EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Dazz Michael	**v**	**London Underground Limited**

Heard at: London Central
On: 6 September 2024 and 9 September 2024 in chambers

Before: Employment Judge Hodgson

Representation

For the Claimant: in person
For the Respondent: Mr Hamad Zovidavi, counsel

JUDGMENT

1. The request for reinstatement is refused.
2. The request for re-engagement is refused.
3. The award for compensation pursuant to section 123 Employment Rights Act 1996 is nil.
4. The respondent shall pay the claimant a basic award pursuant to sec 119 Employment Rights Act 1996 of £2,572.

REASONS

Introduction

1. Liability in this case was heard on 26 March 2024.[1] The claim of unfair dismissal succeeded. The reasons were signed on 21 May 2024, and sent to the parties on 30 May 2024.

2. On 22 May 2024, I gave directions for the remedy hearing. These included a provision for the preparation of additional bundle of documents by 9 July 2024, and exchange of witness statements by 30 July 2024.

Evidence

3. The claimant failed to file further evidence. He accepted he received the order but stated he did not understand it. With the consent of the respondent, the claimant gave oral evidence at the hearing.

4. The respondent produced a bundle of relevant documents for the remedy hearing. I heard evidence from Ms Diane Kwarteng, who is employed as a station operations manager.

The issues

5. The claimant applied for reinstatement/re-engagement. At the hearing we agreed that the issues were as follows:

    a. Should there be an order for reinstatement or re-engagement.

    b. What losses had been incurred by the claimant.

    c. Whether the claimant had mitigated his losses.

    d. Whether the claimant contributed to dismissal, and if so whether there should be a reduction in either or both the compensatory award in the basic award.

    e. Would the claimant had been dismissed in any event and if so by when (the Polkey question)

Conduct of the proceedings

[1] I note that the written reasons refer, erroneously, to 2022.

6. I confirmed the question of contributory fault, and the question of Polkey reduction, had been reserved to this hearing. To the extent that facts had been found which are relevant to these matters, they can be relied on. Further evidence could be called. The decision would be made at this hearing.

Findings of fact

7. I have regard to my previous finding of fact where relevant.

8. Since the remedy hearing, the respondent has held what was purported to be an appeal hearing.

9. On 25 March 2024, coinciding with the start of the liability hearing, Ms Diane Kwarteng wrote to the claimant inviting him to an appeal hearing to take place on 17 April 2024. The appeal letter appears to be a standard format and it makes no reference to the tribunal proceedings.

10. On 17 April 2024, the claimant advised the respondent by telephone that he would not attend. He stated he had been advised not to attend, given the ongoing employment tribunal proceedings.

11. A further invitation letter, in essentially identical terms, was sent on 17 April 2024. The date was varied to 9 May 2024. The claimant advised the respondent he would not attend the disciplinary hearing.

12. Ms Kwarteng proceeded with the appeal hearing in the claimant's absence. She refused the appeal. She relied on the written appeal to identify potential appeal points. At the point she made the decision, she had received the liability decision of the tribunal. Her decision summarised aspects of the liability decision that she appears to consider relevant. She stated what action she believed she had taken in relation to those matters.

13. Ms Kwarteng considered the events of 15 November 2022, which had formed the substance of the disciplinary proceedings. Ms Kwarteng did not have the benefit of hearing from the claimant. Ms Kwarteng chose not to interview anyone present on 15 November 2022. Based on the documents, she made a number of findings of facts, which were said to have been made on the balance of probability.

14. At the original disciplinary hearing, the claimant had alleged that Ms Atagana had introduced inappropriate language.[2] Ms Kwarteng referred to this, and she made a number of findings of fact. She said this in her letter of 20 August 2024:

[2] I refer to this at paragraph 72 of the liability decision.

> **You initially contended that CSS Atagena had made a comment to the effect of "I can't believe your dad had another child" and something about "his being a very busy person". You subsequently amended this to "he sticks his thing everywhere" and then to "he can't help but stick his dick anywhere". I note that this was not referred to by the other witnesses and that CSS Atagena expressly refers to the conversation as being "clean and respectful" until your language became "vulgar" and specifically about her. On the balance of probability, I think it likely that it was you who introduced the inappropriate language and that even if some inappropriate language had been previously used it was not, as your comments were, about what one party to the conversation might think and do to another participant. I do not consider that the context of this conversation justified your language.**

15. It follows she rejected any assertion that inappropriate language had been introduced by Ms Ms Atagana, and concluded, positively, the conversation had been "clean and respectful" until the claimant's language became "vulgar."

16. She went on to set out her reasons for upholding the dismissal on the basis of gross misconduct.

17. The respondent's procedure envisaged that the appeal should be concluded in a reasonable time. It would follow that, save for exceptional circumstances, it would normally be concluded before any tribunal liability hearing. The respondent's procedures do not say how the appeal should be treated after a liability decision has been given. There is nothing in the ACAS code which would assist. Ms Kwarteng confirmed that she liaised with HR, and there had been legal input. That legal advice was privileged. The procedure was tailored to the circumstances of this case, but the procedure lack transparency.

18. As for approach to the liability decision she deals with this at paragraph 14 and 15 as follows:

> **14. Once I had considered Mr Michael's original grounds of appeal, I then considered Employment Judge Hodgson's comments. Although this document was not part of the original appeal pack, it was relevant because it commented on evidence that had been reviewed as part of the Employment Tribunal hearing, in which Mr Michael gave evidence himself. There were some points raised by Employment Judge Hodgson that I wanted to consider as part my appeal investigation. Some of the points fell naturally within the grounds for appeal, for which I have set out my conclusions above. However, one additional point was in relation to the circumstances of any comparators.**
>
> **15. I consider that language like Mr Michael used about his colleague, to his colleague, is never likely to be acceptable. I reviewed the comparators referred to in the CDI and, in my view, I do not believe the circumstances were comparable to Mr Michael's situation. Both cases involved physical contact rather than the use of language. One was a case where a male employee had asked a young female trainee to give him a cuddle and to sit on his knee and had demanded that she hug him. This case resulted in summary dismissal for gross misconduct. The other case was a physical assault on a customer and ended in a dismissal suspended for one year**

> **which is a sanction that LUL uses from time to time. I believe that there have been other cases where the use of inappropriate language has resulted in summary dismissal but in this case I did not think it necessary to review them as I consider, as described above, that Mr Michael's behaviour was totally inappropriate and cannot be tolerated within our business.**

19. It follows that the normal appeal procedure was modified.

20. It is unclear why the respondent proceeded with an appeal. It would appear to be the respondent's case that proceeding with an appeal remained open to it and that it was a legitimate culmination of the disciplinary process.

21. As to the events of 15 November 2022, the respondent produced no further evidence.

22. For the reasons I will come to, it is important I resolve whether Ms Atagana used inappropriate language prior to the claimant's use of inappropriate language.

23. In my liability judgment, I confirmed, when considering contributory fault, I must make findings of fact about the actual conduct.[3] I invited the parties to consider calling further witness evidence. The respondent has chosen to call no further relevant evidence.

24. I am not satisfied that the claimant has given a fall or accurate account of the events of 15 November 2022. I accept that there are inconsistencies in his accounts. However, I am not satisfied that his evidence should be wholly rejected. As to the alleged misconduct, his evidence demonstrates prevarication, but I do not view it is fundamentally dishonest. In particular, as to the second allegation against him, when he is alleged to have said "Gina… I can just look at her and in my head I have already fucked her." Whilst he did not immediately admit this. He did admit that similar words were used. Ultimately, on being pressed, he accepted the word "fucked" was used. He also indicated, when asked during the investigation, that he needed to hold up his hands. Before me today, he suggested that he commented on men in general looking at Ms Atagana imagining they had already "fucked" her.

25. I have no doubt that the claimant sought to prevaricate, and he was reluctant to admit that he referred to himself. However, I am also satisfied that he did not wholly lie. He accepted that he had been wrong, but he sought to obscure the detail.

26. At the disciplinary hearing, he made his allegation that the inappropriate language had been introduced by Ms Atagana. The conduct of Ms Atagana was not been the focus of the investigation, and the fact that it

[3] see para 79 of the liability judgment.

was not raised during the investigation is not, in my view, significant. The investigation stage was about the claimant's conduct.

27. It is clear that, on 15 November 2022, there was a conversation which considered polygamy. Moreover, the claimant described it as becoming heated.

28. I have limited evidence. Those who participated in the conversation 15 November 2022 could have given evidence. They have not. I must make findings in relation to Ms Atagana's conduct in circumstances where she has not given evidence. I make it clear, the findings I make are on the best available evidence and on the balance of probability. I am fully conscious that I have not heard from Ms Atagana and there is a real possibility that these findings are inaccurate. On the evidence that I have, I find that the claimant is truthful in his account of the comment made by Ms Atagana. Ms Atagana used crude language when she referred to a colleague's father, who was alleged to have had an affair and made a woman pregnant. She said words to the effect - he can't help but stick his dick anywhere.

The law

29. Section 122 Employment Rights Act 1996 (basic award: reductions) provides:

> **(1) Where the tribunal finds that the complainant has unreasonably refused an offer by the employer which (if accepted) would have the effect of reinstating the complainant in his employment in all respects as if he had not been dismissed, the tribunal shall reduce or further reduce the amount of the basic award to such extent as it considers just and equitable having regard to that finding.**
> **(2) 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.**

30. Section 123 Employment Rights Act 1996 (Compensatory award) provides:

> **(1) Subject to the provisions of this section and sections 124 [, 124A and 126] 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.**
> **(2) The loss referred to in subsection (1) shall be taken to include—**
>
> > **(*a*) any expenses reasonably incurred by the complainant in consequence of the dismissal, and**

> **(*b*) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.**
>
> **…**
>
> **(6) 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.**
>
> …

31. Section 116 Employment Rights Act 1996 provides.

> **(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—**
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> **(a) whether the complainant wishes to be reinstated,**
> **(b) whether it is practicable for the employer to comply with an order for reinstatement, and**
> **(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.**
>
> **(2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.**
> **(3) In so doing the tribunal shall take into account—**
>
> **(a) any wish expressed by the complainant as to the nature of the order to be made,**
> **(b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and**
> **(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.**
>
> **(4) Except in a case where the tribunal takes into account contributory fault under subsection (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement.**
>
> **(5) Where in any case an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining, for the purposes of subsection (1)(b) or (3)(b), whether it is practicable to comply with an order for reinstatement or re-engagement.**
>
> **(6) Subsection (5) does not apply where the employer shows—**
>
> **(a) that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement, or**
> **(b) that—**
> **(i) he engaged the replacement after the lapse of a reasonable period, without having heard from the dismissed employee that he wished to be reinstated or re-engaged, and**
> **(ii) when the employer engaged the replacement it was no longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement.**

32. An order for reinstatement or re-engagement cannot be refused merely because it is inexpedient (see **Qualcast (Wolverhampton) Ltd v Ross** [1979] IRLR 98. The fact that the employer considers another person preferable for an available alternative post does not mean that re-engagement is not practicable (see **Davies v D L Insurance Services Ltd** [2020] IRLR 490, EAT).

33. The availability of possible jobs is to be assessed as at the date that any order would take effect: **Great Ormond Street Hospital v Patel** UKEAT/0085/07.

34. The Court of Appeal in **Port of London Authority v Payne** [1994] IRLR 9 held that the tribunal must make a determination on the evidence in relation to practicability at the first stage. This is provisional. It is at the second stage that the final determination has to be made, with the burden of proof then clearly on the employer. The 'provisional' nature of practicability in the initial order was accepted and emphasised by the Supreme Court in **McBride v Scottish Police Authority** [2016] UKSC 27.

35. An order may not be practicable if there remains a continuing breakdown of trust and confidence between the parties: **Wood Group Heavy Industrial Turbines Ltd v Crossan** [1998] IRLR 680, EAT. In in this case the employers remained convinced of the substantive allegations of misconduct. In such a case, what the tribunal must do is to determine whether this employer has genuinely and reasonably lost confidence. The tribunal should not substitute its own view as to that misconduct **United Lincolnshire Hospitals NHS Foundation Trust v Farren** UKEAT/0198/16. In that case the employment tribunal had accepted that the employee had administered drugs in breach of the trust's policy but considered that the employee had long service, and in the view of the tribunal, the employee could be trusted to act properly in an environment other than an accident and emergency unit, given her experience, record and professional commitment. The tribunal was not permitted to substitute its own view about the trust to be placed in the employee. The correct approach was to ask whether this employer genuinely believed that the claimant had been dishonest, and whether that belief had a rational basis.

36. In **Kelly v PGA European Tour** [2021] EWCA Civ 559 the Court of Appeal confirmed the **Farren** approach.

37. The mere fact that the initial dismissal was for misconduct does not make reinstatement impracticable even if some managers still believe in guilt (especially in a large organisation) see **London Borough of Hammersmith & Fulham v Keable** [2022] IRLR 4, EAT.

38. In **Boots Co plc v Lees-Collier** [1986] IRLR 485, the EAT held that the test for contributory fault under subsections (1)(c), (3)(c) is the same as the test for contributory fault under ERA 1996 s 123(6) in that case, the tribunal had accepted that on the facts there was no argument for a

reduction under s 123(6) and so it followed that it would not be unjust under sub-s (1)(c) above to order reinstatement.

39. A tribunal should make clear if contributory fault will be considered in the liability or the remedy hearing (see **Iggesund Converters Ltd v Lewis** [1984] IRLR 431.

40. If a tribunal considers on the facts before it that the employee's acts caused or contributed to the dismissal it must make the reduction even if the parties have not expressly raised the question of contributory fault (see, e.g., **Swallow Security Services Ltd v Millicent** [2009] All ER (D) 299 (Mar)).

41. It is important to consider whether the claimant's actions caused or contributed to the dismissal itself, not to the unfairness of that dismissal (see **British Gas Trading Ltd v Price** UKEAT/0326/15 (22 March 2016, unreported).

42. It is necessary to determine, as a fact, whether conduct, which may be capable of contributing, did, in fact, occur. The employee's conduct must be to some degree blameworthy for a reduction in compensation to be made and by analogy to be relevant to the question of reinstatement or engagement.

43. Langstaff P in **Steen v ASP Packaging Ltd** [2014] ICR 56, EAT advised tribunals to address four questions—(1) what was the conduct in question? (2) was it blameworthy? (3) (in relation to the compensatory award) did it cause or contribute to the dismissal? (4) to what extent should the award be reduced?

44. Langstaff P further clarified in **Rawson v Robert Norman Associates Ltd** UKEAT/0199/13 (28 January 2014, unreported) that, in relation to the employee's alleged contributory conduct, the test here is whether it actually occurred, not the more general unfair dismissal test of whether the employer reasonably believed it happened.

Conclusion

45. I considered the claimant's request for reinstatement/re-engagement.

46. The respondent's approached to practicability is the same for both reinstatement and re-engagement I can therefore consider both of them together. It is the respondent's position that the claimant contributed to his dismissal and that there remains a significant breakdown of mutual trust and confidence. This is underpinned by the fact that the claimant has not shown sufficient remorse and insight into his behaviour.

47. I accept that the claimant wishes to be reinstated or re-engaged. I accept that his wish is sincere.

48. For reasons I will come to, I am satisfied that the claimant contributed to his dismissal. This in itself would not be conclusive. I may have regard to contributory fault when considering whether to reinstate or re-engage. The question is whether it would be just to do so. In situations where the mutual trust and confidence has broken down, it may not be just to reinstate. I accept that the respondent has lost confidence and trust in the claimant. As to his failure to show remorse, I believe the respondent overstates the position. The respondent's view on tis lacks rationality. At all times, the claimant was prepared to apologise. He did not do so because he was not permitted to make contact with Ms Atagana. By saying he must hold up his hands he showed insight into the inappropriateness of his behaviour.

49. However, I have regard to the nature of the claimant's conduct. He found herself drawn into an inappropriate conversation with colleagues whom he had only just met, in circumstances when he was starting a new job. The conversation by his own admission became heated, and I interpret this as the claimant, and possibly others, showing a lack of control. I accept that the conduct of others may have been inppropriate. However, his language to Ms Atagana was seriously inappropriate and, at best, it showed a severe lack of judgement.

50. At various times, the claimant has made tangential references to his own mental health. He has referred to the death of his father and I have no doubt that this has had a serious effect on him. However, this has not been supported by medical evidence. If the comment made by the claimant was out of character and explained by his then mental health, it may have been unreasonable for the respondent to assume that the behaviour would be repeated. However, the evidence presented by the claimant is inconclusive.

51. I accept that there has been a breakdown of confidence. I have some reservations as to whether the evidence before the respondent is sufficient for its managers to maintain a rational belief that there is a breakdown. I am persuaded, just, that there is sufficient evidence to establish a rational belief, and in the sense the belief is reasonable. In the circumstances, I do not find it just to reinstate or re-engage.

52. When considering contributory fault, I must make findings of fact. The respondent made two allegations against claimant, which I described in my liability decision. I said this:

> **15. Ms Evans undertook the investigation. She met with Ms Atagana on 1 December 2022. This resulted in a statement, signed by both Ms Atagana and Ms Evans. Ms Atagana accepted there was a discussion about polygamy, a practice that she did not support, albeit it was practised in her "culture." She stated that the claimant was also Nigerian. There was also discussion as to whether the claimant would me remarry, as he was separated. She describes that discussion as "clean and respectful." She stated the conversation moved on to "is it possible to be monogamous."**

> **She stated the claimant then became vulgar. When asked to clarify what she meant she stated the claimant said words to the effect, "I can stick my dick in as many women and it's just nothing or it means nothing." (I will refer to this as allegation one.) She said at that point she turned her chair to face the window, as she did not wish to encourage him. She complained that shortly thereafter the claimant directed a comment at her and said "Gina… I can just look at her and in my head I have already fucked her." (I will refer to this as allegation two.) She stated she felt disgusted and livid.**

53. In my liability decision I reviewed the evidence before the respondent in the context of the grounds for the respondent's belief. I have taken into account all the evidence before me and I am satisfied that both allegations are true.

54. I have regard to the four questions suggested in **Steen** — (1) what was the conduct in question? (2) was it blameworthy? (3) (in relation to the compensatory award) did it cause or contribute to the dismissal? (4) to what extent should the award be reduced

55. I have identified the conduct.

56. I have considered the claimant's explanations. I have considered where there is evidence that, in some manner, the behaviour was excused. The claimant has suggested it is excused by Ms Atagana's own behaviour. I reject that argument. Whilst her comment may have been crude, the claimant's comment about her was an escalation. It was offensive and intimidating. I considered whether his language is explained by any mental health issue, but there is insufficient evidence of that. I find his behaviour was blameworthy.

57. I find that his behaviour did contribute to the dismissal.[4] It is his behaviour which was under scrutiny. The behaviour of others may have been relevant to the appropriateness of the sanction of dismissal. However, that does not lead to a finding that his own behaviour did not contribute to dismissal.

58. The final question is to what extent should the compensation be reduced. The reduction is the amount which I consider to be just and equitable having regard to my findings of contributory fault. Whilst I consider the claimant's behaviour to be blameworthy, it did occur in the context of a discussion which was inappropriate. Conversations that are personal may be consented to by the participants, even if they are in breach of an employer policies. Sometimes those conversations take a turn whereby one or more participants becomes uncomfortable, and wishes the conversation to stop. When a conversation has become heated, inappropriate expressions may be used.

[4] Contribution to dismissal is not a necessary consideration for the basic award but it is relevant to the compensatory award.

59. If a complaint is made, an employer is required to consider that complaint, as there may be, for example, allegations of harassment. The employer is presented with a difficult scenario. It may be that no participant had behaved in accordance with the employer's policies. The initial umbrella consent does not allow an individual to make any offensive statement. However, the context is a mitigating factor, and one which I can take into account soon exercising my discretion. I take the view that 50% is the correct reduction.

60. I need to consider whether the claimant's employment would have come to an end. I consider there are two broad matters which are relevant to this consideration.

61. First, what are the chances the claimant's employment would have terminated had a fair procedure been followed.

62. I reject any suggestion that the appeal hearing undertaken by Ms Kwarteng was a legitimate continuation of the respondent's disciplinary procedure. The respondent had an opportunity to deal with the appeal. It failed to do so. By the time the claimant was invited to an appeal hearing, the tribunal was seized of these proceedings, and continuation of the original appeal process was no longer and option open to a reasonable employer. The claim had been issued. Witness statements had been exchanged. The matter was proceeding at a liability hearing. The parties positions were entrenched. There was no possibility of fair appeal hearing happening at that point. Moreover, at the point when the decision was made, fundamental questions of fact relevant to contributory fault were live before the tribunal. The claimant could not have been expected to attend any appeal hearing. Any appeal hearing which is held in circumstances when a claimant cannot reasonably attend will almost inevitably be unfair. Moreover, I do not accept that any appeal officer could have approached the matter without being tainted by the considerations the litigation. The fact that the appeal officer referred to my judgment simply demonstrates the inappropriateness of seeking to proceed with an appeal at all.

63. At best, Ms Kwarteng's statement could be interpreted as evidence of what could have happened on appeal, had it proceeded at the appropriate time. I found her evidence uncompelling. I find, whether consciously or subconsciously, her decision was influenced by the considerations of this litigation. During her evidence, she accepted the behaviour of Ms Atagana was relevant, but could not explain how. I find that Ms Atagana was an honest witness who in evidence sought to defend a position she did not fully understand. She could see the difficulties caused by the approach adopted. It is clear that the context in which the claimant made his comments would be relevant to any disciplinary sanction. If the context was a consensual conversation outside the respondent' procedures during which inappropriate comments were made by others, the sanction of dismissal may have been unreasonable.

64. Ms Kwarteng failed ot consider, when she reached her decision, important matters. First, the appeal was fundamentally unfair because it was reasonable for the claimant not to attend, Second, she ignored the context. Third she made findings of fact that were not reasonably open to her because the context had not been properly explored and the witness evidence was inadequate.

65. If there had been inappropriate comments made by other participants, she could not have avoided considering whether sanctions should be brought against any other participants, or whether the claimant's conduct was subject to such mitigation that dismissal was an unwarranted sanction. Instead, she reached the conclusion that it was the claimant alone who behaved inappropriately, but that was not supported by an investigation open to a reasonable employer. The purported appeal gives poor evidence of what would have happened had there been a fair appeal, and the evidence put forward is self-serving.

66. I have no doubt that some form of sanction, including a final written warning, would have been possible, even inevitable. However, had a fair appeal process been undertaken at the relevant time, I'm not satisfied claimant would be dismissed. The primary Polkey reduction I put at 50%.

67. Second, there is one further matter I should consider. I have taken into account the fact that the claimant found himself entering into an inappropriate conversation, with colleagues that he did not know, in a matter of days of being appointed to the new role. This shows a serious lack of judgment. As noted above, I consider it very likely the claimant would have received a written warning, and in all probability final written warning. I have given consideration as to whether the claimant would have remained employed. I take into account that he had been employed for three years previously.

68. If there had been evidence which suggested that his behaviour was in some way out of character, or was caused because of temporary stress, it is possible that the behaviour would not have been repeated. However, I consider on the balance of probability that the claimant's would have behaved inappropriately at a later date. I find on the balance of probability he would have been dismissed within twelve months.

69. Therefore, approaching losses in this case, I have considered losses for one year. Thereafter, I will apply the reduction of contributory fault and for Polkey deduction.

<u>The amounts</u>

70. The respondent accepts the net weekly pay was £518.84. For one year this is £26,979.68.

71. I have limited pension details. The claim has given no evidence on this. Monthly pension contributions were £124.72 by the claimant. I have no

clear evidence of any contribution by the respondent. I will assume 2% of salary, For this calculation I will assume no more than £100 per month giving a total of £224.72, and on simple calculation that is £2,696.64 per annum.

72. This gives a total broad calculation for the yearly loss of £29,676.32.

73. To that I would add £500 for loss of statutory rights. This give a final figure of £30,176.32.

74. I must then apply a deduction of 50% for contributory fault and a further reduction of 50% for the Polkey reduction. This give a figure of £7,544.08.

75. The claimant has received overpayment of salary. The respondent calculates it at £9,114.89. This is based on the payslip for period ending 3 June 2023 and represents an overpayment of £813.53 and the subsequent payslips at pages being 100% overpayments, totalling £8,301.36, giving a net overpayment of £9,114.89. I accept the respondent's calculation.

76. The basic position when there is an overpayment is that the respondent may seek to recover it. However, the respondent may be estopped from recovering wages that have been received in circumstances when the claimant believed the money was his. I do not have to reach a final decision on that, it is not a matter before me. However, the fact that he has received money which he has not returned is a matter that I can take into account when considering his losses. As the claimant has already received a large sum than his loss, I take the view that there should be no award pursuant to section 123 Employment Rights Act 1996.

77. I observe that the respondent may be entitled to deduct the gross amount, but it matters not. The overpayment exceeds the projected compensatory award. It is not just and equitable to make any award in those circumstances; the claimant knew or ought to have known he was not entitled to the money.

78. I therefore make a compensatory award of nil.

79. The basic award is calculated at £2,572. (Age at date of termination is 43. He had three years' service . The gross weekly pay before deductions was £748.92 (capped at £643)).

80. The tribunal may reduce a basic award if the employee's conduct before dismissal was such that it would be just and equitable to do so: s.122(2) ERA 1996.

81. I see no reason to vary the reduction for contribution, although I may do in relation to the basic award. I will therefore reduce it by 50%.

82. The basic award will be £1,286.

83. I specifically asked for the respondent's submissions on whether the overpayment of wages is relevant to the basic award. The respondent has not sought to argue that it is, albeit I note that my discretion may not be constrained by a reduction for contributory fault. There is not an express just and equitable discretion. I take the view that any overpayment to the claimant may be relevant to the question of enforcement. Enforcement is not an issue for the employment tribunal. Therefore I make the award.

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Employment Judge Hodgson

Dated: 7 October 2024…….

Sent to the parties on:

17 October 2024
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For the Tribunal Office