EMPLOYMENT TRIBUNALS

Claimant: **Mr C Hagan**

Respondent: Sky Retail Stores Limited

Heard at: **ET London South (via CVP link)** **On: 26 October 2022**

Before: **Employment Judge Swaffer**

Representation

Claimant: In person
Respondent: Ms B Davies, Counsel

JUDGMENT having been sent to the parties on ***4 November 2022*** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This was a hearing to decide the remedy following my judgment sent to the parties on 14 July 2022 (the liability judgment), where I found that the claimant had been unfairly dismissed by the respondent.

2. At the remedy hearing, I heard sworn evidence from the claimant, and from the respondent's witness Ms Margaret Kerr.

3. The issues to be considered at the remedy hearing were as follows:

    a. The claimant's original application for reengagement and an application made today for reinstatement
    b. the amount of any reduction in the compensatory award for unfair dismissal to be made under the principles in *Polkey v AE Dayton Services Limited 1988 ICR 142*
    c. the question of whether the claimant contributed to his dismissal
    d. the question whether any adjustment should be made under section 207A(2) Trade Union and Labour Relations (Consolidation) Act 1992 for failure to follow the requirements of the ACAS Code of Practice on Disciplinary and Grievance Procedures.

Preliminary matters

4. Prior to the hearing, the respondent submitted details of vacancies at its branches for retail sales advisors (page 122), including at White City, Crawley, and Ashford. During the hearing, it was clarified that the Ashford vacancy related to Ashford, Kent, rather than Ashford, Middlesex.

5. At the start of the hearing, the respondent indicated that the retail sales advisor vacancies at White City had been "cancelled" on 21 October 2022, and there were no longer any vacancies at White City. This change had not been reflected in Ms Kerr's witness statement dated 24 October 2022 as Ms Kerr was only informed of the change in available vacancies on the day of the remedy hearing.

6. By virtue of his position statement dated 24 October 2022 (pages 126-127), the claimant was seeking reengagement. At the start of the remedy hearing he stated that he was also seeking reinstatement, but did not actively pursue this during the hearing. I nevertheless considered his applications for reinstatement and reengagement.

7. The claimant was seeking reinstatement or reengagement as a retail sales advisor in Crawley, where there were vacancies. His preferred choice would have been White City, but there were no vacancies there. Ashford, Kent was not convenient. At the start of the hearing, the claimant indicated that he would also be interested in call centre roles, as well as retail sales advisor roles. The claimant had not raised this prior to the hearing, and the respondent had no information to hand about any vacancies for call centre roles.

8. I first considered the applications for reinstatement and reengagement. Once I had announced my decision with regard to those applications, I then proceeded to consider compensation.

Findings of fact

9. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed bundle of documents for the remedy hearing.

10. The claimant was dismissed for gross misconduct on 25 November 2020 (the effective date of termination or EDT). He was 39 when he was dismissed. At the liability hearing, I found that the respondent had a genuine belief that the claimant was guilty of misconduct (liability judgment paragraph 71) and that this was the reason for his dismissal (liability judgment paragraph 72). This belief was formed after an extensive investigation and two hearings (liability judgment paragraph 73). The misconduct was that the claimant had breached the respondent's How We Work and Data Protection policies (the Policies) by storing a customer's details in his personal mobile, and sharing that customer's details by sending those details to a colleague. The claimant has always accepted the conduct and that he breached the Policies by his conduct, but offered mitigation for his conduct. I found that the respondent failed to carry out a reasonable investigation due to the overall length of time the investigation

took and the resulting delay to the process (liability judgment paragraphs 78 and 79).

11. The claimant believes the respondent's actions in dismissing him for his accepted conduct were "harsh and unreasonable". The claimant was seeking to revive his submissions from the liability hearing that in deciding to dismiss him the respondent did not take into account what he believes were mitigating circumstances (these are that he believed that by his actions he was doing his best to serve the customer and promote the respondent's business, and said that he had the customer's consent to act as he did; he was waiting at an airport travelling to a funeral on the day he committed the conduct; he had mental health difficulties at the time). The issues of whether the respondent was harsh and unreasonable in dismissing the claimant for his accepted conduct and the respondent's attitude to the claimant's submitted mitigating circumstances are not issues for the Tribunal today in so much as they formed part of his evidence and submissions at the liability hearing, and my findings at that hearing. The submitted mitigating circumstances are relevant only to my findings as to whether the claimant caused or contributed to his dismissal, such that any award made to him might be reduced.

Reinstatement and reengagement

12. The claimant is seeking reinstatement or reengagement in his previous role as a retail sales advisor, at the respondent's site in Crawley. He is also seeking reengagement in a call centre role. I considered these applications first. When he was dismissed, he was working at the respondent's site in Kingston Upon Thames. The respondent did not provide details of any vacancies in Kingston Upon Thames, and the claimant did not submit that he should be reinstated or reengaged at that site.

13. The claimant did not set out precisely the nature of the order he is seeking. As noted above, the claimant has always accepted the conduct which led to his dismissal. The claimant has also always accepted that he was fully aware of the Policies, and had received training on those Policies. His breach of the Policies was not due to a gap in learning or a need for retraining in the Policies, as the claimant was fully are of these. In cases of dismissal for gross misconduct, the key issue is the respondent's perception of the claimant's conduct.

14. The respondent did not consider that the claimant was suitable for reinstatement or reengagement as a retail sales advisor, given the circumstances of his dismissal and its related concerns about him having access to customer data. In addition, the respondent was not willing to consider the claimant for reengagement in a call centre role as it would also involve handling customer data, similar to a retail sales advisor role.

15. The reasons for the claimant's dismissal were his admitted conduct and his breaches of the Policies. I find that the respondent devised and implements the Policies to ensure that it meets its commitments to customers, and that it is compliant with relevant data protection regulations and legislation. I find that non-compliance with the relevant regulations and legislation, and therefore with the Policies, could incur consequences for the customer and

also a serious reputational risk for the respondent, as well as a risk of financial penalties for the respondent. I find that as a result of these potential risks, the respondent stresses the importance of the Policies to employees and provides training.

16. I find that by virtue of his admitted conduct in breach of the Policies which led to his dismissal, the respondent has lost trust and confidence in the claimant. I find that the respondent believes that the claimant's conduct which led to his dismissal demonstrated his disregard for the respondent's designated way of handling of customers' personal details, and also his disregard for the potential consequences for the customer of that data being lost, stolen, or used inappropriately because the respondent did not protect it. I find that the respondent also believes that the claimant had shown disregard for the consequences of his actions for the respondent, both in terms of potential damage to its reputation and potential financial loss in the form of penalties for non-compliance with data protection legislation and regulations. I find that as a result of his admitted conduct and the respondent's related beliefs about his conduct, the respondent has lost trust and confidence in the claimant because the retail sales advisor role requires employees to handle customer data (including personal details) daily, and that given his conduct the respondent does not trust the claimant to do so in accordance with the Policies. I find that a call centre role would also involve the handling of customer data, and I find that the respondent's beliefs and concerns about the claimant handling customer data would be the same as in relation to a retail sales advisor role. I find that the respondent relies on customers being confident in its Policies and procedures, and relies on its retail sales advisors and call centre staff to handle customer data correctly and safely, in accordance with the Policies. I find that all this is evidence of the respondent's loss of trust and confidence in the claimant.

17. I considered the practicability for the respondent of reinstating or reengaging the claimant in a retail sales advisor role in Crawley. I found that it was not practicable for the respondent to reinstate or reengage the claimant in Crawley. I accepted the respondent's submissions that there had been a breakdown in the relationship of trust and confidence between employer and employee, by virtue of the claimant's conduct, which was sufficient to render reinstatement or reengagement impracticable. For the same reasons, I also find that it would not be practicable for the respondent to reengage the claimant in a call centre role. I find that due to the respondent's genuine belief that the claimant is guilty of gross misconduct, reinstatement or reengagement would be impracticable.

18. I find that the claimant caused or contributed to his dismissal by virtue of his accepted conduct (saving a customer's details to his personal mobile and sharing those details with a colleague) and thereby in breaching the Policies. He was dismissed because of his conduct, and this conduct was in breach of the Policies. I find that the respondent, as a result of the claimant's conduct and breach of the Policies, has lost trust and confidence in the claimant (paragraph 16 above). Given this loss of trust and confidence, and the claimant's cause or contribution to his dismissal, I find that it would not be just to order his reinstatement or reengagement.

19. I find that the respondent would have dismissed the claimant in any event had a fair procedure been followed. The claimant accepted that his conduct was in breach of the Policies. I find that had the unfairness (the length of the process and therefore the delay) not happened, the claimant would have been dismissed sooner than he was. I find that the respondent continues to have a genuine and rational (reasonable) belief that the claimant was guilty of gross misconduct, as set out in detail in the liability judgment. I find that the respondent's reasonable belief was based on reasonable grounds after an extensive investigation, a disciplinary hearing and an appeal hearing.

Compensation

20. The claimant was uncertain about the information he had provided in the revised schedule of loss (pages 66-67), and was unable to provide details of the losses he sought to claim in particular with regard to loss of benefits that came with employment (revised schedule of loss pages 66-67). He was also unclear about the benefits he has received since his dismissal; he said he had received universal credit since January 2021 for his children and himself, but was unclear about the details.

21. The claimant has not been employed since he was dismissed almost two years ago. The claimant did not provide evidence of any job applications since his dismissal to support his claim for future losses by showing attempts to mitigate any such losses. The claimant said that he applied for jobs online and by phone. In his position statement the claimant said he had applied for jobs from the EDT until November 2021 (paragraph 8), although in evidence he said that this was an error and should have read November 2022; he had applied for between 30-50 jobs over the 2 years since his dismissal. These included customer service and sales roles, and working for estate agents and charities. He had only had one or two interviews. Things had been slow due to the pandemic. He had studied and achieved qualifications, a police course and a law qualification, although it later emerged in evidence that he had completed the police course prior to his dismissal. He was considering a career change and entering the legal profession; he had had some work experience. He said that his job applications had "slowed down" since he started a law degree with a possible view to changing career.

22. I accept that the pandemic will have impacted on the claimant's job search. However, I also find that the claimant had decided to focus on studying for a law degree and has not been entirely focused on seeking a new job. I find that the claimant was contemplating a significant career change. Whilst the claimant is entitled to make that decision, it would not be just and equitable for the respondent to be responsible for any related financial losses as the claimant studies with a view to changing his career. I find that if the claimant had carried out a sustained search, a period of 8 months to find a new job would be appropriate, taking into account the impact of the pandemic.

23. I find that the claimant has failed to provide evidence of loss of benefits that came with employment, which he quantified at £5512 (page 66). At the outset of the liability hearing the claimant confirmed that the respondent had

paid him all sums owing on termination (liability judgment paragraph 8). He did not raise any argument that he had not been properly paid whilst on suspension. The claimant suggested today that he had not received commission during the period of his suspension and that this commission amounted to 2 or 3 times his basic salary. Details of this loss were not included in his position statement (pages 126-127). The suspension letter (liability bundle page 102) states that the claimant would remain on full pay whilst suspended, and that this was calculated at his basic pay plus an average of any commission/bonus/incentive payments over the last 12 weeks. I find that the claimant did receive pay for commission whilst suspended.

24. The claimant did not provide evidence to support his claim made during the hearing with regard to losses with regard to the respondent's share scheme, or his claim for losses with regard to health insurance. I find that there is no proven evidence of any such loss.

25. I find that the claimant was paid whilst suspended, as set out above (paragraph 23). I find that if the respondent had followed a fair procedure, the claimant would have been dismissed sooner than the EDT as the unfairness was due to the delays in the procedure. In terms of loss of wages to today's date and future loss of income, I find that the claimant was paid by the respondent for a longer period than he would have been if a fair procedure had been followed.

26. I find no evidence that the claimant has suffered any financial loss in consequence of his dismissal that is attributable to action taken by the respondent. He was paid whilst he was suspended, and I find no evidence that the amount he was paid was less than that to which he was entitled, and he was dismissed after a lengthy investigation and two hearings. The unfairness in his case relates only to the delays in the process. Had the dismissal been fair, I find that the respondent would have stopped paying the claimant sooner as he would have been dismissed at an earlier date. I find that as a result of the unfairness, the claimant was paid for longer than would otherwise have been the case. I find that the respondent's actions in dismissing him unfairly did not cause him any additional loss. In reaching this finding, I note that the compensatory award is not intended to be punitive, and is only intended to compensate proven financial loss. I find no such loss in this case. I find that the claimant in fact benefitted financially from the respondent's actions and did not suffer any loss in consequence of his dismissal, as the delay and resulting unfairness meant that he was paid for a longer period than he would have been if the dismissal had been fair.

27. I explained the implications of the judgment in *Polkey* to the claimant. I do not accept his submissions that if the process had been fair he would have kept his job. There is no evidence to support this submission. My findings at the liability hearing are clear that the respondent had a genuine belief that the claimant was guilty of misconduct, and that the relevant misconduct fell within the scope of the respondent's permissible reasons for dismissal (liability judgment paragraphs 71 and 72). The respondent had reasonable grounds for its belief, and the claimant was dismissed after a lengthy

investigation and disciplinary process. It is the length of this process, and the resulting delay, which rendered his dismissal unfair.

28. The claimant submitted that there should be no *Polkey* reduction, or that if there were a reduction it should be 50%. The respondent submitted that there should be a 100% *Polkey* reduction as the claimant would have been dismissed in any event.

29. The respondent accepted that it had breached the ACAS Code of Practice on Disciplinary and Grievance Procedures (the ACAS Code) by virtue of my earlier findings about the unreasonable delay. It submitted that it would not be just and equitable to make an uplift given that the only breach was the delay, and that there was no finding of any malice on the part of the respondent with regard to the delay. If I disagreed, the respondent submitted that a maximum uplift of 10% would be just and equitable given that the delay was the only breach.

30. I explained the ACAS Code to the claimant and my discretion to make an uplift of up to 25% in the compensatory award. Given that the respondent accepted that it had breached the ACAS Code, the claimant submitted that an uplift of 25% would be just and equitable.

31. In terms of contributory fault, I find that the claimant caused or contributed to his dismissal by his culpable or blameworthy conduct, namely his storing and sharing the customer's details in his personal mobile, in breach of the Policies. He accepts his conduct (liability judgment paragraph 73) and accepts that he was aware of the Policies and the potential consequences of his conduct (liability judgment paragraph 75). I find that the claimant's conduct was blameworthy as he was fully aware of the Policies when he committed the conduct. I find that the claimant's blameworthy conduct was the reason and the only reason for his dismissal, and that he therefore caused or contributed to his dismissal. I find that the delay on the part of the respondent was not the cause for his dismissal.

32. I note the claimant's submissions regarding mitigation, namely travelling to a funeral and his mental health difficulties. I find that these mitigating circumstances are relevant in considering the extent to which he caused or contributed to his dismissal and any related reduction to any awards for contributory conduct. I find that in all the circumstances the claimant's blameworthy conduct caused or contributed to his dismissal, and that any related awards should be reduced by 50%. In reaching this figure, I do not accept his submissions with regard to the customer's consent to his actions as I do not find that it is relevant and does not amount to mitigation.

<u>Legal principles</u>

33. Section 113 Employment Rights Act 1996 (ERA) provides that an employee who has been unfairly dismissed may seek an order for a) reinstatement or b) reengagement. Section 114 ERA contains the power to make an order for reinstatement. Section 116(1) ERA provides that the Tribunal should first consider reinstatement, taking into account a) whether the claimant wishes to be reinstated, b) whether it is practicable for the employer to comply with an order for reinstatement, and c) where the claimant caused or contributed to some extent to the dismissal, whether it would be just to

order his reinstatement. Section 114(1) ERA provides that a reinstatement order must require that the employer treat the complainant in all respects as if he had not been dismissed. This means that the complainant must be returned in all respects to his contractual position with the respondent.

34. Section 116(2) ERA provides that if the Tribunal decides not to make an order for reinstatement, it should then consider whether to make an order for reengagement. Section 115 contains the power to make an order for reengagement. Section 115(1) provides that reengagement need only be in employment comparable to that from which the employee was dismissed, or other suitable employment.

35. Section 116(3) provides that in considering whether to make an order for reengagement the Tribunal shall take into account a) the claimant's wishes about the nature of the order to be made, b) whether it is practicable for the employer to comply, and c) where the claimant's conduct caused or contributed to some extent to their dismissal, whether it would be just to make an order, and (if so) on what terms.

36. Whether it is practicable to make an order for reemployment (either reinstatement or reengagement) is a question of fact for the Tribunal, which has the discretion to decide whether to make a reemployment order. A breakdown of trust and confidence between employer and employee may be sufficient to render reemployment impracticable. *Wood Group Heavy Industrial Turbines Ltd v Crossan 1998 IRLR 680 EAT* indicates that a genuine belief in relation to the claimant's conduct is sufficient to present a barrier to reengagement. The relevant test when considering whether reemployment is practicable following dismissal for misconduct is whether the employer genuinely and rationally believed that the claimant was guilty of the misconduct. Where an employee caused or contributed to the dismissal, the Tribunal must consider whether it would be just to make an order for reemployment. Contributory conduct is also relevant to the question of practicability. See *Kelvin International Services v Stephenson EAT 1057/95*.

37. Section 118(1) ERA provides that where a Tribunal makes an award of compensation for unfair dismissal, that award shall consist of a) a basic award calculated in accordance with Sections 119-122 and 126 ERA, and b) a compensatory award calculated in accordance with Sections 123, 124, 124A and 126 ERA.

38. The basic award is calculated in units of a week's pay, as defined in Sections 220-229 ERA. The total will usually depend on the employee's age and length of continuous service and the relevant amount of a week's pay. Section 119 ERA sets out the method of calculating years of continuous employment, counting back from the EDT (Section 119 (1) ERA) and a week's pay, which depends on the employee's age (Section 119(2) ERA). In this case the relevant formula is set out in Section 119(2)(b), one week's pay for each year in which the employee was below the age of 41 but not younger than 22. Each year there is a maximum amount set for a week's gross pay. At the EDT in this case, the maximum amount for a week's gross pay was £538.

39. Section 123(1) ERA provides that 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.

40. In *Norton Tool Ltd v Tewson 1972 ICR 501, NIRC* it was established that the compensatory award should include immediate and future loss of earnings, expenses incurred as a consequence of the dismissal, loss of statutory employment protection rights, and loss of pension rights. It is the employee's duty to provide evidence of his losses. In *Hamer v Kaltz Ltd EAT 0502/13* the EAT stated that the Tribunal must have regard to what the employee has lost in consequence of the dismissal. This will require findings as to what would have occurred but for the dismissal. In *King and ors v Eaton Ltd (No 2) 1998 IRLR 686, Ct Sess* it was stated that in cases where the employer's only failing was procedural, it may be reasonably straightforward to establish what would have happened had a fair procedure been adopted, and to award compensation accordingly. *Morgans v Alpha Plus Security Ltd 2005 ICR 525 EAT* provides that the purpose of the compensatory award is confined to compensating only proven financial loss and is not to be used to penalize the employer.

41. In *Polkey v AE Dayton Services Ltd 1998 ICR 142 HL,* it was held that an employer will not be able to avoid a finding of unfair dismissal by pleading that a failure of procedure made no difference to the outcome of the dismissal process. However, in all such cases, the Tribunal is entitled, when assessing the compensatory award payable in respect of unfair dismissal, to consider whether a reduction should be made to the award on the ground that the lack of a fair procedure made no practical difference to the decision to dismiss.

42. Where a dismissal is found to be unfair, the employer and employee's compliance with the ACAS Code of Practice on Disciplinary and Grievance Procedures is taken into account when determining whether there should be an adjustment to any compensatory award made under Section 207A(2) Trade Union and Labour Relations (Consolidation) Act 1992.

43. Section 122(2) ERA provides that where any conduct of the complainant before the dismissal 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. Section 123(6) ERA provides that 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.

44. In *Steen v ASP Packaging Ltd 2014 ICR 56, EAT,* the EAT set out the correct approach under Section 122(2), stating that the Tribunal should identify the conduct which is said to give rise to possible contributory fault, decide whether that conduct is culpable or blameworthy, and decide whether it is just and equitable to reduce the amount of the basic award to any extent.

Conclusions

Reinstatement

45. I first considered the claimant's application for reinstatement, in accordance with Section 116(1) ERA. I note that the claimant is primarily seeking reemployment (either reinstatement or reengagement) as a retail sales advisor in a different location, Crawley, where there is a vacancy. I have considered the practicability of making an order for reinstatement. In this case, I am satisfied that the respondent has a genuine and rational belief that the claimant is guilty of gross misconduct (paragraph 20 above). The claimant himself, whilst he has offered explanations to mitigate his behaviour, has accepted his conduct and that that conduct breached the respondent's Policies. I am satisfied that the claimant's conduct, in breaching the Policies, has rendered reinstatement impracticable because the claimant's conduct has broken the relationship of trust and confidence between the respondent and the claimant (see paragraphs 17 and 18 above). I am further satisfied that the claimant's conduct (his admitted behaviour in breaching the Policies) caused or contributed to his dismissal (paragraphs 21 and 34 above), and I am satisfied that it would be neither just nor equitable to order the claimant's reinstatement (paragraph 18 above). In forming this view, I am mindful of the decision in *Wood Group Heavy Industrial Turbines Ltd v Crossan.* The claimant's application for an order for reinstatement as a retail sales advisor at the respondent's site in Crawley is unsuccessful and fails.

Reengagement

46. I then considered the claimant's application for an order for reengagement as a retail sales advisor in Crawley, or in a call centre, in accordance with Section 116(3) ERA. I find that it would not be practicable to make such an order, given my finding that the respondent has a genuine and rational belief that the claimant is guilty of misconduct (paragraph 20 above), and my finding that the claimant's conduct has rendered reengagement impracticable as it has broken the relationship of trust and confidence between the respondent and himself (paragraphs 17 and 18 above). I am satisfied that the claimant's conduct caused or contributed to his dismissal (paragraphs 21 and 34 above), and I am satisfied that it would be neither just nor equitable to order the claimant's reengagement (paragraph 18 above). In forming this view, I am mindful of the decision in *Wood Group Heavy Industrial Turbines Ltd v Crossan.* The claimant's application for an order for reengagement as a retail sales advisor at the respondent's site in Crawley, or in a call centre, is unsuccessful and fails.

Compensation

47. I find that the claimant is entitled to a basic award. It is accepted that the relevant figures for calculating the basic award are 3 years and a maximum gross weekly pay of £538. The starting point for the basic award is therefore £1614 gross (£538 x 3).

48. I find that it is just and equitable to reduce the amount of the basic award given the claimant's contributory conduct, as provided for in Section 122(2) ERA. I find that the claimant's blameworthy conduct (paragraph 31 above) was contributory as he accepts and has always accepted that he breached the respondent's Policies, and that he was fully aware of and had been trained in those Policies. I consider that it is just and equitable to reduce

the amount of the basic award by 50% to reflect the claimant's blameworthy contributory conduct, taking into account the circumstances in which the blameworthy conduct occurred and my findings with regard to his mitigating circumstances (paragraphs 21, 34 and 36 above).

49. The basic award is therefore calculated as £1614 gross less 50% = £807. I order that the respondent pays to the claimant £807 gross within 14 days of the date of the original remedy judgment.

50. I do not make a compensatory award in this case. The claimant raised various heads of loss, however I do not find a link between these heads of loss and his dismissal. The object of the compensatory award is to compensate the employee for financial loss as if he had not been unfairly dismissed. The purpose of the compensatory award is to compensate and compensate fully, but not to award a bonus to the employee.

51. This is a case where the claimant was suspended on pay which took into account other matters such as commission and bonus. He was paid by the respondent for the entirety of his suspension, up until the EDT. At the liability hearing, he stated that all monies due on termination had been paid. The reason that the claimant's dismissal was unfair was the respondent's delay in carrying out the process. I therefore considered what loss flowed from that delay, in accordance with Section 123 ERA. I find that if the respondent had followed a fair process, the claimant would have been dismissed at an earlier date (paragraph 25 above).

52. I find that the claimant did not suffer a loss due to the respondent's delay; indeed, I find that he was paid by the respondent for a longer period than he would have been if there had been no delay (paragraphs 24-26 above). The claimant has not therefore proven that he suffered a loss due to the respondent's delay. I find that there was no loss consequent on the claimant's dismissal attributable to the action taken by the respondent. In all the circumstances it is therefore neither just nor equitable to make a compensatory award in this case.

53. Given the finding at paragraph 52 above, it is not necessary for me to consider the matter of the compensatory award further. However, for the avoidance of doubt, had I made a compensatory award, I would have made a *Polkey* reduction of 90% given my findings that the claimant would have been dismissed in any event had a fair procedure been followed (paragraph 19 above). I would have awarded an ACAS Code uplift of 10% to reflect the respondent's admitted breach of the ACAS Code. I would have reduced any compensatory award by 50% to reflect a just and equitable reduction for the claimant's causing or contributing to his dismissal by his accepted blameworthy conduct and breach of the Policies.

EJ Swaffer

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Employment Judge **Swaffer**

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Date 9 February 2023