating with Ms Samuels save for essential emails and had refused to attend certain meetings at which she would be present. It is equally a matter of fact that Mr Barnatt rejected the options that the employer put to him before the dismissal stage was reached.

5.11. There are other facts, however, which we need to include in our assessment as they have some relevance to explain his position both early on in the dispute and around the time of the dismissal decision, or which at least put his position in context. First, we record his previous positive record in respect of the technical aspects of his particular area of compliance work. Whilst there were some indications in his performance that the sort of leadership and communication skills required of a band 1 role might be challenging to Mr Barnatt, the fact he was nevertheless appointed casts a poor light on the selection process

and systems more than it does on Mr Barnatt. So far as his professional standing as a technical expert was concerned, he had a deserved reputation in the organisation and the industry.

5.12. Secondly, an employee cannot be blamed for being inappropriately promoted. We have indicated previously how much of the deficiencies that later emerged could be traced back to the selection process and the manner in which the role was defined and initially managed by Mr Shaw.

5.13. Thirdly, there was a period of confusion over the meaning of Mrs Watret's email in April 2018 about the issue of the PIP "being closed". This was interpreted by Mr Barnatt as saying that there would be no further PIP in the future only for that to in fact be the next stage the employer proposed. His interpretation was wrong but not unreasonably so. That in turn led to a grievance of which certain aspects were accepted, initially at least. We have no doubt that receiving such apparent corroboration of his sense of grievance from the respondent only served to reinforce his sense of injustice further down the line.

5.14. It is against those contextual matters that we see a degree of hardening in his stance as time went on, bolstered by his sense of injustice, but that had not always been the case. There are episodes early on where it is clear Mr Barnatt adopted a conciliatory and reflective approach to his development needs, in particular at the time of Mr Ancona's overview of performance in late 2017.

Discussion and Conclusions

5.15. We do not see any distinction between the first contention of culpable conduct, that is Mr Barnatt's inadequate performance in the role, and the second, that is his inadequate performance leading to the lowest performance rating. We do accept, as we found, that Mr Barnatt was unsuitably skilled and equipped for the Band 1 director role. That is not something we regard as being culpable conduct. His view that he was able to perform at the Band 1 director level is no more than a perfectly natural subjective view of his own abilities no doubt founded on a reasonably successful track record in his specialist field of compliance. It is also a view that the respondent must have shared at the time of his appointment. In fact, in the context of this case, it is a state of affairs that was largely brought about by the respondent's decisions and actions in the way the role was designed and managed by Mr Shaw and particularly the way Mr Barnatt was successfully appointed to the role after a competitive process. The fact that very soon afterwards the respondent began to think it had made a mistake says more about its selection process and systems than it does about any culpable conduct on the part of Mr Barnatt and that is not a state of affairs the employee should take responsibility for.

5.16. That in turn provides the background to why Mr Barnatt expressed his sense of injustice within the respondent's formal grievance procedure. Again, we do not see any separation between the fact there were two grievances. First, at a general level we are extremely uncomfortable with the notion that exercising such an established and fundamental right should lead to an adjustment in compensation. We accept that that could arise in any

given case but the circumstances in which it did would, in our judgment, have to be clear and extreme to turn the exercise of that right into culpable conduct. Secondly, in this case, the background and subsequent events contributed to Mr Barnatt's sense of grievance and the reason for each grievance being lodged. Although we found the position he took was ultimately not made out, the basis for him holding that belief and challenging the situation in each grievance falls someway short of the level we regard as necessary to bring it within the scope of culpable or bloody-minded conduct. Even a misplaced, but genuinely held, sense of grievance is something we regard as falling short but in this case, we have set out the factual context which gives further grounds for why those grievances do not amount to culpable conduct.

5.17. We then turn to Mr Barnatt's rejection of the options put to him before matters proceeded to the dismissal decision. There is nothing culpable or bloody-minded in rejecting an offer to terminate the employment in 3 months with some form of priority status in the interim. There is nothing bloody-minded in refusing the return to his role under a PIP where there was still confusion and dispute about the employer's previous position on resurrecting a PIP. The final offer of the alternative role was something Mr Barnatt should have given more thought to but it was a decision made in the context in which it was offered. There is a particularly close relationship between his decision to reject those options and the basis on which we found the later dismissal to be unfair. That in itself leads us to exercise some caution about whether that can be culpable conduct. Irrespective of that caution, however, a bad decision in hindsight is a long way from culpable or bloody-minded conduct for which it would be just and equitable to adjust compensation. We are not prepared to do so on that basis.

5.18. The final issue is the break down in the working relationship with Ms Samuels. There were of course two individuals involved in that. Each came at that from their own perspective and Mr Barnatt was, in part, fuelled in his stance by the factors we have already referred to. We do find there was some aspects of his attitude to the situation which was ill judged. The idea that he could elect not to communicate with his manager or to attend meetings that she attended is an aspect of this case which we have considered carefully in the context of contributory or other conduct. In the final assessment, we decline to make any adjustment for two reasons. First, even if that had not been the case the resulting stale mate would have presented itself in late 2018 and the difficult decision of termination would have still arisen. Secondly, whilst that may render the conduct blameworthy to some degree, it is not such as would be just and equitable to make a reduction, having regard to the circumstances of his appointment to the role, those other elements we have referred to where his grievance was upheld for a time and the limited extent that that particular conduct played in the employer's final decision termination his employment.

6. Whether there should be a "Polkey" reduction under Section 123(1) of the Employment Rights Act 1996.

Law

6.1. Section 123(1) of the Employment Rights Act 1996 provides: -

> ***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.***

6.2. The concept of a just and equitable sum having regard to the loss sustained by the claimant in consequence of the dismissal, which by then has been found to be unfair, is the foundation for what the lawyers refer to in shorthand as the Polkey adjustment (**Polkey v AE Dayton Services Limited [1987] IRLR 503 HL**). The key principle is that in considering whether an employee would still have been dismissed (at the same time or at a later date and if a fair procedure had been adopted or for some other state of affairs) it is not necessary to adopt an all or nothing approach and the chance can be reflected in a percentage chance that the employee would still have lost his employment. That principle is not limited to procedural deficiencies and the requirement for a just and equitable award applies to any basis on which it may be properly assessed that the employment would have ended in any event.

6.3. We have also had regard to **Software 2000 Ltd v Andrews [2007] IRLR 568** to the extent that the general principles and burdens expounded in that judgment have survived the effect of the repeal of section 98A(2) of the Employment Rights Act 1996.

Facts

6.4. We have already found as a fact that the employer had reached a point in time when a difficult decision had to be made about Mr Barnatt's continued employment. We further find part of that was the fact that the temporary secondment could not continue indefinitely. That point in time having been reached, we find there was no option of simply continuing the secondment nor making it permanent.

6.5. We find status was very important to Mr Barnatt. It was as, if not more, important than the salary attached to the role and he would say as much in the later review hearing.

6.6. We find Mr Barnatt retained a strong view that he had been wronged, and that the person responsible for that was principally his manager Helen Samuels. His view was that it was her that was in the wrong in her assessments of his performance. We find that view would have continued and has to be weighed as a factor in any alternative scenario contended for. We find the mediation conducted between the two had marginal success in the areas of interpersonal relations but not enough to open up any of the potential alternatives for continued employment. To some degree that also explains the attitude Mr Barnatt took to the alternatives proposed by the respondent shortly before the dismissal decision.

6.7. We find that during the intervening periods of grievances and secondment, aspects of Mr Barnatt's role had been changed and another employee had taken responsibility for a specific area of work. We have no doubt that would have helped with volume of work to some degree. We are not satisfied, however, that it would have altered the assessment of competence in the leadership role at that level so as to make any material difference to the prospects of success should Mr Barnatt have resumed any form of PIP at band 1.

6.8. We find there was no realistic prospect of Mr Barnatt securing an alternative band 1 role. First, as is almost always the case, the closer one is to the top of the hierarchy in any organisational pyramid, the fewer roles of that level there are and the more competition there may be for what vacancies arise. Secondly, the evidence of vacancies supported that they arose relatively infrequently. Thirdly, Mr Barnatt had already been unsuccessful in five applications that he had made for band 1 roles. Fourthly, the nature of his very narrow specialist technical skills was such that it is unlikely that he would outshine other applicants in other specialist areas of the business. In other words, his potential band 1 role to fit his specialised background was the one that he had occupied and not succeeded in. Perhaps the main reason is the organisations view of him in such a role. We find those within the respondent's organisation who were likely to engage in any decision making about Mr Barnatt's employment had reason to regard him as being unsuitable to adequately perform in the Band 1 role he had been appointed to. We find that view would be close to determinative of any question as to whether Mr Barnatt could be redeployed or appointed to any other Band 1 role.

6.9. However, despite that very strongly held body of opinion against Mr Barnatt in a band 1 role, we also find that those within the respondent organisation who were likely to engage in any decision making about Mr Barnatt's specialist technical skills and knowledge would be equally likely to regard him in a very positive light, at least insofar as Mr Barnatt was engaged in a role applying that skill and knowledge as opposed to leading others to deliver in that area of activity. That much can be seen from his past record which had more recently been evidenced again during the period of secondment.

6.10. We find there was no possibility of any new stand-alone technical expert role at band 1 ever being created within which those skills could be deployed at his current level.

6.11. We find Mr Barnatt rejected, and would not have contemplated at a later date, the proposal of agreeing to a termination based on a period of 3 months of being at risk during which he was supported to find alternatives. In essence, the notion of finding alternative employment had been tried without success and there is no basis for concluding that such "priority" as he might have acquired would have had the effect of overcoming the shortcomings in the views held of the claimant about his ability to perform at Band 1 level. Again, it is largely academic as this is not something Mr Barnatt would ever have agreed to in any event.

6.12. We find there was no option of Mr Barnatt returning to work with Ms Samuels in his band 1 role or any role. Mr Barnatt's assessment in his evidence of the prospects of him returning to the same Band 1 role working for Helen Samuels were wholly unrealistic and at odds with the evidence of his views at the time. Similarly, we do not accept that there was any prospect whatsoever of the employer agreeing to him returning to that role without a PIP. That question was central to the dispute that got the parties to the dismissal decision. Even putting aside the manner in which that dismissal decision was handled, we can see no realistic basis on which the employer would have even contemplated simply returning Mr Barnatt to his old role, under his old manager. Even if that could be envisaged, it would not be without any form of PIP being in place. Mr Barnatt's submission that there was a 5%

chance of this event is not one we can support on our findings of fact. His percentage is based on his chance of accepting it. Whilst it is itself so low as to be almost de minimis, we go further and conclude that it is an option that simply had no chance of arising.

6.13. Even if such a course could have been taken, we would be left with making an assessment of the chances of that PIP being brought to an end and the question of termination being resurrected within that period. We find that as an alternative to what would have been a dismissal process, Mr Barnatt would not have been afforded an extended timescale to demonstrate improvements and that a decision on whether adequate progress was being demonstrated would have been measured in months. All that is academic as there was no prospect of Mr Barnatt agreeing to it in any event.

6.14. Similarly, we find the prospect of him returning to his old band 1 role on a PIP, whether that was on the same or a renewed basis, or on the same or revised objectives, was an option that had passed its time. We do not accept that there was any prospect that it would have been an option put to the claimant in any alternative process. To his credit, Mr Barnatt accepted in cross examination that his position of seeking a band 1 role was because at the time he believed that he could maintain such a role. Although he now accepts that belief was wrong, he also says no-one said, “if you don’t, we will fire you”. In any event, even if there was a chance that retaining him in a Band 1 role could have been contemplated, which we cannot reasonably see was the case, we would then have to factor in the prospect of that renewed PIP being successfully discharged, or at least sufficiently so to avoid the employer returning to the question of termination within a relatively short period of time which we are not able to see was at all probable.

6.15. The only realistic option available as a means to avoid the dismissal decision was the band 2 role previously offered by the respondent and rejected by the claimant. That rejection was in strong terms, calling it an unjustified demotion. We find it was indeed a demotion, but it was a demotion properly offered in the alternative of failing performance and a failing relationship whilst he occupied the Band 1 role.

6.16. We find Mr Barnatt’s instinctive view of the alternative role was that it was a substantial downgrade in status. He rejected it at the time of the offer, although initially he did so by counterproposal of a return to his substantive role without a PIP. That was at a time when he was not only emboldened by his own view of Ms Samuel’s responsibility for this situation but was being bolstered by his representative of what could and could not happen within the local procedures, which was not always productive. During that process of considering alternatives, the band 2 role was kept open by the respondent and was then explicitly rejected by Mr Barnatt on the grounds of its reduced status. Mr Barnatt accepted in evidence this was “where he was at the time” and that he adopted a bitter stance, reflecting the view he took of the whole episode.

6.17. We find Mr Barnatt held his position on that beyond what must have been the surprise of the dismissal meeting on 13 December 2019. The alternative role was described as a substantive downgrade. It’s potential suitability, in contrast to what was now clearly a dismissal situation, did not prompt any spontaneous questions or challenge as to its

continued availability, even if it was not the preferred alternative option. We accept, however, that that has to be seen in the context of the surprise of the announcement at the meeting. However, having then been dismissed and having had chance to reflect on the reality of the new situation he was then in, Mr Barnatt adopted an approach that maintained the argument of the unsuitability of the alternative post. The grounds of appeal raised the issue once in the context that the alternative *"was a demotion and there was no justification for a demotion"*. A similar position is taken during the review process that took place on 8 February 2020 in lieu of an appeal. We find the notes accurately record how "*the alternative for a 2B position not wanted as 'status' not money important to NB*". We find the issue of that post was not considered further. Mr Thompson covered it briefly within a separate section in his review process dealing with alternative employment. The possibility of the alternative was therefore not explored further. Neither Mr Barnatt asked if it remained open nor, in view of the stance taken by Mr Barnatt, did Mr Thompson explore if he would reconsider his position.

6.18. We find the alternative Band 2 role was still available in the sense there is no evidence to suggest it had been filled or was otherwise no longer *potentially* available to the organisation to use to redeploy Mr Barnatt. The issue was simply that a decision was made not to keep the offer open to Mr Barnatt because of the position the parties had reached and, in particular, because of the previous rejections of it by Mr Barnatt.

6.19. We have already found that, by then, the employer had decided that the time had come when a hard decision had to be made about his continued employment. That was reached sufficiently in advance of the dismissal meeting on 13 December 2018 to allow enough time to commence what might have been a transparent and open process. That could have happened in time to hold the meeting on or around 13 December 2018 as was in fact the case and for a decision to be made. Whilst there might have been some marginal delay in allowing further time for reflection, perhaps measured in days, there was time for this employer to reach a fair decision to dismiss at the time when this unfair dismissal in fact occurred. The procedural defects in the process adopted could all have been conducted fairly within the time available of what actually happened. That includes the employer setting out its concerns about the way forward, any alternative options, holding a transparent hearing and, if a dismissal did then follow, a genuine appeal.

Discussion and Conclusions

6.20. We start with Mr Barnatt's witness statement in which he sets out his opinion of the probability of alternative events occurring. So far as that amounts to his submission on the Polkey points, we did not find his assessment of probability to be convincing or that helpful. It was not based on all potential outcomes and some of the outcomes that were addressed were themselves premised on an assumption of an earlier event occurring that was by no means certain. That was particularly so in respect of the steps that the employer might have taken in a fair process. After cross examination, much of the contentions contained in the witness statement were substantially undermined. Similarly, his percentages applied to each of the options assume all options are there to be assessed as a potential outcome. Putting aside the subjective opinion that lies behind each of the probability percentages given by Mr Barnatt, the accuracy of the probability percentage of any given outcome occurring is

dependent on the 'probability tree' containing and assessing all the possible outcomes and not including those that are impossible (unless a figure of 0% is applied). We therefore do not feel bound by the percentage figures Mr Barnatt has applied to any single option that we might find remained a possibility. We have to assess that option in respect of the range of options actually then available in the context of all the other surrounding circumstances. (For example, he might assess three equally probably outcomes resulting in 33.3% each but we might reject one option being available. The remaining two might then be given a 50% chance each, or we might assess the chances unequally depending on the circumstances as we find them.)

6.21. We also note that much of the submissions on Polkey has focused on the various alternative courses that might have been open to avoid a dismissal. They largely arise from the various offers or circumstances that had been explored in the stages up to the point the need to contemplate dismissal was reached. Those, having already been rejected, are necessarily premised on the offers being restated in our reconstruction of the hypothetical fair dismissal decision stage. The claimant's argument is that, in such a situation, there would not have been a dismissal meaning there should be no Polkey adjustment at all. Whilst that approach is not at all irrelevant to the question before us, there is a risk that viewing the chances of a positive alternative means of remaining employed leads us to view the test from the wrong end of the telescope. That could, potentially, lead us into error. We therefore remind ourselves that the question before us under section 123 of the Employment Rights Act 1996 is to assess the just and equitable losses flowing as a result of the unfair dismissal, that encapsulates the chance that this employer could have fairly dismissed in the circumstances and/or that a fair dismissal could have happened at some later stage or otherwise that the employment may have ended.

6.22. Whilst there were a number of sub-contentions made of positive alternatives, it can be seen from our findings and conclusions that the key contention for reconstructing the world as it *might* have been is limited to the alternative band 2 role.

6.23. As to the other possible scenarios contended for, the first is the chance that the claimant would have returned to his band 1 role without a PIP being in place. We reject that entirely. There is absolutely no basis that we can see for this being a possibility bearing in mind where the parties had got to nor do we accept that Mr Barnatt would have agreed to it even if it were still on the table. To that conclusion we add an alternative. Even if there was an option to return to the band 1 role on a PIP that Mr Barnatt accepted, that PIP would have been designed to demonstrate competence in the same areas that he had failed in previously. Such an alternative is one which would serve only to delay the decision as we have concluded that within a short period it would have become apparent that he could not met the necessary performance in the role and the employer would then have returned to the question of termination. We have no reason to depart from the evidence of how the first attempts at demonstrating competency in the role had failed. We assess the prospects of that to be as close to a certainty as can be said and that such a conclusion would have become apparent on the PIP reviews well within 6 months.

6.24. We are equally satisfied that what Mr Barnatt labelled “Option C” of his probability tree results in a chance of 0%. These sub options related to him being appointed to a different band 1 role. All of the concerns about his ability to meet the expectations of a Band 1 role apply as much to this option and they do to him returning to his own Band 1 role. We also have no evidence of actual vacancies other than that we can infer that they crop up periodically as Mr Barnatt had already applied for 5 of them. However, the fact he was unsuccessful for all 5 is itself a forceful pointer away from the prospect of any future appointment. Similarly, so far as there may be any reorganisation for which he might be “matched” into a new band 1 role, we see no force in that at all. We have not received any meaningful evidence of the reorganisation to be able to assess that. So far as the matching considered the role he occupied, the prospects remain at zero for the reasons previously given. So far as they might relate to other Band 1 roles the inference to draw is that they would have previously been occupied by another Band 1 Director or otherwise that Mr Barnatt would be in some form of competition in the “matching” process with other Band 1 Directors. We do not see any prospect of this option retaining his employment, still less the 18% he gives to it. We reach a similar conclusion in respect of the chance that employment would have been secured as an alternative to dismissal, by the respondent creating a new Band 1 role for the claimant which he would have accepted. He puts that at 18% too. It is an option that simply did not exist and we can see no basis in the evidence to construct it as a potential alternative to a dismissal. The very fact that the employer had got to where it did renders this a wholly unrealistic alternative. As a potential means of securing ongoing employment, these options are, firstly, speculative and secondly, wholly unrealistic based the evidence we have of Mr Barnatt’s lack of success in other competitive selection processes.

6.25. The option given to him in August 2018 that he accepted termination after 3 months of being in some form of priority is not included in Mr Barnatt’s own assessment of probable outcomes and must reflect his view either that the offer would not have been restated by the employer or, even if it was, that it would have been rejected. We concur with that assessment of chance for either or both reasons.

6.26. The final options labelled “Option D” do not appear to us to take matters much further. These are premised on Mr Barnatt remaining in the seconded role. That is not something that was an option at all. Nevertheless, it gives the prospect of him resigning in such a situation as 0% anyway. It attributes a chance of 5% to him accepting that. As we conclude the prospect of this option being live at 0%, the opportunity to accept or reject such an offer does not improve the chance.

6.27. That leaves us with the fact that this employer had, shortly before the dismissal decision, contemplated the claimant’s employment continuing with the offer of the band 2 role. We have dealt with the parties’ contentions on the chances of that positive outcome occurring and by inverting the chance of employment continuing in those circumstances, we arrive at the chance of a fair dismissal. That is the only real question of substance with traction.

6.28. We are unanimous that an alternative fair termination process was more than likely to include the alternative band 2 role. We have to assess the chances of this employer acting in

a way to affect a fair dismissal. Whilst we cannot say that it is a certainty after it had been offered and rejected previously, it was a position that had existed only a short time before the termination decision was formed. Our conclusion is informed principally on the accepted view that Mr Barnatt did have a high degree of relevant technical skill and knowledge and the evidence supported his success at a band 2 level during the secondment. We accept that having offered it and it having been rejected, it was not an essential aspect of a later fair dismissal and the chance of that role being offered as part of an alternative fair dismissal process therefore has to be something less than 100% for the reasons Mr Braier argued. Nevertheless, we are satisfied it would remain reasonably likely to form part of that alternative fair dismissal.

6.29. As to Mr Barnatt accepting such an offer an alternative to a dismissal process, we start with an observation that all decisions are made in a context. They are based on the known facts surrounding the decision in question and, as in this case, the availability of other options and potential outcomes, whether actual and perceived. We are unanimous in our conclusion that if the foundation of the surrounding circumstances changes, so too is the chance of a different decision being made. It is in that context that we have had to assess the evidence of what Mr Barnatt actually said and did following his dismissal and how that might have been different if the process adopted had put matters to him in a transparent way, and the alternatives had still been presented in a different context, namely it's this or termination.

6.30. We are unanimous in our conclusion that the respondent has therefore established that there was a chance that a fair dismissal could have occurred at the time the claimant was actually dismissed. Regrettably, we have not been able to reach a unanimous view on how we assess the chance of a fair dismissal or, looking at it from the other way, that an alternative potentially fair dismissal process conducted by this employer would have resulted in the alternative role being both offered and accepted. The view of the majority (Mrs Bonser, Mrs Andrews) is that there was a very real prospect of the offer being made and that the claimant's attitude to that alternative role would have been different when viewed in the context of a cold choice between taking the band 2 role and being dismissed. The majority rely on the fact that when the offer was in fact rejected, he was arguing from a position of perceived strength, possibly bolstered by his representative and his relative success whilst on secondment and the recent support for part of his grievance and confusion the employer's ambiguous position over reinstating the PIP. He viewed himself as being unfairly treated and that Ms Samuels' view of him was harsh. Whilst some if not all of that reasoning might have been misplaced, it was the position he understood himself to be in. That contrasts substantially with the position of 'take the alternative or be dismissed'. The world looks quite different then. There would also have been scope for some measured reflection on Mr Barnatt's part and some time for discussion with his family and others before the hearing in December which may well have counselled a more pragmatic view of the situation that he was in fact in. Whilst in fact Mr Barnatt maintained a negative view of the alternative role, that was in the context of arguing against a dismissal decision that had, by then, been made. Had the change in reality been put to him as part of the difficult decision that the employer was having to make, it was just as likely to have prompted a different response from him, as it was to prompt the same rejection. For those reasons, the majority assess the overall chance of

him retaining employment with the respondent at 50%, taking into account the chances of both the offer being made and accepted. The corollary is the chance that there could have been a fair dismissal which is also 50%.

6.31. For the minority (EJ Clark), there remains no doubt that, if presented with a different reality in front of him, there is a chance that the decisions made and the resultant outcome would be different. That chance has to be factored into the assessment of the chance of a fair dismissal. The difference in approach with that of the majority has been in reconciling why the assessment of that chance would be significant, especially when viewed against the reality of what was in fact said and done by the respondent and Mr Barnatt and especially at a time he was aware of the reality of the dismissal decision.

6.32. The paradigm situation for a zero “Polkey” reduction in these situations would be where, after the reality of dismissal was apparent, the employee then positively sought to accept the earlier offer of alternative employment as an alternative to dismissal and, in response, the employer unreasonably refused to consider it as it had previously been rejected. That is far from the situation in this case. Mr Barnatt made clear throughout the process that he did not regard the band 2 role as suitable. He had not only rejected it but had complained about it being offered as it amounted to a demotion. The minority accepts that he should not be judged by his reaction on 13 December 2018 when he was hijacked with a dismissal decision out of the blue, however much it might have been foreseeable that the status quo could not continue indefinitely. The difficulty for the minority is that, after that meeting, there was then a considerable opportunity for Mr Barnatt to reflect on the reality between then and lodging his appeal nearly 4 weeks later on 9 January 2019. Those grounds of appeal were drafted in the knowledge that he had been dismissed and that part of the reasoning for dismissal was the refusal of the alternative role with protected terms. The stark reality of the choice was then as present as it would have been had it been put to him within a fair dismissal procedure. Despite that, there is not only no hint of him considering the role as an alternative to dismissal, but the fact of that alternative role continues to be criticised and dismissed as an unjustified demotion. Similarly, when the matters were argued at the hearing on 8 February 2019, nearly 2 months after the dismissal decision, there was still no reflection on this as an alternative to dismissal and the band 2 role was again positively rejected as an afront to his status in the organisation. The notes of the meeting were reviewed by Mr Barnatt and the possibility of an alternative to dismissal did not prompt any reflection of the situation he was in. The question for the minority is to what extent would that position of fact have changed if the alternatives had been offered again to the claimant and presented in advance as part of a fair dismissal process? The answer is that there has to be some prospect there would have been a different outcome in those circumstances but the minority assessment is that the evidence of what actually did happen when dismissal was a known fact points towards that chance being minimal. Putting a figure on it does not admit of fine degrees of distinction. It is a broad brush which means a minimal chance can be reflected in the figure of 10%. Even within a broad-brush approach, the minority could not assess chance above 20%. That is the only area on which we have been unable to reach consensus.

6.33. Despite that difference of view, we are unanimous in one further consequences of this aspect of the case. That is that his view of his status was such that we do not accept that he would have remained working for this respondent indefinitely thereafter. Even if the band 2 alternative was offered and accepted by the claimant, we are satisfied he would not have secured a promotion back to band 1 and that his bitter view of this episode and its effect on his status would have been such that he would have sought alternative employment outside this respondent. We consider it likely such employment would have been secured within about 18 months.

7. Whether S.207A of the trade Union and Labour relations (Consolidation) Act 1992 applies to this dismissal and if so the adjustment.

Law

7.1. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides, so far as is relevant for present purposes: -

> ***207AEffect of failure to comply with Code: adjustment of awards***
>
> ***(1)This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.***
>
> ***(2)If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—***
>
> > ***(a)the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,***
> >
> > ***(b)the employer has failed to comply with that Code in relation to that matter, and***
> >
> > ***(c)that failure was unreasonable,***
>
> ***the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.***
>
> ***(3)…***
>
> ***(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.***

7.2. A claim of unfair dismissal is a claim listed in Schedule A2. The ACAS Code of Practice 1, the Code of Practice on Disciplinary and Grievance Procedures 2015 is a relevant code of practice within the meaning of section 207A(4).

7.3. The code says in its forward that: -

> ***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. The Code does not apply to dismissals due to redundancy or the non-renewal of fixed-term contracts on their expiry***

7.4. The question of whether the code, and more particularly the sanction in section 207A, applies to situations attracting the legal label of "some other substantial reason" has been considered at EAT level with differing results. The cases cited to us were **Lund v St**

Edmund's School Canterbury [2013] (UKEAT/0514/12), **Hussain v Jurys Inn Group Ltd UKEAT/0283/15**, **Holmes v QinetiQ Ltd [2016] ICR 1016** and **Stockman v Phoenix House Ltd [2017] ICR 84**

Submissions

7.5. The claimant submits that the code applies and, consequently, the sanction in section 207A. Mr Heard submitted that **Holmes,** in obiter comments supported that conclusion by analogy with certain ill-health dismissals on ground of capability which would invoke the code where there were elements of misconduct in the application of the sickness absence procedure or that the illness was not genuine.

7.6. Similarly, in **Lund** the claimant was dismissed unfairly for breakdown of trust and confidence. The EAT held that the code applied where the issues leading to the possibility of dismissal included the claimant's conduct. Mr Heard submits that in the later case of **Hussain**, the EAT held that the code applied to dismissals relying on the potentially fair reason of some other substantial reason. Whilst he acknowledges the clear statement given by Mitting J in **Phoenix House**, the latest of the four cases before us, he argues that Phoenix house was decided in ignorance of Holmes and that Holmes and Lund should be preferred and a conclusion reached that the code applied to Mr Barnatt.

7.7. For the Respondent, Mr Braier submitted that **Lund** is an outlier on its own particular facts and has been overtaken by **Phoenix House**. That in that case Mitting J made clear that the ACAS Code was inapplicable to SOSR dismissals, and that whilst some parts of the Code may be capable of being applied to such dismissals, the imposition of a sanction for failure to comply with the letter of the Code was not what Parliament had in mind in enacting s.207A. He found Lund unsurprising in the context of the particular facts of that case and reached clear decision within the ration of the case before him that the code did not apply.

Discussion and conclusions

7.8. This is first and foremost a question of law. There clearly were failures to comply with aspects of the code of practice and, to a large extent, they overlap with the general test of fairness in respect of which we found the dismissal to be unfair. The issue is whether the provisions of the code apply to a dismissal in these circumstances and, more particularly, the sanction imposed by section 207A of the 1992 Act.

7.9. Starting with the code itself, it does not explicitly list the types of potentially fair reasons that are included. It does explicitly exclude redundancy dismissals and dismissals on the expiry of a fixed term contract. The former is a reference to one of the potentially fair reasons for dismissal. The latter is not, it is a reference to a statutory situation which will amount to a dismissal under section 95 of the Employment Rights Act 1996, the fairness of which may still mean the facts have to engage with section 98 of that act, which are often, but not exclusively, going to be for some other substantial reason. We cannot see that that helps substantially in reconciling whether it applies or not to other forms of dismissal for that reason. It may be that focus needs to be not on the legal label of the potentially fair reason, but on the facts or beliefs that engage that potentially fair reason. We are also alive to the fact that, for

the purpose of unfair dismissal there may be more than one reason and it is only the principal reason which engages in the question of fairness. Those observations might tend to steer us towards the analysis of the underlying facts leading to the dismissal process suggested in **Holmes** and the purposive approach suggested in **Lund**, rather than focusing on the end result of the legal label. However, the approach of **Lund** was disapproved of in the later decision in **Phoenix House** and we do not accept that that decision was reached per incuriam in the sense that the relevant part of **Holmes** was obiter and can arguably be distinguished. As for **Hussain**, we do not accept that it says what Mr Heard submitted it says about Lund. The applicability of **Lund** was couched in extremely conditional terms by Elisabeth Laing J and acknowledged there were arguments either way. Her paragraph 47 clearly shows she approached the case before her on the basis that *even if* the code applied, and she made clear she made no decision either way, the only question for her was whether that amounted to a material error.

7.10. We acknowledge that the state of the appellate authorities would benefit from further clarity. For present purposes, however, we are satisfied that **Phoenix House** is to be preferred. First, it provides a ratio and does so in the context of considering **Lund**. It explains that the code may be applicable to SOSR situations, or at least aspects of the process, but the utility of what the code provided for was different to the question of whether parliament intended the sanction imposed by section 207A of the 1992 Act to engage which he concluded it did not. To the extent that there is any conflict between the authorities, we prefer **Phoenix House**.

7.11. Moreover, we are satisfied that the reason for dismissal as set out in Mr O'Neill's dismissal letter does not rely on a belief in Mr Barnatt's conduct. It simply relies on the state of affairs that had by then been reached. Even on the purposive approach, and even factoring some aspect of breakdown of relationship as we found, we do not regard the code as being applicable.

7.12. Consequently, we have concluded that the ACAS code did not apply to Mr Barnatt's dismissal and make no adjustment.

8. Whether we apply the complex or contribution approach to pension loss.

Law

8.1. Part of the just and equitable test posed by section 123 of the Employment Rights Act 1996 includes consideration of any future losses that will be incurred in reduced pension benefits in consequence of the unlawful dismissal. In conducting that task, we have had regard to the Presidential Guidance on the Principles for Compensating Pension loss and the associated principles themselves. The fourth edition of the principles is now in its third revision published in 2021. We have had regard to that as the appropriate version. It is not law but guidance and, accordingly does not need to be read back in time to the date of dismissal. In any event, although it post-dates the date of dismissal, none of the updates to that revision appear to us to affect the general principles.

Facts

8.2. In order to address this single question of principle before us, it is necessary only to record the following basic findings of fact and other relevant factors on which we have reached conclusions.

8.3. Mr Barnatt was dismissed on 13 December 2018. He was 58 years old at the date of dismissal. He found new employment on 27 September 2021, then aged 61. That is a period of nearly three years, 1019 days to be precise.

8.4. We have found elsewhere that he has not failed to mitigate his loss during that period.

8.5. Prior to his dismissal, Mr Barnatt was a member of the respondent's defined benefit pension scheme.

8.6. Putting to one side specific challenges to arithmetic and methodology in the schedule, which we can see are there to be made, the current schedule claims a sum approaching £3/4m on a claim subject to the applicable statutory cap of £83,682. A large proportion of that comes from the effect of grossing up and a claim for a statutory adjustments. Even stripping out those elements, the "raw" pecuniary loss amounts to £367,568, of which £281.728 is described as non-pension losses (with £85,840 being pension loss).

8.7. We have concluded elsewhere that there is a 50% chance of a fair dismissal in December 2018. Within that analysis, we have concluded that the only alternative scenario to avoid dismissal would have been for the lower band 2 role to have been offered and accepted. Even then, we conclude that he would have taken it with a substantial degree of resentment to the organisation and would have immediately began looking for other employment. Whilst we recognise there is evidence of his actual search for employment after being dismissed, we take the view the prospects of securing alternative employment are much better from a position of senior employment than a position of being dismissed and that we would expect him to have secured alternative employment out of choice within a short space of time and in any event by 18 months.

Discussion and Conclusion

8.8. Both Counsel have relied on various extracts from the principles on compensating pension loss to support their contention for the contribution or the complex method of calculation as the case may be.

8.9. Paragraphs 5.30 and 5.32 of the principles suggest the simple method for cases where the period of loss to be compensated is relatively short. Paragraph 5.33 goes on to give a rule of thumb guide to the effect that a period of up to 12 months would probably qualify as a short period whereas a period of 18 months or more would probably not. We are clearly considering a period in excess of 18 months, at nearly double that. In isolation, that would tend towards the complex method. We qualify that slightly to the extent that our factual landscape also includes the reality that there is a 50% chance of a fair dismissal and a 50% chance that employment at a lower grade could have preserved employment but only for so

long as it took Mr Barnatt to leave for a new employer of his own choice, within about 18 months. That is a factor which overlaps with paragraph 5.53 so far as withdrawal factors are concerned. We take the view that that is a factor of some weight. That in itself tends towards the contributions method.

8.10. There is an imbalance in the relative heads of financial loss between pension and non-pension loss. The claim of £271,728 is unaffected by the decision on pension calculation. That factor then engages with what we regard as perhaps the most significant factor of all in the guidance. That is that this is a claim which is subject to the statutory cap. The non-pension loss is already over 3 times the statutory cap. Including what would be the employer's pension contributions of £16,419 per annum, adds another £46,000 to that figure bringing the total financial loss close to 4 times the statutory cap. Even allowing for the 50% adjustment, there has to be a substantial reduction in the underlying calculations for there to be any prejudice in applying the contributions method as opposed to the complex method.

8.11. Conversely, applying the complex method will require the parties to engage in considerable preparation, potentially including expert evidence and certainly at significant cost to both. There are complex arguments arising in this case, even more so than in other pension loss cases, such as in respect of any losses to surviving spouse benefits and the implications of salary sacrifice schemes on pension benefits. In themselves, those sorts of complexities are simply a consequence of this type of claim and the particular issues in the case that the tribunal would have to address. However, where there is a decision to be made such as the one now before us, those considerations become relevant factors and the complex method needs to be justified as a reasonably necessary step for justice to be done. To put it another way, is the additional cost and burden on the parties of adopting the complex method outweighed by any prejudice that would be caused to the claimant by not adopting it?

8.12. In our judgment, the answer is no and we are not satisfied that it is just to calculate pension loss on the complex method in this case. The numbers involved substantially exceed the statutory cap, even taking into account the effect of the Polkey adjustment. For that reason, pension loss will be calculated on the simple, contributions basis.

9. Next steps

9.1. In view of both parties' representations at the hearing that resolving these matters of principle will mean the parties are then likely to be able to resolve the final arithmetic without further call on the tribunal, we have not listed a stage 2 remedy hearing.

9.2. The parties should notify the tribunal as soon as a final agreement has been reached. Should a hearing be necessary, they are to apply for a listing.

EMPLOYMENT JUDGE R Clark
DATE: 16 August 2022

JUDGMENT SENT TO THE PARTIES ON

……...……

AND ENTERED IN THE REGISTER

……...……
FOR SECRETARY OF THE TRIBUNALS