EMPLOYMENT TRIBUNALS

Claimant: Mr G Lovejoy

Respondent: (1) Rowgate Group Ltd (2) CE Jeatt & Sons Ltd

Heard at: Reading **On:** 26 & 27 June 2023

Before: Employment Judge Shastri-Hurst

Representation
Claimant: Mr Livingston (counsel)
Respondent: Mr Clement (counsel)

JUDGMENT having been hand down to the parties on **27 June 2023** 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

1. The second respondent is a private limited company that operates a local bus and coach business. The first respondent is the parent company, the second respondent being the group company. The claimant was a bus operations manager, employed from 21 August 2017 to 5 August 2021, at which point he was summarily dismissed for gross misconduct. He was paid one week's pay as a "goodwill gesture".

2. The claimant was dismissed for two matters of purported gross misconduct:

   2.1. "Incident 1 – the strip dance incident: this occurred on 16 December 2020, and involved the claimant recording his colleague, Mr McAleer, moving to a song, The Stripper, by Dave Rose and his orchestra.

   2.2. "Incident 2" – inappropriate use of the company mobile: this related to the claimant taking two videos of a non-work related conversation he had with Mr McAleer on 13 January 2021 on a company mobile phone.

3. The claimant presented a claim for unfair dismissal and wrongful dismissal on 22 November 2021. The ACAS early conciliation process with the second respondent started on 11 September 2021 and ended on 23 October 2021. In

relation to the first respondent, the ACAS early conciliation process started on 22 October 2021, and ended on 16 November 2021.

4. Initially the claims were both defended by the respondents. However on the first morning of the hearing I was informed that liability had been conceded in relation to both the unfair dismissal and wrongful dismissal claims, but I was asked to make determinations on certain remedy issues, namely contribution, Polky, mitigation and ACAS uplift.

5. Mr Livingston represented the claimant, and both respondents are represented by Mr Clement.

6. I discussed with both counsel how best to deal with the issues left for me to determine. It was agreed that I would need to make primary findings of fact regarding the claimant's actions in relation to the two allegations I have set out above.

7. In order to make the findings of fact necessary, it was decided that I need only hear evidence from the claimant, Mr McAleer, and Miss Hughes. I have also seen the videos in relation to both incidents.

8. I specifically discussed with Mr Clement whether he was content to deal with certain points without me having heard evidence from Mr Rowland (Director and dismissing officer). I was concerned to check with Mr Clement that he was content to deal with those points just on submissions, which appeared to be the indication from the proposed way forward. Those two points were:

    8.1. The ACAS uplift under s207B of the Trade Union and Labour Relations (Consolidation) Act 1992;
    8.2. The credibility issue regarding Mr McAleer's two statements made in relation to Incident 1 (dated 23 July 2021 and 10 September 2021 respectively). The accuracy of the first statement (taken by Mr Rowland) is in dispute.

9. Mr Clement confirmed that he was content for me to deal with all remedy issues without hearing evidence from Mr Rowlands.

10. On this basis I only read the witness statements of the claimant, Mr McAleer and Miss Hughes, and documents to which those statements refer. I heard evidence from those three individuals, and had the benefit of closing submissions from both representatives, including written submissions from Mr Livingston.

11. On the second morning of the hearing, Mr Clement asked that Mr Rowland give evidence on a narrow point regarding mitigation of loss; namely the job market regarding transport drivers, and bus drivers' average salaries. I asked if Mr Clements wanted me to read Mr Rowland's statement: he answered no. When Mr Rowland gave evidence, therefore, his witness statement was not read or sworn into evidence, as this would have meant that Mr Livingston would have had to cross-examine him on its contents. Mr Clement was content to proceed on the basis that Mr Rowland's statement was not read and not sworn into evidence.

12. I had a bundle, the last page of which is numbered 272, as well as an additional bundle from the respondent, totaling 22 pages. I informed the parties that I would only read the pages that I was directed to read, as opposed to reading the bundles from start to finish.

Issues

13. An agreed list of issues had been prepared between the parties, for which I am grateful. In light of the respondents' concessions, I need only consider:

    13.1. Did the Respondents fail to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures ('the Code')? The Claimant relies on paragraphs 45(i) to (iv) of the Claimant's Grounds of Claim as breaches of the ACAS Code of Practice.

    13.2. Is it just and equitable for the Tribunal to increase the compensatory award pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

    13.3. If so, by what proportion?

    13.4. If the claimant was unfairly dismissed, did he cause or contribute to his dismissal by blameworthy conduct?

    13.5. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

    13.6. Should there be a Polkey reduction be made to the compensatory award?

    13.7. Has the Claimant acted unreasonably in taking steps to mitigate his loss?

Law

Contributory fault

14. Regarding a reduction to the basic award, under s122(2) of the Employment Rights Act 1996 ("ERA"), the relevant test is whether it is just and equitable to reduce compensation in light of conduct of the claimant prior to the dismissal. The conduct need not contribute to the dismissal. The Employment Appeal Tribunal ("EAT") has confirmed that the same test of whether a claimant's conduct is "culpable or blameworthy" applies to the s122(2) reduction question as to s123(6) ERA – **Langston v Department for Business, Enterprise and Regulatory Reform UKEAT/0534/09**.

15. In relation to a reduction in the compensatory award, under s123(6) ERA, the test is whether any of the claimant's conduct prior to dismissal was culpable, blameworthy, perverse, foolish or bloody-minded – **Nelson v BBC (No.2) 1980 ICR 110, CA**. Although unreasonable conduct may be enough to amount to such action, Stephenson LJ was careful to state that "I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved" - paragraph 44.

16. The conduct need not be at the level of "gross misconduct" to justify a reduction – **Jagex Ltd v McCambridge [2020] IRLR 187**.

17. This requires the Tribunal to look at what the claimant in fact did, as opposed to being constrained to what the respondent's assessment of the claimant's culpability was – **Steen v ASP Packaging Ltd [2014] ICR 56**. The Tribunal must make findings of fact regarding the employee's conduct, and whether it was indeed culpable or blameworthy. It is purely the claimant's conduct that is relevant when considering whether any contributory fault can be attributed to him – **Parker Foundry Ltd v Slack [1992] IRLR 11**.

18. Once a finding is made that there had been culpable or blameworthy conduct, the Tribunal is at that stage bound to consider making a reduction by an amount that it considers to be just and equitable.

19. The EAT in **Steen** summarised the approach to be taken under s122(2) and s123(6) ERA – paragraphs 8-14:

    19.1. Identify the conduct which is said to give rise to possible contributory fault;
    19.2. Ask whether that conduct was blameworthy, irrespective of the respondent's view on the matter;
    19.3. Ask, for the purposes of s123(6), whether the conduct which is considered blameworthy caused or contributed to the dismissal; and, if so,
    19.4. Ask to what extent the award should be reduced and to what extent it was just and equitable to reduce it.

Polkey reduction

20. The decision in **Polkey v AE Dayton Services Ltd [1987] UKHL 8** permits the reduction of compensation when, even if a fair procedure had been followed, the claimant would have been dismissed in any event.

21. Compensation can be reduced as a percentage, if a Tribunal considers that there was a percentage chance of the employee being dismissed in any event. Alternatively, where it is found that a fair procedure would have delayed dismissal, compensation should reflect this by compensating the employee only for the length of time for which dismissal is found to have been delayed.

22. The Tribunal has to consider what difference a fair procedure would have made, if any. It is for the respondent to adduce evidence on this point. It is always the case that a degree of uncertainty is inevitable, unless the process was so unreliable it would be unsafe to reconstruct events. However, the Tribunal should not be reluctant to undertake the exercise just because it requires speculation – **Software 2000 Ltd v Andrews [2007] ICR 825**.

Mitigation

23. Under s123(4) ERA, the Tribunal is bound to apply the same rule regarding the duty on a claimant to mitigate his loss as the rule relating to mitigation regarding damages recoverable under common law.

24. When a respondent alleges that a claimant has failed to mitigate their losses, the burden of proof falls onto that respondent – **Bessenden Properties Ltd v Corness [1974] IRLR 338**. It is for the respondent to show that the claimant has acted unreasonably; it is not for the claimant to show that what he did was reasonable. It is not enough for the respondent to show that the claimant did not take a step that would have been reasonable for him to take.

25. If it is found that the claimant has mitigated his loss, then the Tribunal must give credit for sums earned. If there is a failure to mitigate, the Tribunal must consider when the claimant should have found work on an equivalent salary.

26. There are three questions established in the case of **Gardiner-Hill v Roland Berger Technics Ltd [1982] IRLR 498**:

    26.1. What steps were reasonable for the claimant to have to take to mitigate their loss?
    26.2. Did the claimant take reasonable steps to mitigate their loss; and,
    26.3. To what extent would the claimant have mitigated their loss had they taken those steps?

27. A percentage reduction is not generally appropriate in terms of dealing with mitigation of loss. The correct approach is for the Tribunal to determine when the claimant should have obtained new employment, if reasonable steps had been taken – **Hakim v Scottish Trades Unions Congress UKEATS/0047/19**.

28. In terms of taking a lower paid job, it is not unreasonable to start off looking for a job of equivalent salary. However, as time passes and no job with equivalent salary is forthcoming, it may at that stage be reasonable to accept a lower paid job. This is a question of fact and degree for the Tribunal hearing the case.

29. Here, the claimant obtained a new job, then resigned from that position, which led him to another period of unemployment. Where a claimant leaves a new job that transpires to be unsuitable, this will not necessarily equate to a failure to mitigate, or break the chain of causation.

ACAS uplift

30. S3 of the Employment Act 2008, by introducing s207A of the Trade Union and Labour Relations (Consolidation) Act 1992, provided for an award to be increased or decreased by a maximum of 25%, should there be an unreasonable breach of any applicable ACAS Code by either party.

31. The party seeking an uplift must raise the issue of breach, although this matter can be raised of the Tribunal's own volition.

32. Underhill P in **Lawless v Print Plus (Debarred) UKEAT/0333/09** set out circumstances for the Tribunal to consider on the ACAS uplift point:

    32.1. Whether the procedures were applied to some extent or were ignored in their entirety;
    32.2. Whether the failure to comply was deliberate or inadvertent;
    32.3. Whether there were any mitigating factors reducing the respondent's blameworthiness.

33. It is also relevant to consider the respondent's size and administrative resources.

34. The Tribunal must go as far as finding that the failure to follow the ACAS Code was unreasonable: it is not sufficient for there just to be a failing – **Kuehne v Nagel Ltd v Cosgrove UKEAT 0165/13**.

35. Further guidance has been provided by the EAT in **Slade v Biggs and Stewart [2022] IRLR 216**, in which a four-stage test was set out as follows, at paragraph 77:

> "(i) Is the case such as to make it just and equitable to award any ACAS uplift?
>
> (ii) If so, what does the ET [Employment Tribunal] consider a just and equitable percentage, not exceeding, although possibly equalling, 25%? Any uplift must reflect "all the circumstances", including the seriousness and/or motivation for the breach, which the ET will be able to assess against the usual range of cases using its expertise and experience as a specialist tribunal. It is not necessary to apply, in addition to the question of seriousness, a test of exceptionality.
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> (iii) Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what in the ET's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting? This question must and no doubt will be answered using the ET's common sense and good judgment having regard to the final outcome. It cannot, in the nature of things, be a mathematical exercise. The EAT must be reluctant to second guess the ET's decision either to adjust or not adjust the percentage in this respect, or the amount of any adjustment, because it is quintessentially an exercise of judgment on facts which can never be as fully apparent on appeal as they were to the fact-finding tribunal. The EAT will certainly not substitute its own view for the judgment of the ET in the absence of an obvious error.
>
> (iv) Applying a final sense-check, is the sum of money represented by the application of the percentage uplift arrived at by the ET disproportionate in absolute terms and, if so, what further adjustment needs to be made?"

Findings of fact

36. I limit myself to findings that are relevant to the limited issues with which I am asked to deal.

37. The claimant was employed as a Bus Operations Manager from 21 August 2017 to the date of his summary dismissal on 5 August 2021.

38. The claimant was line managed by Richard Holgate, Operations Director. In turn, the claimant line managed Michelle Hughes (Controller at the relevant time) and the other controllers. There were usually 4 controllers: in December 2020, there were two.

39. A company mobile telephone was shared between the controllers; ultimately the claimant was custodian of this telephone. I have heard that those who had access to it took videos on it and it was used for different purposes.

40. Mr McAleer also worked for the respondents as a cleaner. The claimant and Mr McAleer have known each other for some 30 plus years and are good friends. They have a jokey relationship, making fun of each other and partaking in practical jokes.

Incident 1

41. On 16 December 2020, the claimant, Mr McAleer and Miss Hughes were all in the office, which is situated upstairs in the building.

42. I have seen the video of the "strip dance" itself, lasting 42 seconds. I will describe what this shows me, and then return to the events immediately prior to the video.

43. In the video, the first shot is of the claimant's computer screen, showing that The Stripper by Dave Rose and his orchestra is playing from YouTube. Shortly after the song begins to play, Mr McAleer enters the doorway to the office and proceeds to move about, initially playing with the zip of his cardigan, and eventually removing it and tossing it to the side. He moves to the music, and ends up sprawled on the claimant's desk. I note that Mr McAleer appears to be smiling, looking into the phone camera; he clearly understands that he is being filmed.

44. I note Mr Clement's point that, when he spoke to Ms Gray, Mr McAleer told her he did not know he was being recorded. Ms Gray is a representative of the respondents. She had a telephone call with Mr McAleer on 5 May 2023, for which I have the transcript at the respondents' additional bundle, page 5. There is a recording of this conversation, however I have not heard it; I have just been referred to the transcript. At page 9 of the additional bundle, Mr McAleer is recorded as denying that he was aware of any recording. This is in contradiction to his evidence to me. However, I find that Mr McAleer was flustered by the phone call with Ms Gray, and may not have given accurate answers to all her questions.

45. Nothing I see on the video leads me to the conclusion that Mr McAleer was forced or bullied into this behaviour, as suggested by the respondents.

46. The claimant is not heard to say anything during the 42 second video.

47. I note that Miss Hughes initially appears in the video. Although she is only visible in the first few seconds of the video, she appears entirely unperturbed by the activities of the two gentlemen, looking instead at the company phone in her hands.

48. Returning then to the events leading to this video, I have the following near contemporaneous evidence to assist me:

    48.1. [66] – Miss Hughes' statement following the call with Mr Rowland on 12 July 2021 in which there are details of the dance incident. I do not accept that this was a statement typed by Miss Hughes, as she suggested in her evidence to me. It is in the same font as that at [77], which is a later statement of Miss Hughes dated 23 July 2021, which she told me was not typed by her. Miss Hughes is not one for remembering dates, and so I find the formal heading on [66] is much more likely to have been produced by Mr Rowland. I also find it unlikely that, having had a call with Mr Rowland, Miss Hughes would have taken it upon herself to type up a note of the call.

48.2. [76] – Mr McAleer's statement, taken 12 July 2021, and then an apparently contradictory one from him dated 10 September 2021 – [85]. I will come back to these later.

48.3. I also have the investigation meeting and disciplinary meeting notes with the claimant – [69] & [80] respectively.

49. In relation to the events immediately prior to the video, I find that:

49.1. The claimant at no point asked or instructed Mr McAleer to remove any clothes, or to strip in any way;

49.2. The claimant did not ask Mr McAleer to lie across his desk;

49.3. The claimant had been listening to the radio when a song came on called The Stripper, by David Rose and his orchestra. When the song came on the claimant suggested that Mr McAleer dance to the music: Mr McAleer initially said no.

49.4. The claimant asked again and said that Mr McAleer should dance to it as it was "his song";

49.5. Mr McAleer left the office at this point to take the vacuum cleaner back downstairs. When he returned back to the office upstairs, he said to the claimant to restart the song on his computer. The claimant found the song on YouTube, and played it. The video then kicks in.

50. I have found these facts for the following reasons:

50.1. Miss Hughes did not raise the dance incident until nearly 6 months after the event. On her evidence today, this was because she was specifically asked about it at that time. Therefore, on her evidence, at no point did Miss Hughes complain about the incident of her own volition. To me, that suggests that at the time she did not take offence, or think there was anything inappropriate about how Mr McAleer had been treated by the claimant on that day;

50.2. In Mrs Hughes' statement, at paragraph 17, she says "from the music being played I was clear that Geoff [the claimant] was wanting Sean [McAleer] to strip dance". In her evidence today, she accepted that the claimant did not ask Mr McAleer specifically to dance or to strip. Her evidence was that the claimant was goading Mr McAleer purely from the choice of song;

50.3. This in fact aligns with what the claimant said in his interview on 21 July 2021; at [69], it is recorded that the claimant stated "at no point did I ask [Mr McAleer] to strip";

50.4. There is some dispute as to whether the claimant heard the song on the radio, or whether he specifically played the song from YouTube. I note in the video the song is being played from YouTube. However I accept the claimant's evidence that, at the beginning of this incident, the claimant had been listening to the radio at which time the song had come on. I accept that it was on Mr McAleer's return upstairs to

the office that the claimant found the song on YouTube in order to replay it. Looking at the video, it appears that Mr McAleer is hovering just in the doorway, waiting for his cue, for the music to start. I find that this was because Mr McAleer and the claimant had had a discussion in which Mr McAleer had told the claimant to restart the music.

51. There is some debate about the contemporaneous statement made by Mr McAleer on 23 July 2021 at [76]. I note that in fact this statement was written by Mr Rowland, not Mr McAleer, and that at [76] it is not signed. I have since seen a signed copy in the addition bundle provided by the respondents at page 2. The signature is dated 23 March 2023, nearly two years after the statement was taken. The fact that this statement was not signed on or around July 2021 would make sense, given that the conversation took place over the telephone, and it was Mr McAleer's unchallenged evidence that he had not seen this statement until 23 March 2023. I note in that statement Mr McAleer is reported to have said that the claimant asked him to take his clothes off; however this is not supported by anyone's evidence from whom I have heard, not even by Miss Hughes, as I have already discussed. I therefore find that the statement taken on 23 July 2021 on [76] is inaccurate.

52. Although Mr McAleer's evidence was quite properly challenged in cross examination, I have not heard any positive evidence from Mr Rowland about the conversation on 23 July 2021. I find Mr McAleer to be a straight-forward, credible witness, possibly easily led (visible from his actions on 16 December 2020, and also in the way he has answered questions, both today and during the course of the internal process, and signed both the statement in March 2023 and the statement in September 2021).

53. I accept that the more accurate statement is the one Mr McAleer provided to the claimant on 10 September 2021 – [85].

54. I will specifically address the feelings of those present on 16 December 2020:

    54.1. Mr McAleer – as I have said, he was a willing participant in a jovial, pre-Christmas act. I have no evidence to suggest that he was pressured, or that there was anything inappropriately influential about the claimant's behaviour in the lead up to this dance. Miss Hughes in her statement suggests that the claimant had "groomed" Mr McAleer. When asked about this in evidence, Miss Hughes stated that she could "only go on what [she] witnessed". Having heard from the two gentlemen who share the relationship in question, I am satisfied that there was nothing near "grooming" taking place between them.

    54.2. Miss Hughes – as mentioned, Miss Hughes did not (on her own evidence) raise a complaint about this dance incident. I do not accept Mr Clement's assertion that Miss Hughes would not have raised a complaint about her manager: there were clearly issues between the two of them by February 2021, and I find that Miss Hughes would not have been backwards about coming forwards (certainly by February 2021) had she had any concerns whatsoever about Mr McAleer's welfare following 16 December 2020, or the appropriateness of the claimant's conduct on that day. I also note that, in the two written

documents I have that post-date Miss Hughes' witness statement of 12 July 2021 (at [73] and [77]), neither mention this incident again. This indicates to me that this incident is not one that had a lasting impact on her.

Incident 2

55. This allegation of gross misconduct relates to videos taken on the company control phone on 13 January 2021.

56. I have heard very little about this matter, which indicates to me the lack of importance the respondents place on this point in relation to the matters with which I am asked to deal.

57. The videos record a telephone conversation that the claimant had with Mr McAleer, in which Mr McAleer had been discussing a death in service benefit. He had said that that benefit would go to his children if anything should happen to him. The claimant was joking with Mr McAleer that it was not fair that his children would get the money, as he had known Mr McAleer for longer. The claimant had used his own personal phone to make the call to Mr McAleer, using the company phone to record it.

58. Again, this allegation relates to an incident that happened some five months prior to the matter being raised with the claimant.

59. I have not heard of any oral evidence about the use of this mobile phone, other than that from the claimant. I accept that the conversation in question was not work-related. One may consider it unwise to use a company phone for matters that are not work-related. However, I note that the company phone is used by numerous people for numerous purposes.

60. I have not been taken to any policy or any guidance about how this telephone is to be used or, more importantly, not used. The claimant's evidence at paragraph 44 of his statement, that "there had always been a camaraderie in the workplace and practical jokes and horseplay are commonplace" was not challenged. Neither was his remark at paragraph 45 challenged, that "there had been a relaxed jovial atmosphere at Bracknell and Wingfield and this had never been an issue in the past". I find that the claimant's use of the company phone was nothing out of the ordinary in these circumstances.

61. This allegation, as mentioned, only arose in July 2021. It appears that this allegation arose from the trawling of the company mobile by Mr Rowland and/or Mr Holgate: I do not see how the respondents would otherwise have become aware of the matter. This suggests that there is no regular monitoring of how the mobile phone is used, and no check at director level to ensure it is used for work matters only.

Mitigation

62. The claimant's contract of employment terminated on 5 August 2021. Since then he applied for various jobs as evidenced at [188] to [190] of the bundle. In his witness statement at paragraph 64 onwards he has set out in some detail the applications he made over the course of several months.

63. The claimant obtained a new job with First Bus and started working on 15 February 2022, until he resigned from that position in October 2022. The claimant resigned for two main reasons: first the south and south-west business units of the First Bus were merging, and only one Operations Manager was required. Secondly, the role with First Bus placed the claimant's place of work as Taunton, which was over 150 miles from the claimant's home, and his family. I accept the claimant's evidence, which was unchallenged, that he felt this was too far from home, and that he missed seeing his grandchildren in particular. He therefore left at the stage of the jobs being reduced from 2 to 1, in order to find a job closer to home. I find that this was a reasonable step to take at that time, and in those specific circumstances.

64. I note that the taking of the First Bus role in the first place, it being some 150 miles from home, indicates that the claimant was not cherry picking the jobs for which he applied.

65. He then had a further period of unemployment, between October 2022 and March 2023. He commenced a new role with Carousel Buses on 20 March 2023, as a PVC driver, working on average 39 hours a week. He remains in that role to date.

ACAS Uplift

66. In terms of the respondents' approach to the disciplinary process, I find the following:

    66.1. Mr Rowland undertook the investigation and disciplinary hearing. This was unnecessary given the size of the company and its available external HR support from NatWest Mentor Services. I note in both sets of meeting minutes, it is Mr Rowland who does the talking, even though Mr Holgate is in attendance at the investigation;

    66.2. The claimant was not provided with Miss Hughes' statement until after the decision to dismiss (it is discussed in the disciplinary hearing and Mr Rowland says he will send it out to the claimant – [80]);

    66.3. The claimant was only provided with a copy of the investigation meeting notes and Mr McAleer's statement from 12 July 2021 at the disciplinary hearing – [80] (paragraph 39 of the claimant's statement, which was unchallenged);

    66.4. The claimant was not provided with a copy of the videos the respondents' relied upon to dismiss him (paragraph 39 of the claimant's statement, which was unchallenged);

    66.5. No note was taken of the second interview Mr Rowland had with Miss Hughes;

    66.6. The statement at [76], which was used to support the decision to dismiss, was inaccurate and unsigned;

    66.7. The statement from Miss Hughes, used to support the decision to dismiss the claimant, was incomplete, in that it is not a full note of a

meeting, but a summarised statement made by Mr Rowland after the telephone conversation.

67. On the point about the respondents not providing the claimant with an appeal, I note the claimant's evidence as to why he missed the deadline. It was because he only received the dismissal letter when he returned from holiday on 18 August 2021. However, he then waited until 10 September 2021 to attempt to lodge his appeal. I have no explanation for that delay, and nor did the respondents at the time – see email from the claimant at [83.1]. The respondents did not breach the ACAS Code by refusing to hear the claimant's appeal.

68. I therefore find that there were breaches of the ACAS Code, as I have set out above.

Submissions

69. I heard submissions from both Mr Livingston and Mr Clement, and had written submissions from Mr Livingston.

70. Mr Livingston expanded on his written submissions. In short, he asserted that there should be no reduction for contributory fault. Firstly, he argued that there was no conduct by the claimant that reaches the level required in order to make a reduction under ss123/122 ERA. Secondly, and in any event, he argued that any conduct by the claimant cannot be held to have contributed to his dismissal, or caused it. This is because the reality of the situation was that the disciplinary process was a sham, and that Mr Rowland and Mr Holgate simply found an excuse to dismiss the claimant.

71. In terms of any reduction applying the rule in **Polkey**, Mr Livingstone stated that, on the evidence, the respondent could not demonstrate what would have happened had a fair procedure taken place. Therefore, no reduction should be made.

72. Regarding mitigation, Mr Livingston stated that the claimant had mitigated his loss, and that the respondents had failed to prove otherwise. I asked about the lack of evidence regarding mitigation (job applications) since the claimant obtained his job with Carousel Buses. Mr Livingston stated that in the claimant's Updated Schedule of Loss, he had asserted that it would take 12 months from today to find a job on a salary equivalent to his salary with the respondents.

73. Regarding an uplift for breach of the ACAS Code, Mr Livingston submitted that there had been a wholesale and deliberate failure to comply, in various ways as set out in his written submissions. He stated that this was not the case of a small employer doing its best, but that the respondents had access to NatWest Mentor Support as external HR advisors. He sought an uplift of 25%.

74. Turning to Mr Clement's submissions, he submitted that I could be satisfied that the claimant had conducted himself in a manner that was culpable and blameworthy: that in relation to the dance incident, the claimant asserted power and influence over Mr McAleer in order to get him to act inappropriately at work. He did not put forward a quantified level of reduction sought by the respondents.

75. Regarding Polkey, Mr Clement made no submissions.

76. In terms of mitigation, the criticisms levelled at the claimant were that (1) he should have sought positions as a bus driver straight away following his dismissal and (2) the claimant's resignation from First Bus should be a break in the chain of causation, following which the respondent should not be liable for any ongoing losses.

77. Regarding the ACAS Code, Mr Clement stated that there were no procedural defects by the respondent. The only specific point he mentioned was that the respondent was not unreasonable in refusing to consider the claimant's appeal, which was submitted out of time.

Conclusions

Contribution

78. In relation to the two acts that I am asked to consider for the purposes of contribution, namely Incidents 1 and 2, I find that no culpability (as required in ss122/123 ERA) attaches to the claimant's behaviour.

Incident 1

79. I accept that the claimant and Mr McAleer had a jovial, jokey relationship, and that Mr McAleer was a willing participant in the 16 December 2020 matter. I have found that Miss Hughes was in no way affected by the incident.

80. I find that there is no culpability or blameworthiness attached to this behaviour such as would lead to a reduction to either the basic or compensatory award.

Incident 2

81. On the limited evidence I have heard, I am not satisfied that there was anything blameworthy in the conduct of the claimant in relation to this. As I have mentioned, the manner in which the respondents' case has been developed before me suggests that this incident is given very little weight by them as contributing to the claimant's dismissal. The claimant stated in his witness statement that this incident was another jokey matter between himself and Mr McAleer: he was not cross examined on that evidence – C/WS/43-44.

82. There is nothing in the claimant's conduct in either of these incidents that reaches the threshold required in **Nelson**. Although I have stated that the claimant's conduct may have been unwise, this is not sufficient to trigger a reduction under either s122 or s123 ERA. I therefore make no reduction for contributory fault.

Polkey

83. It is for the respondents to present evidence and prove that the claimant may have been dismissed fairly in any event. I have heard no evidence from the respondents' on this point, and therefore it cannot hope to discharge its burden of proof.

84. I make no Polkey reduction.

Mitigation

85. The respondents seek to argue that the claimant failed to mitigate his loss by not obtaining a new job until February 2022. I remind myself that the burden of proof is on the respondents to demonstrate a lack of mitigation, i.e. that the claimant has acted unreasonably. It is not necessary for the claimant to have taken all reasonable steps.

86. The respondent has not produced any job applications that it says the claimant should have applied for and failed to do so. Although I heard general evidence from Mr Rowland about the shortage of bus driver roles, I am not satisfied that the respondents have proven that the claimant acted unreasonably by failing to apply for driving jobs in the first six months of his unemployment.

87. A driver role was not on a par with the job the claimant left behind at the respondents. The claimant did end up accepting the role of a driver with Carousel Buses, which commenced on 20 March 2023; so, when the time came, he was willing to lower his expectations.

88. I therefore find that the claimant did not fail to mitigate his loss between August 2021 and February 2022.

89. In terms of the claimant leaving his job with First Bus in October 2022, I find that he was reasonable in doing so. His evidence, which I accept, was that there was a reduction in head count from 2 to 1, and he was 150+ miles from home. It was reasonable for him to take the decision to resign in those combined circumstances. The respondents say that I have not seen the resignation letter, and also that First Bus may have been asking the claimant to stay. This is speculation, and I must base my findings on the evidence I have heard.

90. I find that the respondents have not proven that there was a failure to mitigate in the claimant resigning from this job. I am satisfied that, as the claimant acted reasonably, his actions in resigning did not break the chain of causation regarding losses flowing from the claimant's dismissal.

91. I do however note that I have no evidence to suggest that the claimant has continued his search for a new job at an equivalent salary to the one he was on at the respondents.

92. He has been in his current role for around three months. I conclude that the claimant should have continued looking for a role at an equivalent salary during the course of his current employment. I have no evidence that he has done so. He has acted unreasonably in not doing so. I note that the claimant says in his Updated Schedule of Loss that it will take him another year to find a job from today. I will apply that 12 month estimate to the time at which he started looking for a new role again, having left First Bus (October 2022).

93. I therefore conclude that any losses will cease as of October 2023. This is over two years from the date of dismissal, looking at the overall picture.

ACAS Uplift

94. I consider that the ACAS Code was breached by the respondents' manner of conducting the disciplinary process, as I have set out above. The breaches that I have upheld do not exactly match those set out in the Grounds of Complaint at paragraph 45(i)-(vi). However, I am satisfied on the facts that the above breaches did occur. They were raised by Mr Livingston in the course of the hearing, and Mr Clement had the opportunity to make submissions on those breaches: he chose not to do so.

95. In light of their size and available resources, including the availability of NatWest Mentor Services, I am satisfied that the breaches I have found were unreasonable.

96. I find that the breaches I have set out were, at least in part, deliberate, in an attempt to rush through the disciplinary process. On certain points, there was a nod to a fair procedure, in that the claimant was offered the right to appeal, and told of his right to be accompanied. This demonstrates to me that the respondents were aware of the correct procedure they were required to follow. However, it also means that there was not a wholesale refusal to follow procedure.

97. As such, I am minded to award a 15% uplift. In looking at the overall effect of such a decision, I note from the claimant's Updated Schedule of Loss that the claimant claims a compensatory award of £55,618.67. 15% of that would be £8,342.80 (if the claimant were to achieve the full award he claims). This does not strike me as disproportionate in all the circumstances: including the size and resources of the respondent, and the deliberate failures within the ACAS process.

Remedy

98. Having provided the above reasons, I gave the representatives some time to see whether they could agree the amount of remedy that the claimant should be awarded.

99. I am grateful to them for agreeing the following figures, and judgment is entered in these amounts:

    99.1. Unfair dismissal – basic award: £3,264;
    99.2. Unfair dismissal – compensatory award: £46,079.47;
    99.3. Wrongful dismissal – £2,847.

100. The total amount of damages awarded is £52,190.47

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Employment Judge Shastri-Hurst

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Date 29 June 2023

Case No: 3323008/2021

REASONS SENT TO THE PARTIES ON
11 August 2023
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T Cadman
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FOR THE TRIBUNAL OFFICE