Neutral Citation Number: [2023] EAT 54

Case No: EA-2021-001192-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9th November 2022

Before:

HER HONOUR JUDGE TUCKER

- -

Between:

J T EDWARDS LTD	**Appellant**
- and -	
ISAAC SEOPANE	**Respondent**

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- -

Mr M Sellwood (instructed by Astons Solicitors) for the **Appellant**
The Respondent appeared in person

Hearing date: 9th November 2022

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JUDGMENT

SUMMARY

Unfair Dismissal, Unlawful Deduction from Wages

The Claimant was dismissed unfairly during the first Covid lockdown in May 2020. The Tribunal found that the reason for his dismissal arose out of a number of issues, including, in particular his request to be placed on furlough because of concerns about his health and the risk of contracting Covid. The Tribunal concluded that the Respondent employer purported to dismiss the Claimant for redundancy in order to hide or disguise the true reason for the dismissal. The Tribunal was entitled to apply an uplift to the compensatory award of 25% and did not err in doing so. However, the Tribunal's analysis and conclusions were less clear in respect of other aspects of its decision on remedy. In particular, it failed to explain its conclusions regarding the appropriate level of pay upon which the compensatory award should be calculated (i.e., whether the calculation should be based on full pay or the furlough rate of pay). Further, the Tribunal failed to set out clear conclusions about one issue in dispute: whether the Claimant would have been prevented from working due to eczema on his hands or, whether, as he asserted, that condition had only become acute after his dismissal and was a stress reaction to that event such that, had he not been unfairly dismissed, he would have been able to continue working. Finally, the Tribunal erred in respect of its approach to the award of compensation for a company car, only raising this matter after conclusion of submissions and, further, failed to set out relevant conclusions about its award of compensation regarding that benefit. Those issues would be remitted back to a freshly constituted Tribunal.

HER HONOUR JUDGE TUCKER:

1. This is my decision in respect of an appeal which has been brought by the Respondent employer. I shall refer to the Appellant as the Respondent, and to the Respondent to this appeal as the Claimant, as they were when they appeared before the Employment Tribunal ("the Tribunal").

2. The Tribunal concluded that the Claimant was unfairly dismissed by the Respondent. This appeal concerns issues arising out of the conclusion of the Tribunal regarding remedy.

The facts and the Tribunal's decision

3. Before the Tribunal the Claimant made a number of claims: unfair dismissal; that he had been subjected to an unlawful deduction of wages; and, a claim for race discrimination. He asserted that his dismissal was an act of race discrimination.

4. The Tribunal found that the claims of unfair dismissal and of unlawful deductions from wages to be well founded and awarded compensation in respect of those matters. However, the Tribunal dismissed the Claimant's claim of race discrimination. It did, however, make an award in respect of the Respondent's failure to provide a statement of terms and conditions of employment, noting that the Claimant had never asked for such a statement and, therefore, in the Tribunal's judgment, the failure to provide the statement was an omission rather than a deliberate act and, awarded two weeks' pay by way of compensation.

5. In my view, the Judgment and the Reasons are, in the main, carefully written and they are concise. They identify the relevant issues that were before the Tribunal, in particular, at para. 10. They also set out in a concise, but accurate manner, a statement of relevant law and the principles that the Tribunal should apply, at paras. 2 to 12.

6. The Claimant worked for the Respondent from 12th April 2017 until his dismissal on 10th May 2020. Looking back, (and, when considering the facts of this particular case I consider that it is important to do so and recall the extraordinary events then taking place) it will be recalled that the 10th May 2020 was in the midst of the first Covid lockdown in the UK.

7. The Respondent is a relatively small business. Its work concerns the maintenance and refurbishment of services for schools and hospitals. The evidence before the Tribunal was that most of the work it undertook in schools tended to peak during school holiday time, particularly during the summer holidays.

8. As I have noted above, the business is a small one. Its managing director is Mr James Edwards and he owns the company. His wife is employed to undertake accounts work and administrative work. There are a number of other staff who have technical professional qualifications; for example, as an electrician, as a carpenter or gas fitting. The Claimant was employed to 'price' for tenders and interacted with those asking for tenders; he was responsible for securing work and securing contracts. It is clear from the Tribunal's Reasons that he was successful in that work, bringing in a substantial volume of work of significant value to the business.

9. Although the Claimant initially worked, purportedly, as a self-employed sub-contractor, the Tribunal found that, in reality, the relationship between the parties had been one of employer and employee from the start.

10. Like many other businesses, the Respondent's business was affected by the Covid pandemic. That impact was described in paras. 27 to 28 of the Tribunal's Judgment in this way:

> **"27. The pandemic had two effects on the Respondent. First, work at schools dropped off – most projects were put on hold. Secondly work at the hospital increased greatly. The project Isaac Seopane was overseeing went from 2 toilets / hand washing faculties to 4, 8 and then**

> **16, and showers for doctors to use were required."**

In other words, some work dropped off. However, other work dramatically increased. The Tribunal found that the Claimant claimed for more overtime than he had worked before. The Tribunal made findings that those hours were in respect of work actually done by the Claimant and was for work which was required to be done by him.

11. One member of staff asked to be put on furlough. That individual felt that he was at increased risk of contracting Covid and/or of experiencing more serious consequences if he did become infected with the Covid virus. His application to be placed on furlough was granted. Another employee (not the Claimant) also requested to be put on furlough but that was not granted. The Claimant had his own, genuine, concerns about working. The Tribunal expressed that in these terms:

> **"31. Mr Seopane has asthma. He used an inhaler from time to time. He had a skin complaint – eczema on his hands. Also he is Black, which appears to be a covid risk factor. The hospital had a lot of covid patients. His wife was very concerned about him working there."**

12. As noted above, it is important to reflect back to how things were in May 2020. We now know a lot more about Covid, we now live in an environment in which many people are vaccinated. But at the time, in early spring of 2020, there was real, acute, anxiety about Covid and about contracting it. It was not understood clearly how the virus was transmitted and spread nor, indeed, what the risk factors were. Nor, sadly, were health professionals as experienced or skilled in managing the condition as they now are. Many people with Covid died from it. There was genuine fear about the risk of contracting Covid.

13. The Tribunal found as a fact that the Claimant asked to be placed on furlough and that he had genuine reasons for wishing to make that request arising from his concern about the risk of contracting Covid.

14. James Edwards asked the Claimant to provide medical evidence to support the suggestion that

he was at increased risk because of his asthma. The Claimant was unable to do so: he knew that he would not be classed as being extremely vulnerable and he had not received a letter instructing him to 'shield'.

15. The Tribunal found that Mr Edwards believed that what the Claimant was seeking to do was misusing the furlough scheme. During one discussion, Mr Edwards asked the Claimant what he would do if he were placed on furlough. The Claimant said he would use some of the time to finish his Master's Degree on-line. He also expressed a hope to be able to go and visit his family in Botswana, having booked a trip to do so long before; that, however, being more of an aspiration than realistic given the limitations that there were on international travel at the time.

16. On 10th May 2020, and after the Claimant and Mr Edwards had met to discuss the Claimant's request that he be placed on furlough, Mr Edwards e-mailed the Claimant. He stated, in that e-mail, the following:

> **" Then, as now, the greatest misunderstanding seems to be employees/sub contractors understanding that Furlough is a request that can be made by the employee/sub contractor, not as the government intend it to be used 'to protect redundancy' and the business. Furloughing ls to protect employees from immediate redundancy when there is not sufficient work."**

Mr Edwards also set out in that e-mail some purported concerns about the amount of overtime that the Claimant had worked and asked the Claimant to attend a meeting with him the following morning, face-to-face.

17. In reply, about half-an-hour later, the Claimant wrote to Mr Edwards. He stated he could provide evidence about the asthma medication that he took; he raised an issue about the overtime payment and the lack of, he said, a contract in respect of what the Respondent was proposing. He again put forward his case that he wished to be furloughed and he could not see why he was being treated differently from the former employee who had been granted furlough for health reasons without any medical evidence.

18. That led to the following response from Mr Edwards, some 26 minutes later:

> **"39. … "With regret - we are at an end. I am not prepared to have you manipulate furlough for your benefit. We will follow statutory redundancy procedures and work within the law. Please bring all possessions back to the office in a timely manner."**

19. The Tribunal noted that after the Claimant's dismissal, Mr Edwards undertook his work. It also appeared to have accepted that, although schools were re-opening, by September 2021, when the hearing took place, budgets for work for maintenance were not still freed up. The Tribunal recorded that although the furlough scheme was winding down, as of July 2021, many employees and staff were still furloughed. The end of the furlough scheme was at the end of September 2021. The Tribunal also recorded that, at the time of the hearing, the Claimant was not able to work by reason of the eczema on the palms of his hands.

20. The Tribunal robustly rejected the Respondent's case that the reason for dismissal was redundancy. The Tribunal's view was that the Respondent had improperly used the label of redundancy as a disguise for the real reason for dismissal. At para. 48 of the Judgment, the Tribunal sets out a clear statement of what the actual reason for dismissal was:

> "**48. It follows that the reason James Edwards did not furlough Isaac Seopane was not that he was considered to be redundant. It was a variety of reasons:**
>
> > **48.1. He thought Isaac Seopane was taking advantage of the UK taxpayer for his own ends (online work on a masters degree and going to Botswana).**
> >
> > **48.2. He did not believe health considerations prevented Isaac Seopane working at the hospital.**
> >
> > **48.3. He was very unhappy at the level of overtime claimed"**

21. The Tribunal then went on to state, in paras. 50 to 51, further detail as to why it did not consider the Claimant was dismissed for redundancy. It noted that Mr Edwards took great exception to what he saw as the misuse of tax-payers' money to be paid to be at home studying, not working, by necessary implication when there was work to be done. The Tribunal stated as follows:

> **"51. James Edwards did not want to put Isaac Seopane on furlough. That was – inevitably – because he was very busy at the hospital. He was not redundant in terms of the work he**

> **had to do. The decision to dismiss the Claimant was because he wanted to stop working on work that needed doing at the hospital, not because there was no work for him to do."**

22. The Tribunal further found (1) that Respondent's contention that there was a need to reduce overheads was simply not credible and, (2) that the Claimant had brought in £2m of business over the two years previous to his dismissal. The Tribunal stated that the reason for dismissal was not redundancy. It considered that the Respondent's statement **"We will follow statutory redundancy procedures and work within the law"** was not cogent evidence of the real reason; rather, it was, in the Tribunal's view, **"to dress up a dismissal for other reasons as a redundancy"**. Furthermore, the Tribunal noted that Mr Edwards' statement that there had been complaints about the Claimant's work at the hospital, in fact, further undermined the Respondent's position: not only because there was no evidence of such complaint, but also because, to dismiss for such a reason, genuine or not, was a reason connected to capability or conduct, not related to redundancy.

23. The Tribunal concluded that:

> **"57. the dismissal was not for a reason within S98(2) (redundancy). Or, if it was for capability or misconduct, it was unfair."**

The Tribunal concluded alternatively that, even if the reason for dismissal was redundancy, it was "in effect, a sanction, not an objective economic decision." It stated:

> **"58. ... While there is no reason to keep on an unsatisfactory employee who could be furloughed, there was no proper procedure which could have led to a fair redundancy on objective grounds."**

24. I pause at that point because, in my judgment, it is clear that the Tribunal found, having regard to para. 57, that the reason for the dismissal was not a potentially fair reason. Reading the judgment as a whole, I consider that it believed that the reason for the dismissal was because of the request to go on furlough; Mr Edwards' view about that; and, potentially, because of the criticisms which he said were made of the Claimant's work by hospitals. But the reason for the dismissal was simply not a fair reason. It follows, that the submission made by the Respondent that the dismissal was one which was simply procedurally unfair dismissal is not accurate. The dismissal was found to be

substantively unfair.

25. The Tribunal also observed within the Reasons, that if there had been genuine concerns about the Claimant's future role within the business because of the volume or type of work which required to be done, then it was important to note that, as the Respondent acknowledged, the whole purpose of furlough was to prevent redundancies for those who may be affected by a down-turn of business as a result of the Covid pandemic. Its purpose was to protect employees from immediate redundancy where there was not sufficient work.

26. As noted above, the Tribunal found that the claim of race discrimination was not made out. Within the evidence, relevant to that claim, however, the Respondent advanced the case that one factor which suggested that race was not a factor within the decision to dismiss, was the fact that the Claimant had been given a very expensive company car as part of his package of renumeration. The Tribunal included the loss of a company car within its calculation of the compensatory award. In an e-mail sent to the parties on 30th September 2021, the employment judge acknowledged that that had not been raised as a specific aspect of the compensatory award. The judge stated as follows:

> **"I am sorry, Counsel – I should have explained – it was an integral part of the defence to the race claim that the Claimant was provided with the most expensive company car. He lost that benefit on dismissal, so we added in a figure that was modest for such a vehicle. As the award is capped, it made no difference to the sum payable. But I should have discussed it with you and I apologise for not doing so."**

27. At paragraph 66 the Tribunal made the following findings of fact regarding the company car which the Claimant benefitted from:

> **"The Respondent submitted that [the Claimant] had a very expensive company car and this was a strong contra indicator to race discrimination. The vehicle is indeed a good car, a VW Amarok. However, it was 4 years old and previously used by James Edwards. No other employee needed a car: [they all needed vans]. James Edwards owned the company, and he would choose whatever vehicle he wanted for himself and his wife. The assertion of the Claimant that it had been difficult to sell, hence given to him was not challenged. This was no more than that the Claimant needed a car and James Edwards passed his vehicle on to [the Claimant] when he got a new one."**

28. The conclusions of the Tribunal regarding remedy are set out at paragraphs 71 and following. At paragraph 74, the Tribunal recorded the following regarding the Claimant's fitness to work:

> **"The Claimant is signed off from work, by reason of eczema on the palms of his hands, which he attributes to stress arising from his dismissal. In his submissions he made reference to Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] IRLR 481: but such a claim can only be successful if a discrimination claim succeeds."**

29. The Tribunal therefore recorded that the Claimant, at the time of the hearing, was signed off from work by reason of eczema on the palms of his hands and noted that the Claimant attributed that flare up of eczema to stress arising from his dismissal. The Tribunal accurately noted that a claim for personal injury can only be made where there has been a successful claim of discrimination.

30. The Tribunal dealt with the future loss at paras. 77 to 81. Earlier in the Judgment, (para. 10) the Tribunal had identified relevant issues and some of the relevant legal principles. It referred expressly to s.123 ERA 1996 at paragraph 86.

31. At para. 78, the Tribunal referred to the Polkey principle. It stated as follows:

> **"78. The Tribunal will have to assess loss and consider carefully the Polkey principle. On the basis of the facts found, and subject to reassessment after submissions, the Tribunal considers that there would have been an extended period of furlough, at the end of which there would have been a fair dismissal either on the basis of redundancy (because James Edwards was doing the Claimant's work) or capability (Isaac Seopane indicating that it might be 6 months from now until he is able to work again)."**

The Tribunal continued:

> **"79. The Tribunal's preliminary assessment is that the period would be until the end of July 2021, when the Government contribution reduced to 60%, but the employer was obliged to pay another 20%.**
>
> **80. There would have been no reason to bring matters to a head before that, particularly for an employee who had brought in about £2m of work in a relatively short time. The increasing problem of schools being undermaintained has been headline news … , and there would be good reason to keep Isaac Seopane furloughed so that when such work resumed he could again play a profitable role in seeking it.**
>
> **81. That would be a period of 1 year and 6 weeks, at 80% of pay.**
>
> **82. The Acas Code will apply, as the dismissal was not by reason of redundancy. Given that no process at all was followed, the uplift must be the maximum of 25%."**

32. Two points are relevant here. First, Within the identified issues, the Tribunal recorded that it was required to determine whether an uplift should be applied (made) of **"up to 25%."** Paragraph 82 must be read alongside that part of the Reasons. Secondly, the reference to the 'preliminary assessment' referred to in paragraph 79 requires some elaboration. It was agreed by the parties that having heard evidence and submissions in respect of liability, the Tribunal produced a 'draft' Judgment and Reasons which it circulated to the parties, and then, having heard further submissions, gave the final Judgment and Reasons with passages added to it in respect of remedy. I remain a little unclear as to precisely how much of the final document was different to the draft.

33. The Tribunal made an award for £500 for loss of statutory rights. It applied a cap of 1 year's salary in respect of compensation. As noted above, it set out the statutory provisions in respect of the compensatory award in section 123 of the **Employment Rights Act ("ERA") 1996**. It then set out, at paras. 87 and following, this passage:

> **"87. The circumstances of this case are highly unusual. While ensuring that the whole of the statutory guidance was borne in mind the Tribunal paid particular attention to the words "just and equitable in all the circumstances"."**

It noted that the Claimant **"was dismissed at the worst possible time, a few weeks into"** the first Covid lockdown. It noted that although construction continued, recruitment almost came to a stop at the start of that lockdown. It set out at para. 91 the following passage:

> **"91. The Tribunal fully appreciated that what would have happened had there been a fair procedure is to decide whether there should be a reduction in compensation, not as a means to assess recoverable loss. It is nevertheless relevant to the consideration of what is just and equitable.**
>
> **92. There was no evidence of mitigation of loss. Neither was there evidence from the Respondent as to the availability of jobs in the sector, or more widely. The Tribunal therefore has to assess the extent of compensation in a hypothetical environment, based on its assessment, as an industrial jury, of when it was likely the Claimant could gain suitable alternative employment.**
>
> **93. [The Claimant] said that the eczema on his palms had prevented him working. Counsel for the Respondent pointed out that he had been able to use his computer for this hearing and doubted that he was unable to work. The Claimant said that he had obtained universal credit by reason of fit notes by so stating It is not submitted that loss should be limited to the maximum of 6 months SSP because of inability to work, although the Tribunal raised**

the point.

94. The submission was that loss should be limited to perhaps 3 months, submitted as a reasonable period of time during which to find alternative work.

95. [The Claimant] had returned to Botswana from November 2020-January 2021, and the submission was that November 202 as a long stop date for the cessation of compensation for loss of the job.

96. The Tribunal accepted the Claimant's submissions that:

96.1 He was seeking a visa for his wife and children to join him in the UK (he has indefinite leave to remain), and the loss of his job meant that he could no longer seek such as visa as he could not demonstrate income at the required level.
96.2 His masters was modular based, and he could not finish it without the work he was doing for the Respondent.
96.3 He needed (for the same reason) to get a similar job."
96.4 He also could not accept low paid work (and it would not be reasonable to expect him to do so) because he had to demonstrate a substantial income to bring his family to the UK.
96.5 Because his family could not come to him, he went to Botswana to see them."

97. The Tribunal did not accept the submission that it should select a period in the usual way and compensate for that period. While it is for a claimant to mitigate his loss, there is a responsibility on the Respondent to show that he has not…"

34. I am not clear which 'usual way' paragraph 97 refers to. The Tribunal was required to apply the statutory provisions to determine loss, as it appears, elsewhere in the Reasons to recognise. In any event, the Tribunal concluded that it was highly unlikely that the Claimant would have found an alternative role before January 2021 (paras. 99-100). The Tribunal stated that:

"101. There must come a point when loss ceases, and the Tribunal finds that the prevalence of vaccination and the easing of lockdown 3, widely expected to be permanent, means that by a year after dismissal, it would no longer be reasonable to attribute loss of income to the Respondent.

102. That also accords with the *Polkey* consideration that redundancy would have been likely at about that time (but the one conclusion was not the reason for the other conclusion."

The law

35. Four grounds of appeal have been advanced by the Respondent as follows:

i) First, that the Tribunal made an error in respect of its assessment of future loss because it awarded future loss of one year. That error led to a perverse decision and arose from an error in understanding or, acknowledging, the Respondent's submissions that were made before the Tribunal including:

a. The claimant not providing evidence of mitigation;

b. The claimant not being fit for work and therefore, the respondent's submission that compensation should be limited to SSP

ii) Secondly, that the Tribunal erred, in a number of respects, in applying the ACAS uplift to the award that it made. First, the tribunal did not make a sufficiently clear decision regarding the reason for dismissal so as to permit it to conclude that the ACAS code applied. Secondly, that the Tribunal did not follow the correct process for determining the level of uplift to be applied, having regard, in particular to **Kuehne and Nagel Ltd v Cosgrove** (UKEAT/0165/13/DM) and **Slade v Biggs** [2022] IRLR 216 and **Acetrip Ltd v Dogra** (UKEAT/0238/18). Finally, the uplift was applied to the award of compensation for unlawful deduction from wages;

iii) Thirdly, that the Tribunal made an error in respect of the calculation of the Claimant's salary for the purposes of awarding compensation, because it based its calculations upon the Claimant's contractual rate of pay, not the furlough rate of pay, and, applied the 25% uplift to the full salary rate, rather than the furlough rate of pay. In addition, the Tribunal erred by 'grossing up' the figures used in respect of the award for unlawful deduction from wages;

iv) Fourthly, that the Tribunal erred in respect of one particular aspect of the compensatory award, which was the award of the 'round' sum of £2,000 as compensation for the loss of a company car. This was an error as the Claimant did not seek such a sum, evidence was not called in respect of this head of loss, and, the possibility of making the award was not raised with the parties until after the remedy judgment was provided to them.

The law

36. I do not propose to set out at length in this judgment the relevant statutory provisions the

Tribunal was required to apply, nor, indeed, the relevant furlough provisions; suffice to say that, on a claim of unfair dismissal, once the decision is made that appropriate remedy is to award compensation, the Tribunal must is to calculate having regard to the relevant statutory provisions, including those set out in s.123 of the **Employment Rights Act** 1996.

37. Tribunals must provide adequate reasons for their decisions so that parties and their representatives must know why they have won or lost. A judgment and reasons which reaches this standard is often referred to as one which is *Meek* compliant.

38. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) applies to s.111 of the ERA 1996 pursuant to which claims of unfair dismissal are brought before Tribunals. At s.207(2) if provides that, if appears to the Tribunal that,

> *"the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, the employer has failed to comply with that Code in relation to that matter and that failure was unreasonable,"*

the Tribunal may, if it considers it just and equitable to do so, increase any award it makes to the employee by a maximum of 25%.

39. Two authorities are potentially relevant in this case. First, in **Rentplus UK Ltd v Ms Susan Coulson** [2022] EAT 81 and the observation made by His Honour Judge Tayler that:

> "30. If an employer considers that an employee is guilty of misconduct or has rendered poor performance, … the Acas Code is applicable even if it said that dismissal is for SOSR [some other substantial reason] because it resulted from the response of fellow employees to the misconduct or poor performance that had led to a breakdown in working relationships.
>
> 31. [an employer cannot] … sidestep the application of the ACAS Code by dressing up a dismissal that results from concerns that an employee is guilty of misconduct, or is rendering poor performance, by pretending that it is for some other reason such as redundancy"

Judge Taylor also referred to the importance of considering the Reasons as a whole when considering whether the Tribunal erred in respect of its approach to whether to make an uplift and, if so, the level.

40. Secondly, in **Homes v Qinetiq Ltd** [2016] IRLR 664, Simler P as she then was noted that

> "12. … if the employee faces an allegation of culpable conduct that may lead to disciplinary action, whether because of misconduct or poor performance or because of something else, the Code applies to the disciplinary procedure under which the allegation is investigated and determined."

Conclusions and discussion

41. The Tribunal's Reasons are, mainly, clearly written and they are concise. However, at the point the Tribunal started to consider the question of compensation, the analysis became more confused. The process of issuing a draft judgment (including the Tribunal's initial views regarding remedy) prior to the issues regarding remedy were determined has not, in my view, assisted clarity of analysis. It would, in my view, have been far preferable for the Judgment and Reasons on liability to have been prepared, and then, a separate decision on remedy prepared. A tribunal may, of course, set out its preliminary view on a particular matter. However, once having invited submissions on that issue, it must then take care to ensure that it sets out clearly why it remained of that view (despite the submissions made) or, was persuaded away from that initial view, and why.

Ground 2: ACAS uplift

42. In respect of liability, the clear and significant finding that the Tribunal made was that the Claimant was dismissed unfairly, and substantively so. The dismissal arose from the matters which had occurred immediately preceding the letter that was sent to the Claimant referred to at paragraphs 18-23 above. The Tribunal was clear that the dismissal was not for redundancy, and that that asserted reason was, in truth, no more than a guise for the true reason. The true reasons behind the decision to dismiss involved matters most properly described as being related to the employer's views about the Claimant's conduct and performance – to what the Respondent employer clearly considered was culpable behaviour. In my view, in the circumstances of this case, the Tribunal was legitimately entitled to conclude that the ACAS Code applied to the facts it found. The Tribunal was clearly alert to the fact that it would not have applied had the real reason for dismissal been redundancy.

43. Although shortly stated, the specific conclusions regarding the uplift was at para. 82 of the Reasons:

> **"82. The Acas code will apply, as the dismissal was not by reason of redundancy. Given that no process at all was followed, the uplift must be the maximum of 25%."**

I accept that the Tribunal could have set out much more detail regarding that conclusion, for example, expressly stating at this point that there was no fair procedure followed; that a potentially fair reason of redundancy was used as a cover-up for an unfair reason; that the employer purported to state that it would follow correct legal procedures but, in fact, did not do so; that the dismissal took place just after an employee had raised legitimate question within their employment. Reading the Reasons as a whole, the reference to the reason for dismissal in para 82 (and the other parts of the Reasons regarding the Tribunal's decision in that regard) and the phrase, "Given that no process at all was followed",(again, in the context of the Reasons as a whole), I am satisfied that the Tribunal applied the correct legal principles and was aware that there was a discretion to be exercised. I entirely accept the proposition that the Tribunal could have set out more reasoning, could have referred to the authorities. Best practice would be to provide more detail. However, I am satisfied that it did what was required, which was to consider whether the ACAS Code applied and whether it would be just and equitable to increase the award, and to what extent.

44. If the Respondent is aggrieved by that finding, it may wish to reflect upon the fact that it used redundancy as a label for dismissal, and then did not follow any procedure. Had the respondent been honest about why the dismissal was taking place, and followed a fair procedure, then it would not have found itself in the position that it did.

45. That, in my judgment, addresses a large part of Ground 2 of the Respondent's appeal: that the (ACAS) uplift should not have been applied and how the Tribunal should have calculated the level of the uplift.

46. The third part of Ground 2 is that the Tribunal erred in applying the uplift to the unlawful

deduction of wages claim. In respect of that issue I am unclear whether the Tribunal considered that the Claimant had raised a grievance by the response he wrote to the managing director. That is not explicitly referred to within the Judgment. As noted above, the analysis in respect of the application of the ACAS uplift is short, and, it is wholly unclear whether the Tribunal made a deliberate decision to apply the ACAS uplift to the unlawful deduction of wages claim (and if so, why it considered that was appropriate), or, whether it has done so accidentally, because it has included the sum awarded within the compensation award. I consider that that aspect of Ground 2 should be allowed: the Tribunal's analysis is not *Meek* compliant and its reasoning in this respect is inadequate.

Grounds 1 and 3: error in respect of future loss and error in respect of calculation of salary for the purposes of the award of compensation

47. I propose to deal with Grounds 1 and 3 together. As I have stated above, the Tribunal's analysis in respect of remedy is not as clear as the Tribunal's factual determinations and analysis regarding the substantive liability issues. In particular, paras. 78 to 81 are a little difficult to follow, in my judgment, as, indeed, are paras. 91 and 101 to 102.

48. The Tribunal has not clearly set out whether the compensation awarded for that time period of time should be on the basis of full pay or on the basis of the rate of furlough pay.

49. Reading the Reasons and Judgement as a whole, fairly and objectively, does not remedy that issue. In my judgment, if the reader seeks to discern from the Reasons the clarity required, they do that which is impermissible: remedying a lack of clarity within the Reasons when they are, in truth, not sufficiently clear on the point in issue.

50. The analysis at paras. 78 to 81 of the Reasons suggests that the Tribunal concluded (perhaps) that, had the Claimant not been unfairly dismissed, then he would, in fact, have been placed on furlough for a year and then (because Mr Edwards was doing the work whilst he would have been on

furlough) would have been, or could have been, fairly dismissed. The difficulty with that analysis, however, is that the Tribunal found that Mr Edwards did not believe that the Claimant should go on furlough, because he thought that that was a misuse of the statutory scheme. Arguably, therefore, the award of compensation should have been made on the basis of the Claimant's full rate of pay.

51. The Tribunal, in my judgment, did not, however, conclude that the Claimant failed to mitigate his loss. That, in my judgment, is clear from the Reasons. Further, in my judgment the Tribunal came close to setting out a conclusion that the eczema from which the Claimant suffered had begun after his dismissal. There is, however, no clear finding of fact about that. The Tribunal has not set out within its Reasons how and why it calculated compensation because it has not determined (one way or the other) whether or not the eczema suffered by the Claimant began after the Claimant had been dismissed and was because of a stress-reaction to that dismissal. The Tribunal did not, thereafter, set out its conclusions about whether and how that impacted upon his ability to work and the compensation awarded.

52. My initial reaction on reading the Appeal, was that Ground 1 was unlikely to succeed because the Tribunal found that the time for compensation was 52 weeks; it found that there had not been a failure to mitigate; and that it had accepted the case advanced by the Claimant regarding his inability to work because of eczema on the palms of his hands, namely that that had only arisen since dismissal and because of the stress and anxiety he experienced after dismissal. On further reflection, however, I accept that those conclusions are not within the Reasons: there is simply not a finding to that effect as to when and how the eczema arose.

53. In those circumstances, I consider that I must allow the Appeal in respect of Grounds 1 and 3, However, as to the issue of mitigation, the Tribunal recognised that it is for the Respondent to prove a failure to mitigate. It is clear in this case that it did not do so. The contention that the Tribunal

erred in its approach to the question of mitigation is not made out and I dismiss that aspect of Ground 1.

Ground 4

54. Finally, I turn to consider Ground 4 in respect of the award of compensation regarding the car. The task of the Tribunal, once it considered that the Claimant was unfairly dismissed, and that the appropriate remedy was one of compensation, was to award compensation in accordance with the principles set out in s123 of the **ERA 1996**.

55. In my judgment, it is clear that the Tribunal considered that compensation for the loss of the benefit of a car was a this was a legitimate head of loss. The Claimant represented himself. This head of loss was one which the Tribunal was fully entitled to identify and raise with him. That should have occurred, ideally, at case management stage, or, at the latest, prior to the close of submissions. In this case, the point was raised after the close of submissions. The Judge recognised that this had taken place and provided a candid apology by email to the advocates. My view, however, is that it was an error not to have raised this point prior to the close of submissions, at the latest, and to allow further submissions (or evidence) regarding that matter before the Tribunal reached conclusions upon this issue. It is a matter upon which the Respondent could and should have been heard. I do not, however, accept the submission made that the only outcome is that the head of loss should not be allowed.

56. The Tribunal's conclusion on liability should stand: the Claimant was unfairly dismissed in the circumstances, and for the reasons, set out within the Judgment and Reasons. The Tribunal legitimately concluded that the appropriate remedy was one of compensation. Further, the Tribunal legitimately concluded that an ACAS uplift should be applied at the level of 25% to the compensatory award. The issues upon which I have allowed the appeal are:

i) Whether the uplift of 25% applied only to the award of compensation for unfair dismissal/ what if any conclusion the Tribunal reached regarding the claim of unlawful

deduction from wages.

ii) The rate of pay upon which compensation should be calculated: this will require a consideration of whether, had the Claimant not been unfairly dismissed, he would have remained working on full salary or, alternatively, would have been placed on furlough?

iii) When the Claimant begin to experience eczema on his hand such that he could not work? Is that something which occurred as a result of the unfair dismissal and what, if any, impact it has upon the award of compensation; and

iv) Fourthly, in respect of the car, what, if any, award should be made by way of compensation for the loss of use of a company car?

57. As to disposal, having further submissions and been referred to **Sinclair Roche**, I consider that the appropriate order is that the issues on remedy set out above are remitted to a differently constituted tribunal. Despite the Claimant's submissions to the contrary, I was not satisfied that it would be appropriate for the EAT to determine issues (iii) and (iv) above. In my judgment, there is not, on the findings found by the Tribunal, and recorded within the Reasons, only one correct outcome. I considered, briefly, whether it would be appropriate to ask a further question of the Tribunal and adjourn the appeal, but considered (again having heard further submissions and considering the decision in **BMC Software Ltd v Shaikh** [2019] EWCA Civ 267) that that would not be appropriate or consistent with the overriding objective. Further, although the Tribunal was clearly professional in their approach, I considered that it would be an unrealistic request to ask the original Tribunal to disentangle themselves from their stated conclusions and one which would all too easily give rise to the potential criticism that they had not, or could not, fairly and objectively re-visit the relevant issues,

58. During those further submissions, however it was clarified and agreed between the parties that, in respect of the claim of unlawful deduction of wages, the figures used by the Tribunal were

'gross' figures and that they should not be 'grossed-up.

59. It will be a matter for the Tribunal to consider whether any further evidence is required to be heard. be a matter for the Tribunal, subject to the clear findings made by the Tribunal regarding the reason for the dismissal and the period of time for which compensation should be awarded. There may be a need to hear evidence regarding the Claimant's eczema and his personal use of the car, and, possibly whether the compensation should be awarded on the basis of full salary or furlough salary. In respect of this last point the Tribunal must be careful not to go behind the findings of fact made regarding the reason for dismissal.