# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
|---|---|---|
| Miss S A Rees | v | Hine Meats Limited t/a Greens of Pangbourne |

**Heard at**: Reading Employment Tribunal
**On**: 9 February 2024 (in public, face-to-face), 20 March 2024 and 1 May 2024 (in chambers)

**Before:** Employment Judge George; Mrs C Anderson, Dr C Whitehouse.

**Appearances**
**For the Claimant:** In person
**For the Respondent:** Mr E Mawoko, litigation consultant
Ms G Kennedy-Curnow, litigation consultant (written submissions on the ACAS uplift only)

## RESERVED JUDGMENT

1. The respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 and it is just and equitable to increase the compensatory award payable to the claimant by 25% in accordance with s 207A Trade Union & Labour Relations (Consolidation) Act 1992.

2. When the proceedings were begun the respondent was in breach of its duty to provide the claimant with a written statement of employment particulars. There are no exceptional circumstances that make an award of an amount equal to two weeks' gross pay unjust or inequitable. It is just and equitable to make an award of an amount equal to two weeks' gross pay.

3. The respondent shall pay to the claimant compensation for unfair dismissal of **£9,025.31** calculated as set out in the following table. The award of compensation in respect of the food allowance is set out separately in case there needs to be a different tax treatment of that sum.

**Compensatory Award**

| | |
|---|---|
| 18 weeks and 5 days @ £321.06 (incl. pension loss but net of tax and NI) p.w. | 6008.41 |

| | | |
|---|---|---|
| Bonus (after deduction for tax and NI) | 261.55 | |
| 25% uplift for s.207A TULR(C)A | 1,567.49 | |
| Subtotal | 7,837.45 | 7,837.45 |
| | | |
| loss of food allowance | | |
| 18 weeks and 5 days @ £20 p.w.gross | 374.29 | |
| 25% uplift for s.207A TULR(C)A | 93.57 | |
| Subtotal | 467.86 | 467.86 |
| | | |
| Total Compensatory Award | | 8,305.31 |
| | | |
| s.38 EA 2002 (made after ACAS uplift according to s.207(5) TULRCA) – 2 X £360 | | 720.00 |
| | | |
| **TOTAL AWARD** | | **9,025.31** |

4. We make a preparation time order in favour of the claimant. The respondent shall pay to the claimant **£683** calculated at 5 hours @ £42 p.h. + 11 hours @ £43.

# REASONS

1. In addition to the documents noted in our reserved liability judgment, sent to the parties on 22 December 2022, as having been available at the time of the hearing in November 2023, some additional documentation was provided to the tribunal at the remedy hearing. In these reasons pages in the remedy bundle are referred to as RB page 1 to 73 and in the remedy supplementary bundle as RSB page 1 to 31 as the case may be. Where it has been necessary to refer to pages in the liability hearing bundle, we use the description LB page 1 to 160.

2. We refer to, but do not repeat, our findings of fact in that liability judgment. In it we found that the claimant had been automatically unfairly dismissed but that her claims of detriment on grounds of protected disclosure were not well founded. Without limitation to the paragraphs in the reserved liability judgment which were relevant to our conclusions at the remedy stage, we remind ourselves about relevant findings we made about the credibility of the witnesses in particular of Mr Hine (see paragraph 17 to 22 of the reserved liability judgment). When it came to our findings about one key event, namely the meeting of 23 February 2021, we preferred the claimant's account and remind ourselves of our findings in paragraphs 96 to 122 and in particular our finding at paragraph 113 that the claimant did not make the alleged statement about short-term memory deficiency.

3. We also made relevant findings about the extent to which capability was an issue during the employment at paragraphs 26 to 30 and that there was a discussion about stock control in the probation meeting, see paragraphs 80 to 91. We made a finding that capability was not mentioned in the probation extension letter but

that the claimant's absence on 21 January was part of the reasons for that extension.

4. The claimant had less than one year continuous service so the arithmetical formula for calculating a basic award leads to a nil award. This explains why there is no basic award in the schedule of loss put forward by the claimant in RSB page 56, updated as at 9 February 2024.

5. The following issues arose to be decided in relation to remedy:

   6.1 Would the claimant have remained in post after 31 March 2021 - which was the end of her probationary period - or would she have failed to successfully complete probation?

   6.2 Is the claimant entitled to compensation for loss of statutory rights?

   6.3 What period of loss of earnings has the claimant shown to have been caused by the unlawful dismissal? In particular, were the claimant's losses extinguished from 10 August 2021 when she obtained alternative employment at a higher rate of pay or did her loss continue through that subsequent employment and then onwards from February 2022 when she resigned from it?

   6.4 Has the claimant failed to mitigate her loss? The tribunal will need to consider:

      6.4.1 Acting reasonably, what steps would the claimant have taken to mitigate her loss?

      6.4.2 Had she taken those steps, what alternative income would she have earned and from what date?

      6.4.3 Did the claimant act unreasonably in failing to take those steps?

   6.5 Should an award be made under s.38(3) Employment Act 2002 (hereafter referred to as the EA 2002) for lack of a s.1 ERA statement of terms and conditions at the time proceedings started? If so, should the award be of two or four weeks?

   6.6 How should the tribunal assess loss of pension benefit?

   6.7 Would the claimant have earned a bonus had her employment with the respondent continued and, if so, in what sum?

   6.8 Was the claimant entitled under the terms of her contract to £20 per week food allowance and, if so, over what period should she be compensated for the loss of that benefit?

7 The claimant had also originally included a complaint of unpaid Christmas overtime hours but this had effectively been dealt with at the liability stage and in the most recent schedule of loss (RSB page 5) the alleged loss was deleted.

8 In respect of the claim for compensation for loss of statutory rights, the claimant had been in employment for approximately five months at the date of dismissal and had not acquired statutory rights to long notice or not to suffer unfair dismissal. The claimant argued that she should be compensated for the lack of an opportunity to acquire those rights but, in reality, she had only recently started her employment and it was not as though she was imminently going to acquire them had the respondent not acted as they did. Our view is that the claimant is seeking compensation for loss of rights that she did not have and it is too speculative to say that she would have acquired them. We would be compensating her for the loss of something that she did not have.

9 It is the unanimous decision of the tribunal that the claimant has shown that it is more likely than not that she would have successfully completed her probationary period. Our findings were that it was only the dismissal that was unlawful not the extension of the probation. Therefore, as at the date of dismissal, she was still on probation, which was to last until the end of March 2021 (LB page 114). Our findings were that her performance or capability was not the basis of the decision to extend probation at that time; that was based on frequent absence.

10 Between then and the meeting on 23 February 2021 there had been no mention of performance issues. The only mention of performance issues we found there to have been during that meeting was minor, contrary to Mr Hine's evidence of the exchanges on that date. In any event, Mr Hine had gone into that meeting with the intention to give the claimant clear markers for how she needed to conduct herself in order to succeed in completing probation which had just over a month to run. We are of the view that the claimant would have made sure that she would have passed. None of the performance matters were matters which she could not have satisfied the respondent about and we are satisfied that she would have been confirmed in her employment at the end of March 2021 had the respondent acted fairly and lawfully.

11 The claimant obtained alternative employment at a local pub/restaurant starting on 10 August 2021. This was at a higher rate of pay and extinguished her losses. The basis on which she argues that she should be compensated for the difference in income that she actually earned during and after that employment is that the reason that she resigned from it was to do with ill health. She sets out in her paragraphs 25.1 to 25.6 the efforts she made to find alternative work and the success that she had. Her work at The George was a full-time job as a junior Chef de Partie. She explains that, in February 2022, she left that employment because she had badly torn two tendons in her right arm that required four months of shock wave treatment to avoid surgery. Her argument was that, had she not been required to leave her employment with the respondent she would not have taken alternative employment that was more physically demanding. This, she argues, led to her taking time off work for problems with her arm and, ultimately, to her resignation because the job was too onerous, given that physical injury.

12 The question for us is whether the loss of that income, the loss of the replacement employment and the difference during that employment between what she would have been earning with the respondent and any sick pay she was receiving when

absent through ill health from her work at The George, is attributable to the actions of this respondent.

13 S.123(1) Employment Rights Act 1996 (ERA) provides as follows:

> "Subject to the provisions of this section and [sections which limit or reduce the amount of the compensatory award] 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."

14. We have taken into account the guidance of the EAT in Whelan v Richardson [1998] I.C.R. 318 EAT and Islam Channel Ltd v Ridley (UKEAT/0083/09) as well as the wording of the statute itself.

15. In Whelan v Richardson HHJ Peter Clark (page 324F to H

"Each case must depend upon its own facts. … Compensation is to be assessed in such a way as to compensate the employee, not penalise the employer, in relation to the compensatory, as opposed to an additional or special award. Neither party should gain a 'windfall'. Compensation must be that which is just and equitable. Parliament has thereby granted a discretion to industrial tribunals which ought not to be placed in a straitjacket by too rigid statements of principle handed down by this tribunal in appeal decisions. However, that discretion must be exercised in accordance with clear principles, to some extent imported into this field from the common law by the words of the statute."

And then at page 325G to 326 D the EAT sets out 5 points of principle, the last 3 of which are particularly relevant in the present case:

> "(3) … where the applicant has secured permanent alternative employment at a lower level of earnings than he received before his unfair dismissal [... h]e will be compensated on the basis of full loss until the date on which he obtained the new employment, and thereafter for partial loss, being the difference between the pre-dismissal earnings and those in the new employment. All figures will be based on net earnings.
>
> (4) Where the applicant takes alternative employment on the basis that it will be for a limited duration, he will not then be precluded from claiming a loss down to the assessment date, or the date on which he secures further permanent employment, whichever is the sooner, giving credit for earnings received from the temporary employment.
>
> (5) As soon as the applicant obtains permanent alternative employment paying the same or more than his pre-dismissal earnings his loss cannot be revived if he then loses that employment either through his own action or that of his new employer. Neither can the respondent employer rely on the employee's increased earnings to reduce the loss sustained prior to his taking the new employment. The chain of causation has been broken."

16. This approach was modified by the Court of Appeal in Dench v Flynn and Partners [1998] IRLR 653 as explained by HHJ McMullen QC in Islam Channel

paras 17 & 18 explaining that the Court of Appeal had been of the view that although in many cases a loss consequence upon unfair dismissal will cease when an applicant gets employment of a permanent nature at an equivalent or higher level of salary or wage than the employee enjoyed when dismissed, "to regard such an event always and in all cases putting an end to the attribution of the loss to the termination of employment cannot lead in some cases to an award which is just and equitable."

17. HHJ McMullen QC described the paradigm case where the replacement work was not permanent and said there was no automatic guillotine on whether a persons' continued losses might be compensable by a former employer. Nevertheless, the statute directs the tribunal, when deciding what is just & equitable to have regard to the loss sustained by the claimant "in so far as that loss is attributable to action taken by the employer". This is an important consideration.

18. We do not consider the losses of income caused by the claimant being on sick leave during her employment at The George or following her resignation from that job are attributable to the act of the respondent to the present claim in dismissing her from her job as a butchers. Although one might say that 'but for' her dismissal from the butchers, she would not have worked at The George and would not have injured her arm, there was no connection between the claimant's inability to sustain fitness to work at The George and the events that we have found to be unlawful acts of this respondent. We therefore conclude that the loss of income attributable to the actions of the present respondent stop on 9 August 2021 the day before she started work at the George. It is that loss we consider when assessing the compensatory award.

19. In reaching this conclusion we have taken into account the explanation the claimant confirmed in evidence as set out on page RSB page 4 (the updated schedule of loss as at 9 February 2024 prepared following the liability judgment) In that, the claimant corrected the calculation in the original schedule of loss at RB page 56 and 57, which had been done on her behalf, but which did not include all of the losses that the claimant had wished to claim for. More detail in RSB page 3 and 4 is set out than is in her original witness statement about her search for alternative work and the financial circumstances she is in now. Nevertheless, it is clear that the replacement work was at a higher rate of pay than she had with the respondent and this extinguished her losses.

20. The respondent argued that the claimant had failed to mitigate her loss and she was cross examined about the attempts she had made to find alternative work. We accept that she made the attempts that are set out in the section headed "Job searches" (RSB page 4). She started looking for alternative work within weeks of being dismissed by the respondent.

21. National restrictions on businesses and on members of the public were in place due to the coronavirus pandemic at that time. We have refreshed our memories of the particular regulatory restrictions and note the following dates:

21.1. On 12 April (a little less than two weeks after the end of the claimant's employment) non-essential retail was permitted to reopen but outdoor meetings only were permitted in small groups;

21.2. On 29 March the stay at home order came to an end;

21.3. On 17 May 2021 indoor venues reopened; and

21.4. On 19 July most legal limits on socialising were lifted.

22. We accept that this context affects the likelihood that retail and hospitality businesses would between April and July 2021 be reopening and advertising for staff. The claimant describes there being limited public transport which we accept . However, there is a train station in Pangbourne which is also served by buses. Some public transport would have been available, for example, into Reading.

23. The claimant had been offered project work by a contact of hers as is evidenced by the letter at RSB page 7. Her contact states that, when he knew that Ms Rees was no longer in employment with the respondent, they engaged in multiple discussions with a view to her being contracted to carry out work for the company he worked for as she had in the past. However, in July 2021, he himself left the company in question because he needed treatment for two serious medical conditions. We accept that the claimant genuinely and reasonably expected, during the period March to July 2021, to be likely to obtain work through her contact.

24. The respondent argues that the claimant could have explored sources of potential employment in Reading or other potential employers in the local area with whom she could have worked remotely. There is some force in that argument although the respondent has not put forward evidence of particular jobs that were available at that time. Nevertheless, we think that acting reasonably, somebody in the claimant's position would have cast the net more widely.

25. We move onto the second part of the question that we have to decide. We give weight to a number of factors: the claimant's age, the well-known difficulties in finding employment in general for people of her age, the uncertain state of the job market at the relevant time with the country just coming out of a national lockdown, and the complete lack of evidence or specific vacancies. We are not satisfied on the balance of probabilities that there would have been high number of employers looking for staff who did not have people to bring back from furlough, contrary to the respondent's argument. We do not think that there is evidence that the claimant would have been likely to find work that extinguished her losses any sooner than she did had she looked at a wider range of possible employment opportunities. It is quite possible that the lifting of most restrictions on 19 July coincided with the availability of work at The George. We are not persuaded that the claimant would have found work sooner had she taken any different steps.

26. Furthermore, we accept that she had personal reasons why she limited the overtures she did make to those she knew and trusted and those who were local to her. She had a reasonable expectation that the encouraging signs of employment through her contact would lead to fruition until July 2021. There matters that were personal to the claimant to do with her previous experiences with other employer(s) that mean that she did not act unreasonably in the steps that she took. The claimant has not failed to mitigate her loss.

27. Turning to the question of the lack of a statement of terms and conditions. The full details of what is required to be provided under s.1 ERA are as follows:

> "(3) The statement shall contain particulars of—
> (a) the names of the employer and [worker],
> (b) the date when the employment began, and
> (c) [in the case of a statement given to an employee, ]the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period).
>
> (4) The statement shall also contain particulars, […] of—
> (a) the scale or rate of remuneration or the method of calculating remuneration,
> (b) the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals),
> (c) any terms and conditions relating to hours of work including any terms and conditions relating to—
> (i) normal working hours,
> (ii) the days of the week the worker is required to work, and
> (iii) whether or not such hours or days may be variable, and if they may be how they vary or how that variation is to be determined,
> (d) any terms and conditions relating to any of the following—
> (i) entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the [worker's] entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated),
> (ii) incapacity for work due to sickness or injury, including any provision for sick pay, [...]
> (iia) any other paid leave, and
> (iii) pensions and pension schemes,
> (da) any other benefits provided by the employer that do not fall within another paragraph of this subsection,
> (e) the length of notice which the [worker] is obliged to give and entitled to receive to terminate his contract of employment [ or other worker's contract],
> (f) the title of the job which the [worker] is employed to do or a brief description of the work for which he is employed,
> (g) where the employment is not intended to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end,
> (ga) any probationary period, including any conditions and its duration,
> (h) either the place of work or, where the [worker] is required or permitted to work at various places, an indication of that and of the address of the employer,
> (j) [(j) to (n) are not applicable to the present case]."

28. The provisions of s.38(3) EA 2002 mean that if at the time the proceedings start there is no statement complying with s.1 then we must consider whether to award two weeks' or four weeks' pay. As is recorded in our liability judgment, in effect the respondent accepted that this was something that they had failed to provide and there was no statement of terms and conditions that complied in full with s.1.

29. What the claimant did have were the documents at LB page 89, the letter dated 20 October 2020 offering her employment for a trial period, and the document at LB page 90 which sets out her hours and some information about benefits. The claimant was given the general assistant information. We accept her evidence that she was not provided with the written bonus policy that is at page 91. She was only told that she would be eligible for a bonus but not how the bonus would be calculated. That would, it seems to us, probably fall within s.1(4)(da) ERA.

30. What is missing, if one compares the details of LB pages 89 and 90 and those required by s.1(3) and (4) ERA, include the rate of pay, details of her holiday entitlement, statutory sick pay entitlement, the start date of continuous employment, the details of the bonus policy, the food allowance/details of the staff discount and the conditions of probation. This amounts to quite a number of relevant pieces of information that were not available. The claimant argues that it is relevant that she was not pointed towards the availability of a grievance policy and this is true but this is not one of the matters that is stipulated under s.1 ERA.

31. In closing Mr Mawoko, on behalf of the respondent, argued that although there may have been some omission in providing all of the details that would be required in a contract the reasons were the extremely busy Christmas 2020 period shortly after the claimant started, the ongoing coronavirus pandemic with the restrictions and challenges that that posed for essential services retail outlets such as the respondent, and the ill health of key members of management from the respondent who had Covid-19 during the relevant period.

32. This is not among the more serious kinds of default that we have seen. The reasons provided, which we accept as genuine, do not excuse the default but are reason we sympathise with in the circumstances. We consider that it is just and equitable to make an award of two weeks' gross pay.

33. The following are our findings on the other alleged losses which are said to flow from dismissal and are argued should be included in the compensatory award.

34. We have found that the claimant had extinguished her losses and therefore we are looking at a period of loss from 1 April to 9 August 2021 inclusive and no further. We think it likely that the claimant would have stayed in employment in that period so there is no realistic prospect she would have left for some other reason. Had she stayed in employment she would have been paid one further bonus instalment in May 2021 in accordance with the policy at LB page 91. In that document it is explained a second bonus is usually added to the May salary but that it is based upon the overall performance and profitability of the company for the full financial year up to the end of March. There is no suggestion that the business was not in profit at that time.

35. The claimant considered that the payment she received at Christmas was an underpayment. We rejected that argument at the liability hearing and accepted that the payment of £150 at that time was the appropriate rate for her given her position and her length of service, which was less than three months as at Christmas. She argued orally that she would have been paid £300 in May 2021 and £600 the following Christmas which was why she argued that the figure of £900 as an estimated bonus (RSB page 5) was appropriate.

36. As a consequence of our conclusions on the period of the loss we are only considering the May 2021 bonus. In our view, the claimant would certainly have been eligible for at least a further £150 for the three months January to March 2021 – that would have been identical to the Christmas bonus. The respondent could easily have provided anonymised payslips for general assistants dated May 2021 had the figure claimed by the claimant been inappropriate. Their only argument in submissions was that she would not have been in employment at that stage and we reject that. In the absence of evidence from the respondent we accept the claimant's evidence that the second bonus for the end of the financial year would probably have been higher than the interim bonus in Christmas and accept that £300 is a reasonable estimate of her loss. We award £300. However that is a gross figure and the compensatory award should be calculated net of tax and National Insurance.

37. Doing the best we can we have compared the gross weekly basic pay of £360 with the net weekly basic pay of £313.86. This shows that the tax deducted represented 13% of the gross weekly pay and we think a reasonable estimate of the tax and National Insurance that would have been deducted from the bonus is that marginal rate of tax. £300 x 87% gives a net figure of £261.55 for the bonus that would have been paid to her in May 2021.

38. We next consider what were the terms as to staff discount or food allowance. The general assistant's terms at LB page 90 indicate that the employee would be qualify for staff discount on goods. The claimant's evidence was that, in fact, this was operated as a food allowance of £20 per week. This is set out in her schedule of loss. The respondent stated in closing that a 25% discount on purchases was part of the benefits provided to employees but no questions were asked of the claimant about that in cross examination. Potentially the evidence by the claimant of a flat rate food allowance of £20 per week is not documented in LB page 90 but then it is only a partial description of the terms of a general assistant in any event.

39. Given the lack of challenge by the respondent and the previous findings of lack of reliability in respect of Mr Hine's evidence, we have decided on the balance of probability that this is something the claimant was entitled to as part of her employment. There is no refence to it on the payslips as a benefit in kind and therefore it seems that the purchases up to £20 in a week as a benefit in kind were not treated by the parties as being subject to tax. Whether they should have been or not is not for us to say. We therefore are in a position where we need to award the gross figure and make clear that our findings are that it is a benefit from employment. The figure will be calculated separately and the parties will have to agree what the appropriate tax treatment is.

40. We move on to consider what the terms were as to pension. The payslips show the employer's pension contributions were 2% of gross salary. There is relevant information in the liability hearing reserved judgment about the dates at which the claimant would have been enrolled in the respondent's pension plan and we conclude that, certainly for the period covered by the loss - namely from 1 April 2021 onwards - she would have been enrolled in that scheme. 2% of the gross weekly salary of £360 is £7.20.

41. When calculating the weekly loss of earnings we therefore use the net basic pay of £313.86 to calculate compensation but add to it the figure of £7.20 a week which is the actual sum that the respondent would have contributed to the claimant's pension plan. That is the amount by which she is out of pocket.

42. So, the multiplicand for the loss of earnings is £313.86 plus £7.12 which equals £321.06. The period of the loss is 1 April 2021 to 9 August 2021 which is 18 weeks and 5 days. Multiplying that by £321.06 comes to £6,008.41 to which should be added the net bonus figure of £261.55 so that the total losses for that period, excluding food allowance which will be set out separately as previously explained, are £6,269.96.

ACAS Uplift: s207A TULRCA

43. We move on to consider whether there should be an uplift on the compensation for an unreasonable failure to follow the ACAS Code of Conduct on disciplinary or grievance procedures. We drew to the parties' attention the case of Ikejiaku v British Institute of Technology Ltd UK EAT/0243/19 a decision of the EAT of 7 May 2020. That was a case in which the claimant had succeeded in a complaint of automatic unfair dismissal on grounds of protected disclosure. The EAT remitted to the tribunal consideration of whether there should be an uplift under s.207A of the Trade Unions and Labour Relations Consolidation Act 1992 (or TULRCA) because the respondent accepted in that case that the protected disclosure in question was a grievance within the Code's definition. The EAT accepted that dismissal for the principal reason of a protected disclosure did not engage the ACAS Disciplinary Code because it was not an allegations involving the culpability of the employee (see Ikejiaku para.47).

44. After the remedy hearing and after the panel discussion day in chambers on 20 March 2024, the EAT decision in SPI Spirits UK Ltd v Zabelin [2023] EAT 147 came to the attention of Employment Judge George. It seemed that, since it considered Ikejiaku , the case of Zabelin had the potential to affect our conclusion on whether or not there should be an uplift for an unreasonable failure to follow the ACAS Code of Conduct on handling grievances. Judge George caused the tribunal to write to the parties on 3 April 2024 to draw this case to their attention and to invite any further submissions upon it.

45. The claimant's submissions were sent to the respondent and the tribunal on 10 April 2024. Although they could not originally be located by the tribunal, they were resent by the claimant and the respondent at Judge George's request and we thank the parties for their cooperation in this respect. Due to a change in fee-earner with conduct for the litigation at Peninsula, the respondent asked for extra time to make submissions and their response is dated 24 April 2024.

46. Zabelin makes clear that for the grievance provisions of the ACAS Code of Conduct to be engaged, a grievance needs to be in writing (relying on paragraph 32 of the Code – see para.80 of the judgment in Zabelin . Where the EAT in Zabelin differed from the differently constituted EAT in Ikejiaku was in relation to the application of the ACAS Code on Disciplinary Procedures. HHJ Auerbach quoted the relevant parts of the Trade Union and Labour Relations (Consolidation) Act 1992 and pointed out that the jurisdictions listed in schedule A2 include unfair dismissal, the successful claim in the present case. He then went on to address the challenge to tribunals in trying to decide whether the disciplinary or grievance codes apply when they have made a binding decision that a protected disclosure (and not some potentially fair reason) was the reason or principal reason for dismissal.

"72 . I start my analysis by observing that the ACAS Code is concerned with dispute resolution. It is intended to be applied and followed as and when disputes or concerns arise in the workplace, on either side, with a view to assisting their resolution by fair internal process. While employment tribunals inevitably only get involved after the event, the ACAS Code exists in order to help and guide the parties, as it were, in real time.

73. Secondly, in the very broadest of terms, the distinction between grievance and disciplinary situations reflects the difference between a situation where the employee has a concern about something the employer has done, is doing, or may do, and one in which the employer is concerned about something the employee has done, is doing, or may do. In some cases, concerns on both sides may be in play, and a sequential or combined process or processes may need to be followed, which meet the standards of both the grievance and discipline provisions.

74. Thirdly, a recurring theme in the authorities is that the employer ought to follow a fair disciplinary procedure, conforming to the Code, where it is alleged that the employee has behaved unsatisfactorily in some respect for which (so it is alleged) the employee is, or may be, culpable. In line with that approach, the Code itself states that it does not apply to redundancy dismissals, or non-renewal of limited-term contracts. But it does apply where the allegation relates to the employee's conduct, or to what is alleged to be poor performance by the employee.

75. Further, the line drawn by this distinction does not always align with the sub-categories of fair reasons for dismissing under sections 98(1) and (2) of the 1996 Act . This is a recurring theme in cases where the employer seeks to rely upon what is said to be a breakdown in the relationship, and to argue that the Code did not apply, but the employee contends that in substance the underlying concern arose from what was alleged to be their culpable conduct, so that the Code did apply. See: for example, Lund v St Edmunds School , UKEAT/0514/12, 8 May 2013.

76. Similarly, while the statute has a single category of capability, that embraces both cases where it said that the employee was responsible for performing poorly, to which the discipline provisions of the Code would apply, and those where their capability is said to have been affected by ill health beyond their control, so that they would not apply. That is the specific point that arose in *Holmes* , which contains perhaps the clearest discussion of the general distinction between cases in which the employee is alleged to have done something culpable, and those where that is not the concern.

77. However, for present purposes, two further aspects of the discussion in *Holmes* need to be noted. The first is the observation, at [8], [12] and [15], that the Code states that disciplinary situations "include" those relating to misconduct and/or poor performance. That is not exhaustive, and the provisions relating to discipline may apply where there is an allegation of culpable conduct because of misconduct, poor performance or "something else" which requires "correction or punishment".

78. The second aspect is the focus, in the discussion, on what the employer *alleged* , not on what the outcome of the process turned out to be, or whether the allegation was, in fact, well founded. That, I would observe, is in keeping with the fact that the Code is intended to guide parties as to how a matter should be handled going forward, the purpose being to ensure that employees are fairly treated at the time. As the EAT observed in *Rentplus UK Limited v Coulson [2022] ICR 131* , at [30], if, for example, the employer believed at the time that the employee had stolen money, but in fact, as matters turned out, that was wrong, it would be very surprising if the ACAS Code then did not apply. The protection of the ACAS Code is "particularly important for innocent employees."

79. In my judgment, the same general principles should guide the tribunal in deciding, in a case which includes a claim that the claimant made protected disclosures, whether the grievance provisions of the Code, or the discipline provisions, or possibly both, should have been followed. This is to be judged not by reference to the hindsight of the outcomes that the tribunal has determined, such as whether the claimant did, in fact and law, make a protected disclosure, or whether, if so, that was the sole or principal reason for their dismissal, but by reference to what happened at the time.

80. If an employee raises a (written) concern, for example, that they are not being paid the correct wages, or that a pay cut has been wrongly imposed on them, that will trigger an obligation on the employer to follow the Code provisions relating to grievances, regardless of whether the employee raising that concern is later determined also to have amounted to the making of a protected disclosure.

81. Next, where the provisions of the ACAS Code, whether relating to grievance, discipline or both, were triggered by the events as they unfolded, which of them are relevant to the issues before the tribunal may depend on what the legal complaints are and/or which complaints have succeeded. If an employee complained that their pay had been wrongly cut, engaging the grievance provisions, and they later succeed in a wages claim, then the tribunal may need to consider under section 207A whether the grievance provisions were complied with. The same may apply if they also bring, and succeed in, a constructive unfair dismissal claim arising from the same matter. That should and would be so, whether or not the original complaint has been found also to amount to a protected disclosure.

82. But if the employee complains, or also complains, to the tribunal, that, following their complaint to the employer, the employer actually dismissed them, and did so unfairly, then, in respect of *that* complaint, the tribunal may need to consider whether the discipline provisions of the ACAS Code applied and were observed at the time. That may be relevant at the liability stage in respect of ordinary unfair dismissal. If the complaint succeeds, it may also be relevant when considering section 207A at the remedy stage. Once again that will be so, regardless of whether the complaint succeeded only as one of ordinary unfair dismissal, and/or one under section 103A. The employee should be able to enjoy the procedural safeguards of the Code whether their case is simply that they are not guilty of culpable behaviour, or that, more than that, the conduct in question amounted to the making of a protected disclosure. The employer, by following a fair process, would indeed enable them to advance that case, and enable itself then to give that consideration when deciding what to do.

83. Where the successful complaint before the tribunal is for detrimental treatment because of having made a protected disclosure, potentially, depending on the facts of the case, the grievance and/or discipline provisions of the Code may be found to have been engaged, or both, and a failure to follow either or both, to support an uplift under section 207A . The discipline provisions might apply (or also apply) if, for example, in a given case, the tribunal found that the issuing of a written warning was materially influenced by a protected disclosure, and no fair process had been followed."

47. What we take from that passage is that whether the grievance provisions of the ACAS Code or the disciplinary provisions or both sections of the Code should have been followed by the employer is to be judged not by reference to what we have determined but by reference to what happened at the time. This is logical because to be an unreasonable failure to comply with the Code the employer either did or ought to have realised that they should comply with the Code.

48. We need to ask whether the claimant raised a formal grievance by her letter of 26 February 2021, whether that engaged the ACAS Code on grievance procedures and whether there was an unreasonable failure to comply with it. We need to consider whether there was an obligation on the employer to follow the ACAS disciplinary code, taking into account what the employer alleged and bearing in mind, where relevant, the distinction between cases in which the employee is alleged to have done something culpable and those where capability concerns are due to ill health (for example) which are beyond their control.

49. However, whether the claim concerns a matter to which a relevant Code applies is a separate question.

50. In assessing whether s.207A TULRA is engaged we have to consider whether "the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies". We understand para.96 of HHJ Auerbach's judgment to mean that a close relationship between the disclosure and the formal grievance would be sufficient to mean that the proceedings concerned a matter to which the Code applied.

51. The present case differs from the factual situation in Zabelin. We have to consider whether the claim *concerns a matter* to which a Code applies in circumstances where a protected disclosure was oral and was therefore not a grievance which engaged the Code. However, we consider it is relevant whether or not the formal written grievance was closely related to the protected disclosure which was the reason or principle reason for the dismissal. Then the closely related concerns would be the subject of the claim – having been expressed both in the protected disclosure and in the formal grievance.

52. We need to consider whether the letter of 26 February 2021 (LB page 118) was a grievance. We remind ourselves of our findings in the liability judgment about the meeting of 23 February 2021 in particular at paragraph 105. In that meeting, the claimant raised concerns that she had about contradictions between implementing covid regulations and , as she saw it, the respondent failing to support employees who needed to take time off if they were unwell. We consider that by that she was informally raising a grievance in the sense of raising a concern, problem or complaint about workplace practices. Since that concern had not been raised in writing, the ACAS Code of Conduct relating to grievances was not engaged at that point. We found that raising that concern amounted to the making of a protected disclosure.

53. She raised her concern more formally by the letter at LB page 118 in which she referred to the protected disclosure the previous Tuesday. That letter provides a copy of her MED3 fit note but she linked her stress and consequent absence

from work to the respondent's management of their Covid-19 prevention measures. In particular we note the wording of the fourth paragraph:

> "But the past two to three weeks have led to an intolerable burden re honest and open symptom reporting, covid prevention measures, employer/employee duty of care and sick leave. I have tried to discuss this multiple times to get clarity – Tuesday being the last. As we're in the middle of a lethal pandemic, the pressure of second guessing and risking my & others' health/lives is too much."

54. She goes on to say that she is open to speaking late the following week or the week after preferably by phone. In that paragraph in particular she explains the consequences to her of the concern that she has about the way that the respondents manage symptom reporting and their covid prevention measures. The letter of 26 February 2021 also raises a concern about workplace practices and was a formal grievance. It was also clearly linked to the similar statements made by the claimant orally on 23 February 2021. In the first place the same or broadly similar concerns were stated. Secondly, she expressly refers to the 23 February statement about the same concerns.

55. The claimant had clearly raised in her schedule of loss that she considered an uplift for unreasonable failure to comply with a relevant code was applicable in the present case. She did not specify which ACAS Code of Practice she referred to (see RSB page 5). However, the prospect that she might argue that the Code of Conduct in relation to grievances arose. Mr Hine was called to give evidence to explain why the letter at page 118 had not been responded to. His answer was:

> *"I didn't see any point I'd already made the decision following the bombshell over memory that she would be leaving the company. I didn't see any point in taking the issue further."*

56. The claimant reiterated the question that, by the letter, she had offered to speak further about her concerns and Mr Hine said that he had not seen the point.

57. We found in our liability judgment that the alleged comment about memory was not made. Mr Hine had said at the liability stage that he had spoken to Mr Philip Cripps and Christopher Cripps about his decision after the claimant had left the room and he and his grandson had conducted the next meeting. His evidence was that, at that point, on 23 February, he had caught up with Philip Cripps and told him about the meeting and about the package that the respondent would offer or give the claimant. This appeared to be evidence that the decision to dismiss had been made on 23 February 2021 and yet the letter of dismissal was dated 1 March 2021 and sent some time later.

58. To the extent that Mr Hine's evidence was that he had sent the letter of dismissal before the claimant sent her letter on LB page 118, he is mistaken. Furthermore, there is clear reference to the contents of the letter of 26 February 2021 in Mr Hine's letter of 1 March 2021 by which he dismissed the claimant. Not only does he say he is sorry that the claimant has another ailment, he explicitly refers to the email in the penultimate paragraph and the claimant's expressed wish not to come into the shop. On any view, a decision to dismiss had not been

communicated to her by the date of this letter so she was still an employee and the obligation to investigate her grievance remained. There are 3 days between receipt of the claimant's formal grievance and communicating the decision to dismiss to her; the respondent appears to have presumed that the allegations were unfounded and proceeded to dismiss the claimant without any further formalities.

59. We are glad to see that the respondent has apparently now engaged external HR consultants and we were told that they would in future take advice should such a situation arise again. However, that does not avoid the conclusion that there was a total failure to follow the Code of Practice in relation to the claimant's grievance. That applies to grievances that have been presented in writing so it applied from the point when the claimant sent the letter at LB page 118 (SPI Spirits (UK) Ltd v Zabelin). The Code provides for a formal meeting to be held without delay (paragraph 33) to the statutory right to a companion at such a grievance meeting (paragraph 35), paragraph 40 requires the decision on what action to be taken to follow the grievance meeting and for the decision to be communicated in writing with the employee notified of the right to appeal. Paragraph 41 specifies the necessity to hold an appeal. None of these paragraphs were complied with. The only explanation for these failures is that the respondent did not see the point because the decision to dismiss had already been made. We do not think that provides an acceptable reason not to comply with the ACAS Code. There was an unreasonable failure to comply with all of the provisions of the Code set out in this paragraph.

60. Even if the decision to dismiss was made after the oral informal compliant by the claimant the letter was not drafted until after the claimant wrote her own written grievance. Potentially, had the respondent treated the claimant's letter as a grievance, they might have paused and investigated her concerns with cool heads and she might never have been dismissed because they might have reconsidered their decision. Her concerns were far from unreasonable.

61. We have not seen any mitigating factors and there was a total failure to deal with the grievance, instead the respondent confirmed the dismissal they had decided upon which was motivated by the oral communication of broadly the same contents as the grievance a communication which we decided was a protected disclosure. This seems to us to be a relatively serious situation.

62. However, in assessing the amount of uplift which is just to award under s.207A TULRCA, we also have in mind our conclusions on the applicability of the ACAS disciplinary code which are set out in the paragraphs which immediately follow and the overall effect on compensation. Taking things in the round, we consider it to be just and equitable to uplift the award of compensation by 20% for an unreasonable failure to follow the ACAS Code of Conduct on handling grievances.

63. It was also argued on behalf by the claimant that the ACAS Code of Conduct on disciplinary matters applied. The bullet point under paragraph 1 of the Code states that:

"• Disciplinary situations include misconduct and/poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted.

• Grievances are concerns, problems or complaints that employees raise with their employers."

64. There is always an element of unreality when considering whether a disciplinary code applies to a situation when the factual context the respondent claimed existed at the time of the decision to dismiss has been found not to have happened. The judgment we make is whether, on the facts we found, the respondent had an obligation to follow the ACAS Code of Conduct on disciplinary matters.

65. The respondent stated that they had dismissed because a statement made by the claimant suggested that she had a health problem that would have impacted or explained performance issues of a serious nature that they were perceiving. We rejected this. We rejected their assertion that the claimant said those words. However, we accepted that the context include one performance related concern which was raised in the meeting – the question of out of date gravy which had not been removed from a high shelf. The claimant's response was that she had put into effect a system to avoid that risk. In addition to the stock rotation point, the respondent had extended the probation for reasons to do with persistent absence by the claimant including for ill health.

66. It has been held that a disciplinary situation did not extend to a case in which the employer conducted a procedure to terminate an employee's employment as a result of incapacity due to ill health: Holmes v QinetiQ Ltd [2016]ICR 1016 EAT. The Code is limited, in our view, to internal procedures related to allegations of culpable misconduct or performance or some other form of culpable behaviour.

67. The explanation given for dismissal by the respondent, which we rejected, was, broadly speaking, capability related in the sense of whether the claimant had a medical condition affecting her performance. However, the background to the discussion did include elements of performance that the respondent considered might affect whether she would be confirmed in position: rotation of stock and the January extension of probation because of attendance. These are matters which involve allegations of culpable behaviour on the part of the claimant and would, on the face of it, engage the ACAS Code of Conduct on discipline.

68. The claimant was still in probation but we think that the respondent still needed to manage the probation fairly. The mere fact that she had less than two years' service – and therefore lacked the right to claim 'ordinary' unfair dismissal is irrelevant to whether the ACAS Code of Conduct on disciplinary applies to a situation or not. We see no reason why the fact that a probationary review was expected to take place by the end of March 2023 means that the principles of a fair process set out in the Code should not apply. Mr Hine's intention going into the meeting on 23 February 2023 was to state the (limited) ways in which the claimant's performance had fallen short and outline what was necessary for a successful conclusion to her probation. In the liability hearing, the claimant

frequently contrasted the relative formality of the January probation review meeting – which was recorded in writing with the reasons for the extension given – with the lack of warning that she was to be challenged about her performance on 23 February 2023.

69. Our view is that there is an obligation to follow the ACAS disciplinary code when managing probation. The separate question of whether, given a particular set of facts, there has been an unreasonable failure to follow the code would no doubt take into account the history of the probation and actions of the managers in instructing and monitoring performance. The consequence to the probationer of failure is that they are out of a job.

70. The particular breaches of the ACAS disciplinary code which are relevant in the present case are that the claimant was not invited to a probationary review meeting – she had no warning that that was to be the subject of the meeting; she was not informed of the particular ways in which she was alleged to have fallen short before Mr Hine made a decision about her conduct, and she was not informed that she could, if she wished, have a companion. The provision of the Code which states that the employer should decide on the action after they've seen the employee is one of the most fundamental. On our findings, the respondent formed a view about the claimant's culpability for performance related issues before asking her about them and intended to warn her that she would not be confirmed in probation.

71. We take into account the size of the operation. The ACAS disciplinary code is intended to be flexible and a small, family-run butchers cannot reasonably be expected to have the formal processes of a multi-national. Had they followed their own practice from January then there would be no unreasonable failure but we do not see any acceptable explanation for the unfair process followed in relation to the meeting on 23 February 2024.

72. Having said that, we are mindful of the decision we are about to explain in relation to the grievance which had greater impact on the claimant's continued employment. The losses were caused by the dismissal and the failure to follow a fair process leading up to the meeting at which the protected disclosures were made was part of the context but not causative of dismissal. The central importance of that meeting to the claimant's allegations and the respondent's defence means that the claim concerned that meeting to which the ACAS disciplinary code applied. We think it important to mark our view that probationers need a fair opportunity to explain themselves before a decision is taken about whether they should be confirmed in position or not. That principle can fairly be reflected by a 5% uplift in the compensation awarded.

73. It is just an equitable that there should be a 20% uplift for an unreasonable failure to comply with the ACAS Code of Conduct on grievances and a 5% uplift for an unreasonable failure to comply with the ACAS Code of Conduct on disciplinary procedures. The total uplift is 25%.

Preparation Time Order

74. The claimant has applied for preparation time order. That is an order that the paying party make a payment to the receiving party in respect of the receiving party's preparation time while not legally represented. It is available in respect of time spent working on the case except for time spent at any final hearing: Rule 7(2) of the Employment Tribunal Rules of Procedure 2013.

75. The particular trigger relied on by the claimant is that she argues that in a number of respects the respondent, or their representative, has acted:

> "vexatiously, abusively, disruptively or otherwise unreasonably in … the way that the proceedings (or part) have been conducted".

76. The claimant wrote indicating that she intended to make the application on 1 February 2024 and asked for more time to formulate it. The hours that she is claiming are in the schedule at RB page 58. It was apparent that there were a large number of alleged incidents connected with the litigation that the claimant relied on as amounting to unreasonable conduct and a fair opportunity needed to be given to the respondent to reply. Furthermore, at the remedy hearing, the respondent was represented by Mr Mawoko whereas Mr Munro had represented them at the liability stage. He himself had taken over conduct of the representation from a different fee-earner. We agreed to postpone consideration of the preparation time order to be done following written submission on the papers at least in part because it did not seem to us to be fair to the respondent that they did not have an opportunity for their representatives to search through the hearing file and their internal file of relevant documents and correspondence in order to respond to the particular allegations.

77. As with an application for a costs order this is a three stage test:

    a. Is the threshold test in rule 76(1)(a) met?

    b. Should we exercise our discretion in favour of making a preparation time order, and, if so

    c. What is the number of hours in respect of which the preparation time order should be made.

78. At the point of our deliberations on 20 March 2024 we had the benefit of written submissions from the claimant and also from the respondent. The claimant broke down the types of conduct into:

    a. alleged breaches of specific orders;

    b. breaches of the obligation to disclose all relevant documents whether they assist the party's case or not (which should more properly be described as a delay in complying with that obligation);

    c. four attempts to strike out the claimant's case which she describes as unwarranted and

    d. miscellaneous other behaviour.

79. The following chronology of the correspondence between the parties and the tribunal is culled from documents on the tribunal file and the correspondence between the claimant and the respondent's representative which is found in a number of different locations in the three different hearing files: the liability bundle, the remedy bundle and the remedy supplementary bundle.

80. On 20 February 2023 the respondent's representatives informed the tribunal that the parties had agreed a variation of extension of time within which witness statements had to be exchanged until 28 March 2023. On 26 March 2023, two days before the extended deadline, the claimant emailed the respondent stating that for reasons to do with extreme poor health of a very close family friend she would not be available to check her emails the following day. That email does not explicitly ask for a further extension of time.

81. The respondent's representative replied the following day stating that he was not prepared to extend the exchange date beyond 28 March 2023 and if the claimant was not in a position to exchange statement he would have to apply to strike out the claim (RSB page 23). The claimant had explained (RSB page 22) that she was taking a family member to hospital for lung cancer surgery on 27 March. So far as we know, the respondent had no reason to doubt the truthfulness of that explanation.

82. In her application she states that it had a great impact on her to read that email in the evening when she returned from hospital and that she immediately had to "jump online and start researching what a strike out was".

83. The following day, 28 March 2023, the claimant applied for an extension of time for witness statements on the basis that she was waiting for further documentation from the respondent which they had not yet disclosed and which she wished to reference in her statement. She made a lengthy and detailed application. On 3 April 2023 the respondent objected to the application for an extension of time and the disclosure application saying that all relevant documents had been provided and applied to strike out the claim on the basis of alleged non-compliance with the order for exchange witness statements and failure to actively pursue her claim.

84. The claimant, on 14 April 2023, put in a 4-page defence to that application and on 18 April 2023 the respondent wrote indicating that they had found and disclosed one additional document. They repeated the strike out warning.

85. On 27 April 2023, the claimant applied for an order for specific disclosure against the respondent referencing overlapping categories of documents to those referred to on 28 March. She specifically applied for payroll documentation and timesheets. She pointed out, accurately, that the respondent had stated in response to her holiday pay claim that they believed everything had been paid but would review their holiday documentation in the payroll records. It was therefore clear that the claimant was seeking documents relating to herself that were referred to in the respondent's grounds of response. They were, on the face of it, both relevant and likely to be necessary.

86. The respondent's response on 3 May 2023 did not engage with the claimant's application but stated that payslips and the P45 are in the bundle. The respondent's representative repeated the argument that the claim should be struck out because they alleged the claimant was deliberately not complying with the requirement to exchange witness statements.

87. The claimant's payslips are in the bundle at pages 123 to 128 and the last in time (LB page 128) does not include a payment of holiday pay. Further correspondence from the claimant of 15 May 2023 states she had accrued 14 days, asserts that holiday pay was not included in payslips and repeats that payslips were not what she was looking for. The respondent, on 31 May 2023, merely repeats the statement that all relevant documents are in the bundle and that the claim should be struck out for non-compliance and failure actively to pursue.

88. It is this exchange of correspondence that led to the 8 June 2023 order from Employment Judge Moore requiring the respondent to provide payroll records by 28 June 2023. Ultimately, the screen shot of payroll records for the claimant at LB page 147 was disclosed. It indicates that she had accrued 14 days' pay. According to the claimant she attempted to contact the named person with conduct on behalf of the respondent 11 times about compliance with the order and on 5 July 2023, 13 days after the date on which compliance should have taken place, Mr Munro emailed to provide the payroll records. He did not, in that email, (RSB page 24) state that he now has conduct of the claim or advise the claimant that the named individual previously with conduct is presently unfit for work. Despite having the opportunity to do so, the respondent in responding to the present application has not engaged with the detail of the claimant's complaint or set out anything to do with whether there were resource difficulties for them in this period.

89. The claimant replied the following day thanking Mr Munro for compliance and asking for an explanation for the delay but none was immediately forthcoming. Eventually, Mr Munro explained in about the second week of August that the person who previously had conduct was on long-term sick leave.

90. On 11 August the claimant wrote to remind Mr Munro that 14 August was the date for exchange of witness statements and she offered to exchange at 17.30 on that date. She was understatedly keen to have a simultaneous exchange and was working as a carer in dementia homes at that time with restrictive breaks during which she would have access to her emails to be able to send her witness statements.

91. It would clearly have been courteous for the respondent's representatives to have notified the claimant and the tribunal of the change of person with conduct of the proceedings as soon as it happened. However, there is no dispute that the original fee-earner was unwell. We do not know anything about when his illness started or at what point the firm, Peninsula, would have known that the condition was serious enough not to expect him to return to work within a reasonable period of time. That is a patently unsatisfactory state of affairs but there is some explanation for the delay.

92. We recall that Mr Hine said that he thought that the payroll records were internal documents and did not understand why the claimant should be entitled to them. Not only were they obviously relevant but, as things turned out, the respondent did not put forward any defence to the holiday pay claim at the liability hearing in the light of their own internal records that she had accrued 14 days' leave and the payslip records that indicated she had not been paid for them at the end of her employment.

93. The delay in complying with Judge Moore's order at only 13 days is not very long. While tribunal orders are expected to be adhered to, we are concerned with whether or not there has been unreasonable conduct of the proceedings, not whether there has been a more technical or marginal breach. However, in the context of the chronology that we have outlined above, delay in compliance called for an explanation and none was proffered even when sought. In their present submissions the respondent's representative does not explain the context of this failure in any more detail than was given when Mr Munro took over as fee-earner.

94. The background to Judge Moore's order was that the claimant had set out perfectly rational reasons why she believed that the payroll records were in existence and were necessary for a fair determination of the hearing. Her suggestion that witness statements should be delayed in order to incorporate that evidence was sensible, given the likely importance to the holiday pay claim, and would not have jeopardised the hearing that was then listed for more than six months in the future. The respondents replied by accusing the claimant of failing actively to pursue her claim and making frequent applications for her claim to be struck out when not only did they have the relevant documents but those documents showed the claimant's claim to be well founded. The suggestion that she was not actively pursuing the claim we think particularly hard to substantiate when one reads the detailed applications the claimant was making at that time.

95. We set out this chronology of the correspondence in some detail because, in her application for a preparation time order, the claimant has relied on parts of the chronology of events as amounting to alleged unreasonable conduct for more than one reason. It seems to us it is possible to overstate the seriousness of the behaviour if it is broken down by the nature of the conduct rather than looking at the chronology of events as they unfolded.

96. By August 2023, the claimant was getting ready for exchange on the 14 August, the date which had been stipulated by Judge Moore.

97. On 11 August 2023, in response to the claimant's long email at RSB page 26, Mr Munro apologised for the lack of contact, explained that his predecessor was likely to be on very long-term sick leave and said he needed to come up to speed with the matter but had conduct (claimant's submissions page 10).This is a perfectly professional email which sought to manage the claimant's expectations of time by stating that he needs to update the draft with the statements but should be in a position to give her information the following week about when they would be ready to exchange. Of course, an experienced litigation consultant should have sought agreement from the claimant for an extension of time and applied

to the tribunal for one. However, Mr Munro did not do so and did not revert to the claimant as he said he would.

98. On 23 August 2023 the claimant set out in an email the present state of litigation from her perspective. As we have said above, her work commitments meant that she could not send the emails at certain times of the day. She was unwilling to send the email to the respondent's representative unilaterally at a time convenient to her except to effect a mutual exchange. Although the tribunal is aware that professional representatives frequently hold documents without reading them and without releasing them to their clients for a period of time to facilitate simultaneous exchange and although Mr Munro did seek to give this reassurance to the claimant, we understand that the claimant, who was representing herself, may not have felt able to trust this assurance. We can understand why she wanted to exchange in the way that she did. Conversely, the stance taken by the respondents is not unusual. The problem was that set against the background of the respondent's previous antagonistic correspondence that we have outlined above, the trust between the parties appears to have been low. Our view is that each party's stance as to how the mechanics of exchange could be effected was reasonable but the lack of coming together led to a delay in exchange at this stage.

99. It is not clear to us exactly when the parties sent each other their witness statements; they may have sent their own witness statements to the tribunal before they sent them to each other. Eventually, on 19 October 2023, the six week check list was sent by the tribunal to the parties. The respondent replied on 30 October but by then the claimant had replied explaining some of the difficulties that had happened and the respondent's check list crossed with a strike out warning letter send by the tribunal on 31 October 2023. The respondent sent in their objection to that on 1 November 2023. By the time of the full merits hearing, it was not necessary for us to make a decision on that warning. The claimant accepted that she was ready to go ahead by the time that the hearing started but stated that her preparation had been truncated, made more onerous and more stressful as a result of the challenges to agree a date for exchange of witness statements.

100. There is one specific allegation of unreasonable conduct in the application in the miscellaneous category that we should make a comment on. At paragraph 7.5 the claimant complains that, by our judgment on 22 December 2023 the respondent was ordered to pay her 14 days' holiday pay. It was only following the remedy hearing that a judgment was issued that include the financial sum and the date from which interest would run if payment were not made. It is that second judgment which is the enforceable judgment for the money sum. The question for us is whether the respondent's failure to pay the claimant the holiday pay within a reasonable period of the judgment of 22 December is itself unreasonable conduct.

101. As we have said, once the payroll document was scrutinised there was no defence of any substance put forward to the holiday pay claim apart from the argument that they had paid her ex gratia more than they had been required to by giving her more notice than they were required to. That in law is not a defence to a holiday pay claim. The background was that the respondent had been

dragging their heels on disclosure, then did not make prompt realistic concessions and then failed to act proactively to make sure that he claimant was not out of pocket for longer than she needed to be. It seems that their request for bank account details to facilitate payment was made at the last minute before the remedy hearing. We do think that there is something unreasonable in this conduct given that, notwithstanding the lack of an judgment with a figure in it, it was perfectly clear how much the respondent should pay to the claimant.

102. We do not think that this has had an impact on the time spent by the claimant in preparation and the respondent has not, in substance, breached an order or judgment but this episode gives us a poor impression of the seriousness with which the respondent is taking our rulings. That seems to us to be relevant to our exercise of discretion and relevant to the question on whether, on other occasions, the respondent has acted in order to avoid fulfilling their obligations until the last possible opportunity.

103. We are of the view that the correspondence outlined in the chronology set out above was unreasonable conduct of the litigation. We do not set too high a bar for the tone of adversarial correspondence in litigation and remind ourselves that when parties are in dispute it is not unusual for points to be made robustly. That must be set against the overriding objective to avoid unnecessary formality, cost and delay and the parties' duty to cooperate with each other to assist the tribunal to achieve those objectives. On occasions, the respondent threatened to apply to strike out the claim and urged the tribunal to warn the claimant of the risk of striking out the claim when there was no realistic prospect that the tribunal would make such an order. The claimant was not to know that, however – particularly when reading the email for the first time.

104. We are not able to say whether this was the conduct of the respondent or of their representative or of both. On the one hand the respondent has, in relation to compliance with the order for disclosure, been dilatory in executing what was required of them and not consistent in the forbearance they expect of the claimant compared with the lack of forbearance they afford her. On the other hand, we do not accept the criticism the claimant makes in her section 8.1 about the respondent initially not proffering Mr Christopher Cripps as witness. There is no positive obligation on a party to put forward a witness who may harm your case and that contrasts with the obligation to disclosure all the relevant document whether they support your case or support that of the other side. There is no property in a witness. The claimant would have been at liberty to contact Mr Christopher Cripps and ask him to come to give evidence herself.

105. A six week time delay in informing the claimant that documents she sought had been destroyed at the relevant time is regrettable but it is not unreasonable conduct of the proceedings. It is an illustration of the inconsistent expectations in that the respondent was not as cooperative and responsive to the claimant as they appeared to expect her to be.

106. Section 8.2 of the application is an example of the claimant repeating the same conduct under a different type of complaint. The criticism is valid but repeated. The respondent's representative does repeatedly say that the claimant has had everything she is entitled to when she had not. Not only did they subsequently

disclosure the payroll records which established her holiday pay claim, but they had found an additional unrelated document.

107. The claimant complains about the arrangements for inserting photographs of relevant parts of the shop in the hearing file. We find that, certain photographs were disclosed on Monday or Tuesday before the hearing was due to start the following Monday. The claimant responded (RSB page 29 to 31) on Tuesday 31 October 2023 asking for specific photographs to be taken and naming three views that she argued were relevant. At the liability hearing, Mr Munro said that her request had been made on Thursday before the hearing was due to start and it was too late to action. We can see from the documentation it was in fact made on Tuesday and only the day after the photographs had been sent to her. The respondent did not make reasonable attempts to accommodate the claimant's request; this was unreasonable but caused little additional work. However, we accept that it caused uncertainty and unnecessary aggravation to the claimant when she was preparing for the final hearing. Ultimately, she was able to establish the relevant points from the photographs available but it is clear that the respondent could and should have cooperated with the claimant in relation to this.

108. The matters the claimant outlines in section 8.4 of her application are more at the level of normal preparation infelicities when compared with the other inter-parties correspondence we have looked at.

109. In section 9 the claimant reverts to the chronology and threats to strike out the claimant's case. The same conduct is relied on and the passage in section 9 does not set out anything new but explains why it felt like it put pressure upon the claimant. The email of 27 March 2023 at RSB page 23 was when the respondent, through their representative, refused consent to an extension of time for witness statements and informed the claimant that they would apply to strike out the claim if she did not exchange witness statements the following day. We accept that this was an attempt to put pressure on the claimant at a time when she was vulnerable and known by the respondent's representatives to be vulnerable.

110. Although this really repeats the criticism we have already made of the exchange from March through to June 2023 we find that exchange to be unreasonable conduct of the litigation for the following reasons:

    a. The respondent, through their representatives, seemed to be trying to put the claimant under pressure when she explained personal circumstances which meant she was unavailable.

    b. The threats included that they would apply for strike out and unless orders when there was no reasonable basis for such an application because the claimant's application for an extension of time for the witness statements made about seven months before the hearing, was done on the reasonable basis that she wished them to be able to cover missing documents as well as personal circumstances. It is hard to reach any other conclusion than that an experienced litigator must have known the tribunal was highly unlikely to strike out the claim in

those circumstances and therefore that such threats were probably intended to put the claimant under pressure (hence our conclusion at para.110.a. above).

c. Ultimately, despite resisting the disclosure application, it resulted in the respondent disclosing a document that demonstrated that the claimant's claim for holiday pay was correct.

d. There are therefore two unreasonable aspects to this exchange in that the respondent did not engage with the application for disclosure but sought instead to make the fact of the application and the claimant's application for an extension of time the basis for a spurious strike out application.

e. This goes beyond the normal level of disagreement that one might expect in robust exchanges between opposing parties and beyond threatening (and making) applications which are somewhat speculative. The threatened applications for strike out had no real forensic justification. It is particularly ludicrous to say that the claimant was not pursuing the claim as the respondent's representative did on 3 April 2023.

f. It is against that background that the failure to comply promptly with the order for disclosure required an explanation that was not forthcoming although the delay was relatively modest at only 13 days.

111. The other matters that the claimant refers to in section 10 do not add to the unreasonable conduct which we consider it to be just to take into account when considering the making of the preparation time order.

112. As to section 10(b), Mr Hine gave evidence as he recollected it but we found that he was mistaken. There were a number of points where the respondent's witnesses did not agree with each other and where one or more witness's oral evidence did not match contemporaneous documents. As a result, some of their evidence was found not to be reliable. But we do not find this to have been a concerted attempt to mislead the tribunal or unreasonable conduct of the proceedings. Similarly, when Mr Hine repeated his account of what the claimant was alleged to have said on 23 February 2021 (which account we have rejected), is not uncommon for persons to hold to their previous beliefs. That does not necessarily suggest a lack of respect of the tribunal's judgment or an inability to accept it. We find the dragging of heels in the preparation of the case and a failure to progress the claim in accordance with normal professional standards to be more disrespectful and potentially more disruptive to a fair process.

113. We can understand why the claimant is bruised by the consequences of the respondent's evidence being, to her mind, an accusation that she is lying. It is frequently the case in litigation that a party's evidence amounts to an accusation that the other side is untruthful. We do not think in the present case, without more, that this is sufficient to amount to unreasonable conduct of the proceedings. It is, in effect, the respondent defending themselves.

114. Where the claimant in section 10(d) states that Mr Hine accused her in the remedy hearing of telling untruths this appears to be a reference to the examination in chief of Mr Hine about the reasons why he did not investigate her grievance letter at LB page 118 where he stated that, "So far as we were concerned this was untrue".

115. A preparation time order is not intended to be punitive. Part of the reason that we decided there was an unreasonable failure to comply with the grievance was because they did not engage with whether or not the claimant's complaints were true. The ACAS uplift reflects our view of the respondent's conduct here. It is not separate unreasonable conduct which should increase the amount of a preparation time order.

116. Based on the above, we consider that there has been unreasonable conduct of the litigation. We have decided to exercise our discretion in favour of making a preparation time order for the following reasons:

    a. There was a failure on the part of the respondent to engage with the disclosure application and that delayed production of the document which ultimately showed that the claimant's holiday pay claim was made out as the respondent accepted at the hearing when they raised no defence to it. They had not put forward any properly arguable defence.

    b. There were four or five applications or warnings of strike out or requests for strike out warning letters in the period March to June 2023 for which there was no forensic justification. We conclude this must have been intended to put pressure on the claimant within the litigation. No explanation has been put forward for that.

    c. There is an element of a lack of respect for the tribunal authority in the inconsistent approach on the part of the respondent to what they expect of the claimant and what they deliver when they are ordered to provide documents.

    d. We consider that the failure to make attempts late in the day to get the photographs the claimant wants supports our conclusion that the respondent's attitude was one of non-cooperation.

    e. We also take into account that there was no contact towards the claimant at all from June to August 2023 bar one email on 5 July 2023. We postponed consideration of the preparation time application to enable the respondent to have the opportunity to put forward any explanation, given the circumstances of Mr Munro's takeover of conduct from a colleague who was on long-term sick leave. Nothing relevant has been forthcoming. The respondent has not explained why there was the absence of contact that the claimant found so unsettling at that point where she was involved in preparation for witness statements and just coming out of an extremely antagonistic period of correspondence. We accept that this meant that she had to

spend more time than would have been normally expected to look up the procedure and to worry about what she needed to do next.

77 The extra work that she carried out is clearly identifiable by looking at the 4-page application for an extension of time for the preparation of witness statements and disclosure in March 2023 and the 4-page defence to the strike out application. We also accept that she was probably caused additional effort in sending chasing emails and general coping with uncertainty and stress when she should have been able to concentrate on preparation of her witness statement for the final hearing.

117. At RB page 58 the claimant sets out the hours that she has spent preparing for the hearing. Overall they seem to us to be a reasonable estimates of the amount of preparation time that was involved, if anything, possibly an underestimate. However, it is clear that this is the time spent preparing the claim as a whole. We think it right to seek to identify what additional work is associated with the unreasonable conduct that we have found on the part of the respondent or their representatives.

118. In the final five lines of page 58 the claimant identifies 16 hours of work as having been associated with responding to the unreasonable conduct. We accept that that work was caused by the respondent's unreasonable conduct. The hourly rate for a preparation time order as at 1 May 2023 is £43. The applicable hourly rate for the previous year was £42. Doing the best we can based on the quantity of correspondence and the chronology set out above, we think approximately 5 hours would have been incurred prior to 1 May 2023 and should be reimbursed at £43 an hour, making £210. 11 hours should be reimbursed at £43 an hour on the basis that it was time spent after 1 May 2023. That makes £473. The total preparation time order will be of £683.

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Employment Judge George

Date: …7 May 2024……..

Sent to the parties on: 7 May 2024

For the Tribunal Office