Neutral Citation Number: [2024] EAT 122

Case No: EA-2021-000204-RS

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 31 July 2024

**Before** :

**HIS HONOUR JUDGE AUERBACH**

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**Between :**

**N NOTARO HOMES LTD**

**Appellant**

**- and –**

**1) MISS C KEIRLE**
**2) MRS L NASH**
**3) MRS J OWENS**
**4) MISS J MEAD**

**Respondents**

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**Mr E McFarlane** (consultant, Peninsula Business Services Limited) for the **Appellant**

**The Respondents** did not appear and were not represented

Hearing date: 26 June 2024

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# JUDGMENT

## SUMMARY

**UNFAIR DISMISSAL – Compensatory Award**

The claimants in the employment tribunal were dismissed for the given reason of having made certain social media posts. The tribunal found that this was a pretext and that the true reason why each of them was dismissed was for having made protected disclosures.

For each claimant the tribunal found that there had been a social media post that amounted to culpable or blameworthy conduct. It also found in each case that such conduct had caused or contributed to the dismissal. The claimants did not appeal or cross-appeal from those findings.

The tribunal went on to find that, in the circumstances of these cases, it was not just and equitable to make any reduction to the claimants' compensatory awards on account of such conduct.

The respondent appealed. The live ground of appeal contended that, having found that there was contributory conduct, the tribunal was obliged to make *some* reduction to the compensatory awards.

**Held**: Although some reduction to the compensatory award will, in most usual cases, follow from a finding of contributory conduct, it is not the law that there must necessarily be some reduction in every such case. The tribunal did not err in deciding not to make any such reduction on the facts of this case. *Dicta* in **Optikinetics Limited v Whooley** [1999] ICR 984 and **British Gas Trading Limited v Price** UKEAT/0326/15 considered.

The appeal was dismissed.

**HIS HONOUR JUDGE AUERBACH:**

## Introduction

1. The point of law raised by this appeal can be shortly stated. Section 123 **Employment Rights Act 1996** concerns the compensatory award that a tribunal may make to a successful complainant of unfair dismissal. Section 123(6) provides as follows:

> **"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."**

2. If an employment tribunal finds that action of the employee caused or contributed to the dismissal, is it open to the tribunal to go on to decide that it is not just and equitable to reduce the compensatory award at all; or does the law require it to impose some reduction, however small?

## The Facts and the Employment Tribunal's Decisions

3. I will refer to the parties as they were in the employment tribunal, as claimants and respondent. The relevant factual background, and the material parts of the employment tribunal's decisions in this case, are as follows.

4. The respondent operates registered care homes. Five employees who had been employed by it in various capacities claimed that they had been unfairly dismissed for making multiple protected disclosures. They were all litigants in person. Four of them succeeded in their claims.

5. All of those four claimants were dismissed by the same person, purportedly for breaches of the respondent's social media policy. However, in its decision arising from a liability hearing, the tribunal found that this was not the true reason why any of them was dismissed. It is also clear that this was not a case where the tribunal found that the making of the protected disclosures was the principal reason, but social media activity was also a contributing reason, for the dismissals. The protected disclosures were *the* reason for the dismissals of these four claimants. Their social media

activity was found by the tribunal to have been, in effect, the pretext or cloak for the dismissals.

6. There was then a remedy hearing before the same judge, EJ Midgley, sitting at Bristol, at which a number of issues were considered. In its remedy decision the tribunal identified that the respondent's representative raised the argument in his closing oral submissions, that both the basic and compensatory awards should be reduced pursuant, respectively, to sections 122(2) and 123(6) of the **1996 Act**, and suggested that the appropriate reduction would be 10%.

7. The tribunal's self-direction as to the law on this aspect was as follows:

> **"45. A Tribunal may reduce the amount of the compensatory award where it finds that the dismissal was to any extent caused or contributed to by any action of the complainant' (s123(6) ERA 1996).**
>
> **46. A similar power is contained in relation to the basic award in s.122(2) ERA in relation to any conduct which occurred before the dismissal, however, that provision does not contain the same causative requirement which exists in s.123(6); the Tribunal therefore has a broader discretion to reduce the basic award where it considers that it would be just and equitable (see Optikinetics Ltd v Whooley [1999] ICR 984,EAT).**
>
> **47. Three factors must be satisfied if the tribunal is to find contributory conduct (see Nelson v BBC (No.2) 1980 ICR 110,CA): 47.1. the conduct must be culpable or blameworthy 47.2. the conduct must have actually caused or contributed to the dismissal, and 47.3. it must be just and equitable to reduce the award by the proportion specified**
>
> **48. Provided these three factors are satisfied, the fact that the dismissal was automatically, as opposed to ordinarily, unfair is of no relevance (Audere Medical Services Ltd v Sanderson EAT 0409/12).**
>
> **49. In determining whether particular conduct is culpable or blameworthy, the tribunal must focus on what the employee did or failed to do, not on the employer's assessment of how wrongful the employee's conduct was (Steen v ASP Packaging Ltd [2014] ICR 56, EAT)."**

8. Further on, the tribunal considered, for each of the claimants in turn, the various comments that each of them had posted on social media, and which had been relied upon as the pretexts for dismissing them, as set out in its earlier liability judgment. The relevant passage in relation to the first of them, Ms Nash, was as follows:

> **"74.1. In my view, in light of the findings made in the Judgment in relation to Mr Sibanda's conduct at the meeting on 22 January 2018, there was nothing blameworthy**

> **or culpable in Miss Nash's comments about the meeting. However, in casting aspersions directly at Mr Sibanda, and in openly criticising the respondent's conduct concerning its payment of its staff's wages on social media the claimant did act in a culpable and blameworthy fashion when viewed objectively.**
>
> **74.2. That must be considered in the context in which the respondent had regularly failed to pay staff in full or on time, and in circumstances where the respondent's social media policy that was in place at the time was identified in paragraph 35 of the Judgment. The respondent clearly viewed that wording as lacking clarity because thought it necessary to send out a memo as described in paragraph 122 of the Judgment.**
>
> **74.3. I am satisfied that the conduct contributed to Miss Nash's dismissal, although it was not the reason or principal reason for it; I have found that was her protected disclosures. However in the circumstances where the respondent seized on the opportunity to dismiss Miss Nash in relation to that conduct because she had blown the whistle, and where the dismissing officer accepted that the conduct did not constitute gross misconduct and merit dismissal, I find it would not be just and equitable to reduce the award on the grounds of contributory fault."**

9. The tribunal went on to find, in relation to each of the other successful claimants, that each had made a post on social media which was culpable and blameworthy and which did contribute to her dismissal; but that, for the same reasons as it had set out at [74.3] in relation to Ms Nash, it would not be just and equitable to reduce any of their compensatory awards on that basis.

10. The tribunal went on to state that, for the same reasons, it would not be just and equitable to make any reduction pursuant to section 122(2) of any of the basic awards.

11. The relevant paragraph of the remedy judgment is as follows.

> **"The claimants committed culpable or blameworthy conduct in breaching the social media policy. The conducted contributed to their dismissals, but it is not just and equitable to reduce the award of compensation pursuant to ss. 123(6) or 122(2) EAT 1996."**

## The Appeal

12. This is the respondent's appeal. One ground was permitted, at a rule 3(10) hearing, to proceed to a full appeal hearing. It contends that, having found, for each of the four claimants, that there was culpable or blameworthy conduct which contributed to her dismissal, the tribunal erred in failing then, in each case, to make *some* reduction to the compensatory award, and erred in considering that it had

the discretion to decide whether to do so or not. The tribunal erred in relying upon its finding at [74] that the respondent had seized on an opportunity to dismiss the claimants. That was an irrelevance.

13. For various reasons, each of the affected claimants decided not to proactively contest this appeal. There was also no cross-appeal by any of them from the decision that there was some culpable or blameworthy conduct on the part of each of them which also caused or contributed to their respective dismissals. In these circumstances, at the hearing of the appeal only the respondent was represented. Its representative, Mr McFarlane, properly accepted that I still needed to be persuaded that the tribunal had erred in law as contended. He also fairly raised some points which it occurred to him might have been advanced by the claimants had they taken part.

## The Law

14. Unfair dismissal legislation had its origin in the **Industrial Relations Act 1971**. When that Act was repealed by the **Trade Union and Labour Relations Act 1974**, certain of its provisions were substantially re-enacted in schedule 1. That included provision, at paragraph 17, enabling a complaint to be presented to an industrial tribunal (as employment tribunals were then called) of unfair dismissal. That section provided that the tribunal could, in respect of a well-founded complaint, make a recommendation of reinstatement or re-engagement. But, if it did not do so, or it did, but the recommendation was not complied with, it "shall make an award of compensation".

15. Paragraph 19 set out the general principles as to assessment of such compensation, defining, for these purposes, the recipient of the award as "the aggrieved party". Paragraph 19(3) provided:

> **"Where the industrial tribunal finds that the matters to which the complaint relates were to any extent caused or contributed to by any action of the aggrieved party in connection with those matters, the tribunal shall reduce its assessment of his loss to such extent as, having regard to that finding, the tribunal considers just and equitable."**

16. The **Employment Protection Act 1975** then introduced a new regime of remedies for unfair dismissal, including provision for an award of compensation to consist of a basic award and a

compensatory award. As to the basic award section 75(7) provided:

> "**Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall, except in a case where the dismissal was by reason of redundancy, reduce the amount of the basic award by such proportion as it considers just and equitable having regard to that finding.**"

17. As to the compensatory award section 76(6) provided:

> "**Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.**"

18. In **Robert Whiting Designs Limited v Lamb** [1977] ICR 89 the employee admitted to having, following promotion to a managerial role, improperly arranged for bonus payments to be made to himself; but did not admit that he had dishonestly done so. His dismissal was held by the tribunal to be unfair because the decision was announced at the start of the disciplinary interview. The tribunal assessed the employee's contribution at 10% and reduced the basic and compensatory awards by that amount. The employer appealed the finding of unfair dismissal and the decision to reduce the award only by 10%. The employee did not appeal or cross-appeal in respect of the 10% reduction, but his counsel argued that there should in law have been no reduction at all and, hence, there should be "no interference with the sum awarded".

19. At 90F-H the EAT said:

> **"We are unanimously of the opinion that his conduct was deserving of censure and should have been categorised as a serious breach of trust and improper conduct by an employee of managerial status. Nevertheless, it never justified the epithet of dishonesty."**

20. The EAT went on to uphold the tribunal's decision that the dismissal was unfair because it was decided upon prior to undertaking an enquiry and seeking an explanation. It also considered that there was plenty of evidence to support the tribunal's finding, albeit on the balance of probabilities, that the real reason for the dismissal was that the employee was regarded as not good enough in the

new role. "Consequently the case has to be approached on the basis that the employers put forward the wrong reason when they alleged that he had admitted dishonesty."

21. In relation to the award, the EAT then considered the argument for the employee that, as the purported reason for dismissal, whether alleging dishonesty or grave misconduct, had been found to be a bogus reason, the real reason being the failure to measure up to the new job, there should have been no reduction, because the conduct had not caused or contributed to the *real* reason.

22. The EAT noted the change from para 19(3) of schedule 1 of the **1974 Act** referring to cause or contribution to "the matters to which the complaint relates", to section 76(6) of the **1975 Act** referring to cause or contribution to "the dismissal". But the latter was just a neater and more cogent formulation. In any event, in its ordinary meaning "the dismissal" could not be circumscribed to refer only to the context of the real reason for dismissal. In this case: "[t]he employee's conduct certainly contributed to his dismissal in the sense that it was a factor in the minds of the employers. Put another way, the real reason for dismissal was not exclusive of all other matters and a bogus reason does not necessarily shut out the employer completely if there was material to support the reason relied upon." With the consent of the parties the EAT determined that there should be a reduction of 20%.

23. **The Employment Protection (Consolidation) Act 1978** replaced the previous statutory provisions relating to unfair dismissal. The wording of section 73(7) and section 74(6) replaced, in identical terms, the previous wording of sections 75(5) and 76(6) of the **1975 Act** relating to reduction of, respectively, the basic and compensatory awards.

24. The wording of section 73(7), relating to reduction of the basic award, was subsequently replaced, by virtue of changes made by the **Employment Act 1980** and then the **Employment Act 1982**, by sub-sections 73(7A) and (7B). The former provided for a reduction in a case where the claimant unreasonably refused an order of reinstatement. The latter provided:

> **"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."**

25. In **Warrilow v Robert Walker Limited** [1984] IRLR 304 the respondents manufactured confectionery. A pallet of chocolate Brazils was stolen by a van driver. The appellant, a fork lift driver, was dismissed on the basis of collusion with the driver. The dismissal was found to be unfair, in particular because of a lack of reasonably sufficient investigation; but the tribunal found that the appellant was negligent in relation to systems which enabled the van driver to remove the goods undetected. It found his failure to take steps to safeguard the goods was blameworthy and assessed his contribution at 80%. He appealed that decision.

26. The appeal had three strands. The first contended that the tribunal erred in finding the appellant's conduct to be blameworthy. The second was expressed by the EAT, at [13], thus:

> **"The second ground of appeal is that the finding of blameworthy conduct causative of the loss and therefore of the dismissal was not just and equitable and that the amount of the award should not have been reduced at all."**

27. The third was that the reduction of 80% was perverse.

28. The EAT, by a majority, dismissed the appeal.

29. As to the second strand of challenge the majority's conclusion at [19] was:

> **"The question of what is just and equitable goes to the proportion of reduction and not to the question whether there should be any reduction at all. But, quite apart from that aspect of the argument of the appellant, it seems to the majority that the Tribunal, having found as a fact that the appellant was to blame, was fully entitled and obliged to reduce the award to some extent."**

30. They went on to hold that they could not say that a reduction of 80% was perverse. So the appeal overall was dismissed.

31. In **Parker Foundry Limited v Slack** [1992] ICR 302 (CA) Mr Slack was dismissed for

fighting with another employee, Mr Whitmore. The tribunal held the dismissal to be unfair, because the employer had relied upon the statement of a witness who considered Mr Slack to be the aggressor, which had not been disclosed to him. The tribunal however reduced his compensation by 50%. The EAT dismissed a cross-appeal by Mr Slack in relation to that reduction.

32. Mr Slack appealed to the Court of Appeal. He contended that the tribunal had erred, when making the reduction, in failing to consider what had happened to Mr Whitmore, who had only been suspended without pay for two weeks, and who had much shorter service than Mr Slack. Counsel for Mr Slack relied upon the wording of section 74(1) of the **1978 Act**, which provided that, subject to the following provisions, the amount of the compensatory award should be "such amount as the tribunal considers just and equitable in all the circumstances". So, he argued, all the circumstances should also be considered under section 76(6), which should have included what happened to Mr Whitmore. Counsel for the employer, Mr Sales, responded that it was significant that the words "in all the circumstances" did not appear in section 76(6).

33. At 307B – D Woolf LJ said:

> **"It is right to say that there is no express indication in subsection (6) that that is the only matter to which the tribunal is to have regard. However, speaking for myself I consider there is considerable force in Ms Sales' submission that that is the correct literation interpretation of subsection (6). That this is so is confirmed when attention is paid to the similar language contained in section 1 of the Law Reform (Contributory Negligence) Act 1945 which refers to "just and equitable". In a situation where the court is performing the task of apportioning responsibility under the Act of 1945, the matter with which the court is primarily concerned is the extent to which a defendant, who succeeds in showing that a plaintiff has caused an accident, was himself responsible for that very accident. The court's attention is therefore focussed on that matter and the extent to which the complainant's own conduct caused or contributed to his dismissal."**

34. He went on to conclude, at 308A-B, that, in relation to the basic award, under section 73(7B), the tribunal was "not required or indeed entitled to take into account what happened to the other employee in this case…".

35. Further on, Woolf LJ turned to **Warrilow**, noting that counsel had drawn attention to paragraph 19. At 309G he said:

> "**Mr. Gastowicz draws attention to the approach to 'just and equitable' in that passage. However, I see nothing in what Tudor Evans J said there, on behalf of the majority of the tribunal, which is inconsistent with what has been said already in the course of this judgment that, in considering the two subsections, what the tribunal is confined to taking into account is the conduct of the complainant (here Mr Slack) and not what happened to a fellow employee."**

36. Woolf LJ concluded that the appeal should be dismissed. Balcombe and Glidewell LLJ gave short speeches concurring with the material parts of Woolf LJ's reasoning.

37. The **1978 Act** was superseded by the **Employment Rights Act 1996**. Section 122(1) and (2) reproduced, verbatim (apart from some clarifying repunctuation and consequential changes to cross-referencing), sections 73(7A) and (7B) of the **1978 Act** (as amended in 1980 and 1982). Sections 123(1) and (6) reproduced verbatim sections 74(1) and (6) of the **1978 Act**. I have set out section 123(6) at the start of my present decision.

38. In **Optikinetics Limited v Whooley** [1999] ICR 984 the employee was dismissed for asking a more junior employee to help him with a private job, during the employer's time. The tribunal found the dismissal to be unfair because it found that, while this was misconduct, no reasonable employer could have imposed the sanction of dismissal for it. It went on to find that the conduct contributed to the dismissal, but it did not find it just and equitable that the basic or compensatory awards should be reduced at all. The tribunal (as cited by the EAT at 988B-D) said: "This finding reflects our view on the facts that the penalty imposed of summary dismissal was grossly proportionate to the misconduct."

39. At page 989 the EAT drew six propositions from the previous authorities, the third of which was the following:

> **"Once blameworthy conduct causing, in whole or in part, the dismissal has been found, the tribunal must reduce the compensatory award by such proportion as it considers**

> **just and equitable. It must make a reduction: see *Parker Foundry Ltd v Slack* [1992] ICR 302, 309, per Woolf LJ, approving the approach of the appeal tribunal in *Warrilow v Robert Walker Ltd* [1984] IRLR 304, 306, para 19.**"

40. In relation to the compensatory award it went on to conclude, at 989F-G:

> **"The tribunal found that the applicant was guilty of blameworthy or culpable conduct in our judgment and that such conduct was causally linked to the dismissal. At that stage, see proposition (3) above, it was not open to the tribunal to hold that it was not just and equitable to reduce the compensatory award at all. Their discretion was limited under section 123(6) to determine what proportionate reduction was appropriate. Further, it was not open to them to override their finding of causative conduct on the part of the applicant by reference to the conduct of employer in imposing too severe a penalty. For these reasons the tribunal fell into error in failing to reduce the compensatory award by such proportion as they considered just and equitable."**

41. The same did not, however, apply in relation to the basic award. The appeal was therefore allowed, in relation to the tribunal's failure to make any reduction in the compensatory award. The parties agreed to the EAT itself making that assessment, and it decided upon a reduction of 20%.

42. **British Gas Trading Limited v Price** UKEAT/0326/15, 22 March 2016 was a decision of Simler P, then the President of the EAT. The employee had been dismissed for her conduct in an altercation with a colleague. The tribunal found that the dismissal was procedurally unfair and, taking into account of all the mitigating circumstances, that dismissal was beyond the range of reasonable sanctions. The tribunal found that the claimant's conduct was, however, plainly culpable, and had led to the disciplinary proceedings. But, as cited by the EAT at [9], it continued:

> **"However, in my view, it was not that conduct that led or contributed to her dismissal. What led to her dismissal was the Respondent's fundamental failure properly to consider and take account of the mitigating circumstances. … I therefore do not find that the Clamiant contributed to her dismissal to any extent and I do not consider that it is just and equitable to reduce either her basic or her contributory award."**

43. After setting out sections 122(2) and 123(6) of the **1996 Act**, Simler P observed at [12] that both provisions "plainly focus on the conduct of the employee and not on the conduct of the employer." She then set out the six propositions that the EAT in **Whooley** had derived from the earlier authorities. She then said this at [13].

> **"Both counsel accept the correctness of those principles save for a small qualification by Mr Halliday, who cavils at the conclusion identified at (3) that the Tribunal must make a reduction once blameworthy conduct causing, in whole or in part, the dismissal has been found. In his submission, Parker Foundry Ltd v Slack [1992] ICR 302 is not authority for that. Although not the subject of full argument because the point was not directly relevant, I am not sure he is correct. It seems to me that the proper approach here is that having found that conduct did cause or contribute to the dismissal, a Tribunal is required to consider reducing the amount of the compensatory award and to do so by such proportion as it considers just and equitable having regard to "that finding". In other words, in exercising this discretion the Tribunal must have regard to the finding that the actions of the employee contributed to the dismissal. While the words "just and equitable" in section 123(6) give the Tribunal a discretion, that discretion is expressly limited to considering what is just and equitable having regard to the extent to which the contributory conduct found contributed to the dismissal. Given that, it is difficult to envisage circumstances, although I do not altogether rule them out, that would justify a conclusion that it would not be just and equitable to reduce the award at all when there has been a finding that the Claimant's blameworthy conduct caused or contributed to the dismissal."**

44. Simler P went on to consider, at [19] and following, the question on which the tribunal was said to have erred, being "did the culpable conduct cause or contribute to any extent to the Claimant's dismissal?" She noted that in many cases the answer will be obvious, but there may be cases where "an evaluative judgment must be made as to whether the conduct was a legal contributing or an effective cause; or to put it another way, whether dismissal was a direct and natural consequence of the conduct."

45. But in the present case the tribunal did not find that the chain of causation was broken; and the claimant "was not dismissed for something radically or altogether different from the original misconduct alleged." It was impossible to conclude on the tribunal's findings that the claimant's conduct made no contribution at all. At best there were two causes, each of which contributed to the dismissal to different extents. [20] The tribunal erred in confusing the causation of the dismissal with the causation of the unfairness of the dismissal. The fallacious reasoning had also infected the tribunal's approach to section 122(2). The appeal was allowed.

46. I can deal more briefly with two other authorities: **Swallow Security Services Limited v Millicent** UKEAT/0297/08 and **Carmelli Bakeries Ltd v Benali** UKEAT/0616/12. These hold that,

where the facts found point to the conclusion that culpable or blameworthy conduct by the employee caused or contributed to the dismissal, section 123(6) requires the tribunal to consider whether to reduce the compensatory award, and, as necessary to raise the matter for submissions, even if the employer has not specifically raised the matter. In **Benali** the EAT observed at [45] that the tribunal was, in that case, for that reason "bound to consider whether it would be just and equitable to reduce the awards having regard to their findings" and at [47] that it erred "in failing to consider whether and if so to what extent it was just and equitable to reduce the compensatory award."

## The Respondent's Arguments

47. The main planks of Mr McFarlane's arguments may be summarised as follows.

48. The present tribunal erred by stating at [45] that where a tribunal finds that the dismissal was caused or contributed to any extent by action of the claimant it "may" reduce the award. Section 123(6) states "shall", not "may".

49. Mr McFarlane effectively conceded in his skeleton that the issue in **Slack** was a different one, being whether the treatment of another employee could in law be a relevant consideration, and that **Slack** was not, as such, determinative of the issue raised by this appeal. However, he submitted that it "reviewed and approved" **Warrilow** without any adverse comment.

50. **Warrilow** did, he submitted, deal with the point at issue in this appeal, and he relied on the statement, at [19] that the tribunal was entitled "and obliged" to reduce the award to some extent.

51. **Price** did not rule out altogether the possibility that there might *not* be a reduction of a compensatory award following a finding that there had been causative conduct, leaving that question for another day. But the basis on which this was contemplated in **Price** did not emerge.

52. That the use of the word "shall", rather than "may" in section 123(6) had the significance that

he attributed to it, could be seen, he argued, by comparing section 207A **Trade Union and Labour Relations (Consolidation) Act 1992**, whereby, if there has been an unreasonable failure to comply with a relevant Code of Practice, the tribunal "may", if it considers it just and equitable to do so, reduce an award; and section **38 Employment Act 2002**, whereby, if there has been a failure at the relevant time to provide a written statement of terms, the tribunal "must" (save as provided) award the lower amount and "may" if it considers it just and equitable in all the circumstances award the higher amount. Parliament had also amended the provisions of section 123 on a number of occasions over the years, but had not taken the opportunity to amend the wording of this particular subsection.

53. Mr McFarlane also submitted that there were good policy reasons in support of his interpretation, which would support good industrial relations, by ensuring that culpable and blameworthy conduct attracted some consequences, provide incentives to settlement of claims, and promote certainty of outcomes.

54. Mr McFarlane also submitted that a "proportion" is "necessarily and mathematically an amount that is greater than zero, relative to the whole, or else it is not a proportion."

55. Mr McFarlane acknowledged in his skeleton that, for the claimants, it might have been said that **Warrilow** was incorrectly decided and **Slack** not on point, or *per incuriam* in so far as it followed **Warrilow**, so that the EAT was not bound to follow it (see **Palfrey v Transco plc** [2004] IRLR 816 at [20]). He suggested that perhaps an Article 10 argument could also be mounted in this case, given the reliance on social media comments, though no such argument was run in the tribunal below.

56. In oral submissions Mr McFarlane confirmed that his position was that proposition 3 in **Warrilow** is correct, or, at least, that there was no sufficient basis for me not to follow it, applying the guidance in **British Gas Trading Ltd v Lock** [2016] ICR 503 (EAT). The remarks in **Price** were, he submitted, *obiter* and, he implicitly submitted, wrong.

57. In discussion Mr McFarlane accepted that, though the authorities discourage tinkering, his interpretation would not preclude the tribunal from making a very small or nominal percentage reduction. He recalled to mind **Toal v GB Oils Ltd** [2013] IRLR 616, concerning the right to be accompanied under section 10 **Employment Rights Act 1999**. Section 11(3) provides that where a complaint is well-founded the tribunal "shall order the employer to pay compensation" not exceeding two weeks' pay. At [32] the EAT said that such wording suggested that the tribunal did not have the right to award no compensation at all; but where no loss or detriment had been suffered it might, or in fact should, feel constrained to make an award of nominal compensation only, either in the "traditional sum", replacing 40 shillings, of £2, or "some other small sum of that order".

58. Mr McFarlane submitted that this is a case where, applying **Jafri v Lincoln College** [2014] EWCA Civ 449; [2014] ICR 920 I could and should not remit the matter to the tribunal, but should substitute for the tribunal's decision not to reduce each compensatory award, a decision to reduce each of them by the 10% that had been suggested to the tribunal.

## Discussion and Conclusions

59. I start by considering whether I am bound by previous authority that has determined the point at issue.

60. **Lamb** establishes that the conduct does not have to have caused or contributed to the *reason* for dismissal, but just to the dismissal. It is therefore not an error for a tribunal to make a reduction where it contributed to the dismissal, but not the reason. That said, it is not clear to me whether the EAT truly viewed that case as one in which the conduct was no part of the reasons for dismissal *at all*. The conduct was "bogus" but also "a factor in the minds of the employers". But in any event this authority does not hold that it would be wrong in law for a tribunal to decide, in a case where the conduct related *only* to a bogus reason, that it would, having regard to that, make no reduction at all.

61. Turning to **Warrilow**, reliance is placed by Mr McFarlane on the word "obliged" in paragraph [19]. But the second of the three challenges in that case – as framed at [13] – appears in fact to have been to the finding of *causation*; and in any event the contention was that the tribunal erred in *making* a reduction, not that it erred in failing to do so. The conclusion, at [19], that the tribunal was "fully entitled" to make such a reduction was sufficient to support the conclusion that the tribunal did not so err. The additional words "and obliged" therefore appear to me to have been *obiter*.

62. Turning to **Slack**, as I have noted, Mr McFarlane acknowledged that the point at issue in that case was a different one. The issue raised in the present case did not arise, and was not addressed at all by the court. Further, Woolf LJ considered paragraph [19] of **Warrilow**, because counsel contended that it bore on the point that *was* at issue in **Slack** (Woolf LJ disagreed), not for what it said about the point at issue before me. For completeness I note that Balcombe LJ referred to **Warrilow**, but on a different point, referred to by Woolf LJ at [21], being that assessments of this type are a matter for the tribunal, with which an appellate court should not normally interfere.

63. I conclude that **Slack** does not support this appeal.

64. Turning to **Whooley**, the expressly-stated foundation for proposition (3) in that case, that once contributory conduct has been found, the tribunal *must* make a reduction to the compensatory award, was said to be Woolf LJ in **Slack** having approved **Warrilow** to that effect. Respectfully, in view of the analysis I have set out, I think that is a mistaken reading of both **Slack** and **Warrilow**.

65. Given that there is no independent reasoning supporting that conclusion in **Whooley**, which rested wholly on that reading of the earlier authorities, I do not think I am bound to follow it. In addition, as the further passage that I have cited at 989F-G shows, there were two errors identified in **Whooley**. The other was that it was not open to the tribunal to rely upon the conduct of the employer in imposing too severe a penalty. That would have sufficed to support the outcome of the appeal in

**Whooley**. Finally, **Whooley** was, at least, qualified, in the more recent decision in **Price**. For all these reasons I do not consider that I am bound to treat **Whooley** as determinative of this issue.

66. Turning then to **Price** I accept that, as the passage I have cited from the judgment of Simler P itself states, the point was not fully argued, and not directly relevant to the issues in that case. The main point was that the tribunal had erred in its reasoning on the causation point and in focussing on the *respondent's* conduct in dismissing unfairly. Simler P's unsurprising point was that, given that the focus of the section is on what is just and equitable "having regard to the extent to which the contributory conduct" of the employee contributed to the dismissal it is, therefore "difficult to envisage" circumstances that would justify a conclusion that it would not be just and equitable to reduce the award at all in such a case. But, importantly: "I do not altogether rule them out."

67. For these reasons I conclude that I am not bound by prior authority to conclude that the construction advocated by Mr McFarlane is the law.

68. Am I bound so to conclude by the language of the statute itself? I think not. The history does not suggest that I should attach the particular significance to the choice of the expression "such proportion" that Mr McFarlane invites me to attach. The wording prior to 1975, when there was a single award, was that a finding that action of the employee "to any extent" caused or contributed to the dismissal should lead to a reduction "to such extent" as, having regard to that finding, the tribunal considered just and equitable. That did not say "to *that* extent" or "to the *same* extent". It allowed *some* room to decide what was just and equitable "having regard" to that.

69. The award was then, in 1975, split into basic and compensatory awards, so that the provisions were redrafted. At that point the "such proportion" expression was introduced, but, at that point, the causation requirement applied to both the basic and compensatory awards. So I do not think any particular significance can be attached to the change in language. There was still, in respect of both

awards, the trigger condition of conduct contributing to the dismissal to some extent, and then, if that was fulfilled, the just-and-equitable-reduction decision to be taken.

70. When the basic award was by degrees reshaped to the form it took from 1982, the causation requirement was then removed in respect of it. So now the tribunal simply has to decide whether there is (culpable or blameworthy) conduct which makes it just and equitable to reduce the basic award "to any extent" and, if so, to reduce it "accordingly". But the two-stage test in relation to the compensatory award remained. That has remained the position to the present day.

71. Nor am I persuaded by Mr McFarlane's arguments that the ordinary meaning of the words compels the tribunal to make a reduction. The word "shall" means that, once there is a finding of culpable or blameworthy conduct which caused or contributed to the dismissal, the tribunal is obliged to *consider* the question of reduction (as explained in **Millicent** and **Benali**). But what the tribunal has to decide is "such proportion as it considers just and equitable". I am inclined to think that "proportion" was used simply because the nature of the exercise is such that the tribunal should consider making a *percentage* reduction to the award, rather than a reduction by a given absolute amount. But I do not think that this precludes the possibility that, upon consideration, the tribunal might decide that no such reduction at all was just and equitable in the given case. Indeed, on such a literalist reading, a tribunal might be said also to be precluded from ever making a 100% reduction, on the footing that the whole is also not a proportion. But it is well-established that a decision of that type would not necessarily always be wrong.

72. I do not find it of any assistance to consider the provisions of the **1992 Act** and **2002 Act** to which Mr McFarlane referred, each of which had their own, quite independent, origins. Nor am I persuaded by Mr McFarlane's policy arguments. I also consider that, if the tribunal has, in principle, concluded that it would not be just and equitable to make any reduction at all, it would be unattractive for it to be forced nevertheless to make a nominal reduction, unless the language of the statute truly

unavoidably compelled that outcome, as appears to have been contemplated in relation to the different wording of the provision at issue in **Toal**.

73. All of that said, I also respectfully agree with Simler P's general observation to the effect that, ordinarily, one would expect a finding that there was culpable or blameworthy conduct which caused or contributed to the dismissal to some extent, to lead to a reduction being made to the compensatory award, given the requirement to consider what is just and equitable "having regard to" that finding. It would be an atypical case where the tribunal, having engaged in that exercise, concluded that it was not just and equitable to make any reduction at all.

74. The analogy drawn in some of the authorities, with the approach under the **Civil Liability (Contribution) Act 1945**, holds good in many cases – particularly in the paradigm case in which the conduct in question is the same conduct for which the employee was dismissed. But, although the language of the provisions of the **1945 Act** appears to have provided some inspiration to the original drafter of these provisions, there is a danger of the analogy being overstated. We are not concerned here with a single event, such as a car crash, in the lead up to which two drivers may, though to different degrees, have symmetrically contributed by their respective negligence. We are concerned with the intentional conduct of an employer in dismissing, to which some prior conduct of the employee, judged culpable or blameworthy, may have causally contributed to some extent.

75. Further, though its outcome falls to be expressed mathematically, it is important to remember that what the tribunal is undertaking is not a quantitative but a qualitative exercise. When considering, for the purposes of this provision, what the repercussions should be of a finding that the employee has caused or contributed to the dismissal to any extent, the tribunal is entitled to take into account the nature of that contribution and *how* it has been found to have come about.

76. One remove from a case in which the conduct of the employee at issue was the same conduct

for which the employee was dismissed, is a case in which that conduct was not the sole or principal reason for the dismissal but was nevertheless a contributing reason. Yet a further stage removed is a case where the conduct was not a contributing reason at all. Such cases can nevertheless still lead to reductions, for example, where recalcitrant or obstructive behaviour in a disciplinary process is found to have caused or contributed to the decision going against the employee. But in all of these examples, the employee is found by the tribunal to some degree, or in some sense, at least partially, to have brought the dismissal upon themselves, or to have been the partial author of their own downfall. The present case is yet one further remove from all of these scenarios. It was one in which the *only* way in which the employees' conduct was found to have caused or contributed to their dismissals was by way of providing the employer with a pretext.

77. Whether the finding of causation in the sense meant by section 123(6) would, on the facts found in the present cases, have been open to successful challenge, is something I do not have to decide, as no such challenge has been raised in the EAT. What I do decide is that this is an example of the sort of unusual case in which, for each of the claimants, the tribunal was entitled to conclude, having regard to the nature of the findings of contributory conduct, and for the reasons that it gave, that it was not just and equitable to reduce their compensatory awards.

## Outcome

78. The appeal is dismissed.