



EMPLOYMENT TRIBUNALS

Claimant: Dr J Roche
Respondent: University of Southampton
Heard at: Southampton Employment Tribunal
On: 16 July 2025
Before: Employment Judge Self

Appearances

For the Claimant: Mr. C Milsom - Counsel
For the Respondent: Mr T Dracass – Counsel

RESERVED JUDGMENT

1. Subject to the caveat set out at paragraph 28(d) of the Written Reasons and upon the claim to which the proceedings relate concerning a matter to which a relevant Code of Practice applies and further upon the Respondent unreasonably failing to comply with that Code and upon the tribunal considering it just and equitable in all the circumstances to do so, any award it makes to the Claimant shall be increased by 25 per cent.
2. There will be no Polkey / Chagger reduction in this Claim.
3. There will be a 20 per cent reduction in compensatory award on account of contributory fault in respect of the unfair dismissal only on account of the Claimant's blameworthy and culpable conduct that contributed to her dismissal.

WRITTEN REASONS

1. This matter was originally heard over nine days in June and July 2024. Written closing submissions were sent in by the parties in late August 2024 and a Reserved Judgment with reasons promulgated in December 2024. Following a case management hearing this date was reserved for consideration of:
 - a) To what extent, if at all, should the Claimant's claim for compensation be reduced or extinguished by reason of the chance that were it not for the unfair and discriminatory dismissal the Claimant's employment would have terminated by fair and non-discriminatory means at some identifiable point in time.
 - b) To what extent, if at all, should the Claimant's claim for compensation be increased or reduced because of any failings to comply with the ACAS Code of Practice for Disciplinary and Grievance Procedures, and
 - c) To what extent, if at all, should the Claimant's claim for compensation be reduced in respect of contributory fault.
2. At this hearing both parties have been represented by counsel and I would wish to reiterate what I said orally at the hearing and thank them both for the excellent written and oral submissions they provided me.
3. In this Judgment paragraphs of the Liability Judgment will be referred to with the following notation "#paragraph number." Representations from the Claimant will be marked as "C paragraph number" and the Respondent as "R paragraph number". There was no specific bundle for this hearing and so any reference to the bundle will be marked "B page number."
4. Initially the matters detailed for consideration at this hearing at paragraph 1 was going to be determined at the same time as liability but the view was taken that taking into account the substantial Judgment and the specific findings therein, both parties should be permitted to make representations upon the paragraph 1 issues with the benefit of understanding the findings made, but no more evidence could be called upon the issue.

ACAS UPLIFT

5. In accordance with **S.207 TULR(C)A**, the revised Acas Code is admissible in any employment tribunal proceedings and the Tribunal is obliged to take into account any relevant provision of the Code when determining those proceedings. A breach of the Code does not in itself give rise to legal proceedings, but a failure by either party to abide by its provisions will be taken into account by a tribunal as evidence when determining a relevant claim.

6. The Code expressly makes clear that its provisions apply to dismissals where the principal reason is conduct, which was the finding in this case (#349 and #350).
7. Where the dismissal is found to be unfair, compliance by both employer and employee is then taken into account when determining whether there should be an adjustment to any compensatory award made under S.207A TULR(C)A.
8. With regard to the provisions of the Code dealing with grievances a breach of these provisions may be relevant to both parties in relation to the adjustment of any award made by a tribunal in respect of a successful claim brought by the employee.
9. Section 207A(2) TULR(C)A provides that:

'If, in any proceedings to which this section applies, it appears to the employment tribunal that — (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) the failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent.'

10. An identical provision in respect of any failure to comply by an employee is set out in S.207A(3). This reflects the fact that the Code is aimed at encouraging compliance by both employers and employees, so an employee's failure to follow the Code in respect of disciplinary action commenced by the employer or in respect of a grievance raised by him or her can also lead to a compensation adjustment in the same way as a failure by the employer to follow the correct procedures.
11. The list of proceedings (or 'jurisdictions') to which S.207A(2) and (3) applies is set out in Schedule A2 TULR(C)A — S.207A(1). Unfair dismissal is included in the list, as are discrimination claims. It should also be noted that the increase or reduction only applies in respect of the compensatory award.
12. The potential for adjustment to the compensatory award under S.207A only applies if the employer's or employee's failure to comply with the provisions of the Code was ***'unreasonable.'*** As Her Honour Judge Eady observed in **Kuehne and Nagel Ltd v Cosgrove EAT 0165/13**, this means that a tribunal may only consider adjusting the compensatory award once it has made an express finding that a failure to follow the Code was unreasonable — adjustment does not automatically follow from a breach of the Code. While the comment was made in the context of an employer's failure to comply, there is

no reason to suppose that the principle would not apply equally to a failure to comply by an employee.

13. Where there has been an unreasonable failure to comply with the Code, the tribunal may increase or reduce the award if it ***“considers it just and equitable in all the circumstances to do so.”***
14. There is very little case law at appellate level providing guidance on how to determine the amount of the adjustment, if any. The terminology is very similar to that used under the old statutory dispute resolution procedures, so case law decided under that regime would appear to remain relevant to adjustments under S.207A.
15. In **Lawless v Print Plus EAT 0333/09** Mr Justice Underhill, then President of the EAT, pointed out that although the phrase ***“just and equitable in all the circumstances”*** connoted a broad discretion, the relevant circumstances were confined to those which were related in some way to the failure to comply with the statutory procedures. He went on to comment that the relevant circumstances to be taken into account by tribunals when considering uplifts would vary from case to case but should always include the following:
 - a) Whether the procedures were applied to some extent or were ignored altogether
 - b) Whether the failure to comply with the procedures was deliberate or inadvertent, and
 - c) Whether there were circumstances that mitigated the blameworthiness of the failure to comply.
16. Furthermore, the size and resources of the employer were capable of amounting to a relevant factor in the tribunal’s consideration of whether an uplift was appropriate and, if so, by how much. Relevance would depend on whether that factor aggravated or mitigated the culpability and / or seriousness of the employer’s failure.
17. In **Slade v Biggs 2022 IRLR 216, EAT**, the EAT set out a four-stage test to assist employment tribunals in assessing the appropriate percentage uplift for failure to comply with the Acas Code:
 - a) Is the case such as to make it just and equitable to award any Acas uplift?
 - b) If so, what does the tribunal consider a just and equitable percentage, not exceeding although possibly equalling, 25 per cent?
 - c) Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings in discrimination claims? If so, what in the tribunal’s judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?

- d) Applying a “final sense-check”: is the sum of money represented by the application of the percentage uplift arrived at by the tribunal disproportionate in absolute terms? If so, what further adjustment needs to be made?
18. The EAT further held that any uplift must reflect “***all the circumstances,***” including the seriousness of and / or motivation for the breach.
19. A further matter that might influence the level of uplift is the size of the total compensation awarded. In **Abbey National plc v Chagger 2010 ICR 397, CA**, an employment tribunal awarded almost £2.8 million to a claimant found to have been both unfairly dismissed and discriminated against on the ground of his racial origins. The tribunal awarded an uplift of only 2 per cent, utilising a specific provision in the Employment Act 2002 to award less than the normal minimum of 10 per cent for non-compliance with the statutory procedures if there were “***exceptional circumstances***” for doing so.
20. Although the Chagger case was concerned with a specific statutory provision governing the now defunct statutory procedures, it arguably established the broader principle that a tribunal can take into account the overall level of compensation when considering what adjustment to make. In fact, Elias LJ later went further in **Wardle v Crédit Agricole Corporate and Investment Bank 2011 ICR 1290, CA**, where the Court of Appeal disapproved a tribunal’s decision to award a 50 per cent uplift. In his view, the maximum uplift should be “***very exceptional indeed***” and should apply only in the most serious cases. The tribunal should have had regard to the size of the award in determining the uplift and its failure to do so was an error of law. Thus, it seems that not only is a tribunal entitled to take account of the size of the award when setting the level of uplift (if any) it deems to be just and equitable, it is obliged to do so.
21. In **Slade v Biggs (2022) IRLR 216** the EAT had the opportunity to address this issue specifically in the context of the Acas uplift. It held that while “***wholly disproportionate sums***” must be scaled down, large awards should not inevitably be given the benefit of a non-statutory ceiling which has no application to smaller claims. Nor should there be reference to past cases in order to identify some numerical threshold beyond which the percentage has to be further modified. That would cramp the broad discretion given to the tribunal, undesirably complicate assessment of what is just and equitable and introduce a new element of capping into the statute that Parliament has not suggested. The EAT further observed that while the maximum uplift should undoubtedly be applied only to the most serious cases, the TULR(C)A does not state that such cases should necessarily have to be classified as exceptional. The EAT considered it notable that the remarks in Wardle were made in the context of a (maximum) 50 per cent uplift, as opposed to an uplift of 25 per cent.
22. In **Rentplus UK Limited v Coulson (2022) ICR 1313**, HHJ Taylor considered the issue of whether there was a specific need to identify the specific provisions of the Code that he or she alleges have been breached. At paragraphs 32:

“The employment tribunal has to consider whether there has been a breach of the Acas Code and, if so, to what extent. This will nearly always involve consideration of which provisions of the Acas Code have been breached and which, if any, have been complied with. This is an objective question, and a matter of substance.”

And at paragraphs 33-36:

“What if the employer goes through the motions of applying a fair procedure, but it is a subterfuge and nothing the employee says could possibly make any difference, because dismissal is predetermined, so that the process is truly a sham? Mr Kohanzad contends that in such circumstances the dismissal would be unfair but there would be no breach of the Acas Code which is all about complying with its basic procedural requirements, not substantive fairness. If an employer seeks to apply a procedure that fully complies with the Acas Code in good faith but makes such a mess of it that the dismissal is unfair, I can see that it could be appropriate to award no uplift as there is no failure to comply with the terms of the Code, the unfairness is compensated by a finding of unfair dismissal. However, if an employer acts in bad faith and pretends to apply an appropriate procedure, I cannot see how that could amount to compliance with the Acas Code. If dismissal is predetermined and the employer will not take any account of anything said by the employee, at a hearing or appeal, it is hard to see how the employee is in a better position than would have been the case if the procedure had not been applied at all, and the meetings had not taken place. That would be my determination on application of first principles and common sense. I consider it is consistent with the authorities.

The issue was considered by Underhill LJ in De Souza v Vinci Construction UK Ltd [2018] ICR 433 , in the context of an alleged failure to comply with the grievance provisions of the Acas Code, albeit obiter:

“54. I have so far considered only the question of unreasonable delay. It is arguable that some or all of the other complaints admitted by Vinci, set out at para 38 above, also constituted breaches of the Code. Some of those complaints are about alleged procedural unfairnesses and others are about the actual outcome. Although the mere fact that a grievance has been (as a tribunal subsequently finds) procedurally mishandled or wrongly rejected does not constitute a breach of the Code, there might nevertheless be such a breach if the conduct or decision in question were found to show that the grievance was not considered in good faith. But it is unnecessary for us to decide whether that is so as regards any of the complaints in question. That will be a matter for the consideration of the employment tribunal on remittal.” (Emphasis added.)

That approach was approved by Simler J in Qu v Landis and GYR Ltd (unreported) 8 March 2019 , para 65:

“Read fairly, it seems to me that the tribunal’s findings in the liability judgment do sufficiently identify the provisions of the Acas Code with which the respondent failed to comply and do set out adequately the basis on which the employment tribunal concluded that the respondent had failed to comply with those provisions. These are not findings based on any assessment of the quality of the respondent’s decision-making. They are findings about failings in the process that was adopted and importantly include an implicit finding that the claimant’s grievances in relation to the [Performance Improvement Plan] process leading to his dismissal were not considered in good faith. That latter finding is itself a finding of breach and not an assessment of the quality of the respondent’s decision-making (see if necessary, De Souza (above) at para 54) .”

Accordingly, I consider that if a disciplinary, capability or grievance procedure is purportedly applied by an employer acting in bad faith, who takes no account of what the employee says, there is a breach of the Acas Code.”

23. The Respondent accepts the following points:
- a) That the Claims upon which the Claimant was successful are ones within Schedule A2 TULR(C)A — S.207A(1) and so are claims to which the Code applies (R – 38).
 - b) That because the Tribunal found that the principal reason for dismissal (#349) was conduct the Code is engaged in this case (R - 38).
24. That being so the next question to be asked is whether ***“the employer has failed to comply with that Code in relation to that matter.”*** I consider the following findings relevant within the Judgment:
- a) On 25 March 2020 Hannigan asked Davey to get the probation paperwork in order not ***“because of the possible need to save the Claimant and for her to make the necessary changes to succeed but was purely there in order to be able to justify the termination of the Claimant (#195 and #256).***
 - b) On 16 April 2020 there was a missed opportunity to get the probation process back on track because Davey knew what the outcome was going to be for the Claimant” (her dismissal) (#202)
 - c) The view that the Claimant was to be dismissed was adopted by Davey Read, Reid (the temporary head of school) and Scholtz (#349)
 - d) The decision to dismiss was a ***“foregone conclusion”*** from March 2020 (#350a) and there was nothing the Claimant could have done from that date onwards to save herself. The process in April /May 2021 was in effect ***“a sham”*** (350b and 350h).

- e) Scholtz did not have **“an open mind”** when he dismissed the Claimant and **“the process he enacted in April may was simply a rubber stamping of the view that the claimant did not fit in and would be better out of the organisation which had been concluded by others earlier”** (#350c). Scholtz simply accepted what he was told and made no attempt at any reasonable enquiry” (350e).
 - f) Brailsford who undertook the appeal failed to properly investigate matters raised by the Claimant because she was guided towards the management desired outcome by HR and accordingly her conclusions were tainted.
25. In their submissions the Respondent asserted that there was no breach and there were no steps within the Code that were left out and set out what they contended was compliance at R39 (a) to (f). I consider that the Respondent's actions are wholly consistent with this part of HHJ Tayler's dicta in **Rentplus UK Ltd** cited above:
- “However, if an employer acts in bad faith and pretends to apply an appropriate procedure, I cannot see how that could amount to compliance with the ACAS Code. If dismissal is predetermined and the employer will not take any account of anything said by the employee, at a hearing or appeal, it is hard to see how the employee is in a better position than would have been the case if the procedure had not been applied at all, and the meetings had not taken place. That would be my determination on application of first principles and common sense. I consider it is consistent with the authorities.”***
26. Having found that there was a breach of the ACAS Code the next issue was whether or not it was unreasonable. There is only one conclusion to that on the findings made and that is the conduct of the Respondent was clearly unreasonable.
27. An uplift should be granted in those circumstances if the Tribunal **“considers it just and equitable in all the circumstances to do so.”** I have a broad discretion but that discretion must be related in some way to the Respondent's failure to comply with the statutory procedures. I have considered the matters set out in **Lawless** (above) and conclude that as the Respondent knew the outcome before any “process” started and as I have found that the running of the process was a “sham” I can only conclude that that was a deliberate act, and a fair application of the ACAS process was ignored all together. I can find no circumstances that mitigated the blameworthiness of the failure to comply. I find that the Respondent's size and administrative resources were more than capable of following the ACAS Code if there had been any desire to do so. There was no such desire.

28. Following through with the test set out in **Slade** leads me to the following conclusions:
- a) I do consider this to be a case where it is just and equitable to award an Acas uplift.
 - b) Taking into account all the matters outlined above I am satisfied that the uplift should be set at a maximum of 25% as no lesser figure reflects the egregious nature of the Respondent's conduct.
 - c) I do not consider that the uplift overlaps, or potentially overlaps, with other general awards, such as injury to feelings in discrimination claims and so no adjustment is required.
 - d) I am not in a position at this stage to apply the "final sense-check" so as to consider whether the sum of money represented by the application of the percentage uplift arrived at by the tribunal is disproportionate in absolute terms? This will have to be applied at the next stage of this remedy process when the actual financial sums are clarified.
29. I next deal with the Respondent's assertions that the Claimant was in breach of the ACAS Code and so any award should be reduced on account of the Claimant's failings. Specific details of these submissions only came to light in Counsel's written submissions (R 40-42).
30. The Respondent asserts that the Claimant was in breach for the following reasons:
- a) The Claimant failed to attend her dismissal hearing in breach of para. 12 of the Code which states that **"...employees should make every effort to attend the meeting."**
 - b) At no stage did the Claimant ever raise a grievance about the alleged discrimination / harassment which was said to be contrary to para. 32 of the Code which states that where a grievance cannot be resolved informally a formal grievance should be raised.
31. It is factually correct that the Claimant did not attend the dismissal hearing. On 10 May the Claimant was signed off until 14 June with stress at work and severe anxiety. This followed both Professor Stopa on 19 April and the GP on 28 April writing to the Respondent to indicate that the Claimant was unfit to attend a dismissal meeting.
32. Professor Stopa wrote again on 24 May 2021 to say that the Claimant was not fit to either prepare for the hearing or attend it. Notwithstanding that letter the meeting went ahead on 25 May in the Claimant's absence.
33. I did observe at #287 of my Written Reasons:

“The Claimant’s ability to be able to produce the document for her appeal having so recently been unable to take any part at all is quite remarkable and whilst I accept that the Claimant’s capacity was diminished over the dismissal period I do not accept that it was renewed hope that allowed her to make the transition to being capable of undertaking what is a substantial and detailed piece of work. I find that there was an element of simply hoping to postpone the hearing for as long as possible and hoping that the medical evidence supporting such a postponement would achieve that aim.”

34. I do not seek to renege upon that finding. The Claimant’s evidence was that she had had a great deal of support in producing her appeal documents and I have no doubt that was true. I also accept that preparing a written treatise as to points on appeal is different to the stresses and strains that would be apparent at a face to face meeting. Making the above findings does not alter the fact that there was medical evidence that I am unprepared to ignore from Professor Stopa the day before the meeting that the Claimant was unfit to attend it. I find that was the reason why she did not attend and as a result do not find that her failure to attend on health grounds was unreasonable conduct on her part.
35. Similarly, I do not consider that her failure to raise a grievance was unreasonable either and entirely reject the suggestion by the Respondent that ***“matters might have taken a different course”*** (R-42) in light of the findings of long standing pre-determination that I have already found within my Written Reasons. I note that for the last ten months the Claimant was absent from work ill in any event which would have inhibited her ability to raise a grievance and in any event the Claimant was entitled to conclude from her treatment up to that point that a grievance was unlikely to be of any benefit to her. Further I do not recall, nor have I been able to locate in my hearing notes this matter being raised in cross examination.
36. In conclusion I reject the Respondent’s representations that there should be any ACAS reduction on account of the Claimant’s actions or inactions.

POLKEY / CHAGGER REDUCTIONS

37. Employment tribunals can make ***“just and equitable”*** reductions under S.123(1) of the Employment Rights Act 1996 (ERA) where the unfairly dismissed employee could have been dismissed fairly at a later date or if a proper procedure had been followed. Ever since the House of Lords’ landmark decision in **Polkey v AE Dayton Services Ltd 1988 ICR 142**, compensation can be reduced to reflect the likelihood that the employee would still have been dismissed in any event had a proper procedure been followed.
32. In Polkey, their Lordships ruled that the question of whether the employee ultimately suffered any injustice — i.e. whether the procedural irregularities really made any difference — was to be taken into account when assessing compensation. But in all such cases, tribunals will be entitled, when

assessing the compensatory award payable in respect of the unfair dismissal, to consider whether a reduction should be made on the ground that the lack of a fair procedure made no practical difference to the decision to dismiss.

33. In **O'Donoghue v Redcar and Cleveland Borough Council 2001 IRLR 615**, CA, the Court of Appeal held that where an employee had been found to have been unfairly dismissed on sex discriminatory grounds, the employment tribunal had been entitled to deploy Polkey-type reasoning to limit the period of loss.
34. When applying the Polkey principle, a tribunal should consider not only how long a fair procedure might have taken but also whether there was a real chance that the claimant might have remained in employment if a fair procedure had been followed. In **Venkatesan v Surabi Ltd EAT 0193/14**, the EAT held that the employment tribunal had erred by focusing purely on how long a fair procedure would have taken. What it should have done was consider whether there was a chance that, had such a procedure been followed, the Claimant could have shown that he had the right to remain and work in the UK and therefore would not have been dismissed.
35. It has been suggested in several cases that the Polkey principle applies only to cases where the unfairness of the dismissal derives from procedural failings rather than substantive injustice. The basic reasoning underlying this view is that it is only appropriate to speculate about what would have happened or might have happened in the context of procedural failings, since only in such cases is it feasible to construct the world as it might have been by positing what the fate of the employee would have been if the procedural failures had not occurred. In contrast, it is far more difficult and, so the argument goes, neither just nor equitable to speculate about what would or might have been the position where an employee has been dismissed in circumstances that are substantively unfair — for example, because of the employer's lack of a reasonably held and genuine belief in the employee's misconduct.
36. In **King v Eaton Ltd (No.2) 1998 IRLR 686**, Ct Sess (Inner House), the Court of Session held that, if there has been a merely procedural lapse or omission, it may be relatively straightforward to envisage what the course of events might have been if procedures had stayed on track. If, on the other hand, what went wrong was more fundamental, and seems to have gone "**to the heart of the matter,**" it may well be difficult to envisage what would have happened in the hypothetical situation of the unfairness not having occurred. In that case, the tribunal cannot be expected to '**embark on a sea of speculation.**'
37. In **O'Donoghue**, a Claimant unsuccessfully contended before the Court of Appeal that it was not open to a tribunal — in the light of the **King** decision — to make a finding on the inevitability of her dismissal, since her dismissal had been found to be substantively unfair. The employment tribunal in that case had found that the claimant had been both unfairly dismissed and victimised

but that she would have been fairly dismissed in any event within six months because of her unacceptable attitude towards colleagues and the complaints that had arisen as a result of her behaviour. Accordingly, it limited her compensation to the period of six months during which her employment would have continued. The Court of Appeal rejected the employee's appeal, stating that: ***"If the facts are such that an [employment] tribunal, while finding that an employee/applicant has been dismissed unfairly (whether substantively or procedurally), concludes that, but for the dismissal, the applicant would have been bound soon thereafter to be dismissed (fairly) by reason of some course of conduct or characteristic attitude which the employer reasonably regards as unacceptable but which the employee cannot or will not moderate, then it is just and equitable that compensation for the unfair dismissal should be awarded on that basis. We do not read Polkey or King as precluding such an analysis."***

38. One question of considerable practical importance is: in what circumstances does an employment tribunal have to consider whether to make a Polkey reduction? In **King** Lord Prosser (giving the lead judgment of the Court of Session) observed: ***"The matter will be one of impression and judgement, so that a tribunal will have to decide whether the unfair departure from what should have happened was of a kind which makes it possible to say, with more or less confidence, that the failure makes no difference, or whether the failure was such that one cannot sensibly reconstruct the world as it might have been."***
39. What is the degree of speculation expected of tribunals when considering a Polkey reduction? In **Gover v Propertycare Ltd 2006 ICR 1073, CA**, Lord Justice Buxton expressly approved the way in which His Honour Judge McMullen at EAT level had formulated the basis for considering whether a Polkey reduction should be made. In that case, the employment tribunal found that the compensatory award for employees who had been unfairly dismissed for refusing to agree to changes in their terms and conditions should be limited to four months' losses. That was the period of time the tribunal said it would have taken to conduct proper consultation about the proposed changes, at the end of which the employees would have been fairly dismissed, as it was likely, in the tribunal's view, that the employer would have offered more reasonable terms, but the employees would have continued to reject them. On appeal, upholding the tribunal's Polkey reduction, HHJ McMullen observed:
- 'The tribunal [was] doing what it [was] engaged to do: to draw upon its industrial experience of circumstances such as this and to construct, from evidence not from speculation, a framework which is a working hypothesis about what would have occurred had the [employer] behaved differently and fairly... The criticism advanced by [counsel] is that in seeking to construct the hypothesis the tribunal had so many pieces of the jigsaw missing that the only correct approach was to disallow any kind of Polkey reduction. We do not accept that proposition***

because the findings, based upon a careful analysis of the material which it had before it, and drawing upon its experience, do indicate that it was satisfied that there was material sufficient to make a judgement.'

40. The Court of Appeal's approval of HHJ McMullen's formulation suggests that tribunals are required to hypothesise about 'what ifs' and 'maybes' in their deliberations as to remedy to a far greater extent than had been previously understood. This impression has been reinforced by subsequent decisions of the Court of Appeal and the EAT, as discussed below.
41. In **Thornett v Scope 2007 ICR 236, CA**, the Court of Appeal held that a tribunal's task when assessing compensation for future loss of earnings will almost inevitably involve a consideration of uncertainties. Any assessment of future loss is by way of prediction and therefore involves a speculative element. A tribunal's statutory duty may involve making such predictions and tribunals cannot be expected, or even allowed, to opt out of that duty merely because their task is a difficult one and may involve speculation. Although there may be cases in which evidence to the contrary is so sparse that a tribunal should approach the question on the basis that loss of earnings would have continued indefinitely, whenever there is any evidence at all that that may not have been the case, this must be taken into account.
42. Soon after in **Software 2000 Ltd v Andrews (2007) ICR 825**, Mr Justice Elias, the then President of the EAT, reviewed all the authorities on the application of Polkey, including **Gover** and **Thornett** and summarised the principles to be extracted from them. These included:
- a) In assessing compensation for unfair dismissal, the employment tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal
 - b) If the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee (for example, to the effect that he or she intended to retire in the near future)
 - c) There will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal
 - d) However, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an

element of speculation is involved is not a reason for refusing to have regard to the evidence

- e) A finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can effectively be ignored.

43. At another point in his judgment, Elias P stated that ***“The question is not whether the tribunal can predict with confidence all that could have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise.”***

44. In **Britool Ltd v Roberts 1993 IRLR 481**, the EAT stated that the burden of proving that an employee would have been dismissed in any event was on the employer. While it is for the employee to show what loss he or she has suffered as a result of the dismissal, this is not a heavy burden since the fact that there has been an unfair dismissal in itself creates a prima facie loss. Accordingly, so long as the employee can put forward an arguable case that he or she would have been retained were it not for the unfair procedure, the evidential burden shifts to the employer to show that the dismissal might have occurred even if a correct procedure had been followed.

45. In **Whitehead v Robertson Partnership EAT 0331/01** the EAT stressed the importance of employment tribunals adequately explaining their reasons for making a Polkey reduction. In the EAT's view, it was incumbent upon the tribunal to demonstrate its analysis of the hypothetical question by explaining its conclusions on the following:

- a) What potentially fair reason for dismissal, if any, might emerge as a result of proper investigation and disciplinary process?
- b) Depending on the principal reason for any future hypothetical dismissal, would dismissal for that reason be fair or unfair?
- c) Even if a potentially fair dismissal was available, would the employer in fact have dismissed the employee as opposed to imposing some lesser penalty, and if so, would that have ensured the employee's continued employment?

46. In any case where the employer has dismissed for a substantively fair reason but has failed to follow a fair procedure, the compensatory award (but not the basic award) may be reduced — potentially to nil — so long as it can be shown that a fair procedure would have resulted in a dismissal anyway. The logic for a nil award (or to express it differently, a 100 per cent reduction) is that any procedural failure that served to render the dismissal unfair made absolutely no difference: the outcome would have been exactly the same even if a fair procedure had been adopted. The phrase ‘exactly the same’ in this context means that the employee would have been fairly dismissed on the same date as he or she was unfairly dismissed.
47. The obverse finding — that had a proper procedure been carried out there was a 100 per cent likelihood of the employee not only retaining his or her employment but also doing so on exactly the same terms and conditions — will lead the tribunal to conclude that it is not just and equitable to reduce the compensatory award at all. However, a finding that a claimant’s employment would have continued indefinitely should be reached only where evidence that it might have been terminated earlier is so scant that it can be effectively ignored (**Software 2000 Ltd**)
48. In **Williams v Amey Services Ltd EAT 0287/14** the EAT helpfully summarised the various methods by which it is open to a tribunal to make a Polkey reduction. Her Honour Judge Eady observed that:

‘In making such an assessment the [employment tribunal] is plainly given a very broad discretion. In some cases, it might be just and equitable to restrict compensatory loss to a period of time, which the [tribunal] concludes would have been the period a fair process would have taken. In other cases, the [tribunal] might consider it appropriate to reduce compensation on a percentage basis, to reflect the chance that the outcome would have been the same had a fair process been followed. In yet other cases, the [tribunal] might consider it just and equitable to apply both approaches, finding that an award should be made for at least a particular period during which the fair process would have been followed and thereafter allowing for a percentage change that the outcome would have been the same. There is no one correct method of carrying out the task; it will always be case-and-fact-specific. Equally, however, it is not a “range of reasonable responses of the reasonable employer” test that is to be applied: the assessment is specific to the particular employer and the particular facts.’
49. In Polkey itself Lord Bridge was at pains to point out that there was no need for an ‘all or nothing’ approach when making an appropriate reduction. He cited with approval the case of **Sillifant v Powell Duffryn Timber Ltd 1983 IRLR 91, EAT**, where Mr Justice Browne-Wilkinson pointed out that *“if the... tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal*

amount of compensation by a percentage representing the chance that the employee would still have lost his employment”.

50. The question of a Polkey reduction requires the tribunal to consider both whether the employer could have dismissed fairly and whether it would have done so. Furthermore, the enquiry is directed at what the particular employer before the tribunal would have done, not what a hypothetical fair employer would have done. These points were emphasised by the EAT in **Hill v Governing Body of Great Tey Primary School 2013 ICR 691, EAT**. There, the EAT allowed an appeal against the employment tribunal’s assessment of compensation because it appeared to have based its decision on a consideration of whether, if the employer had followed a fair procedure, a tribunal would have concluded that the resulting decision to dismiss was fair. This was not the proper test.
51. The legal bases for making Polkey reductions under S.123(1) ERA and reductions on account of employees’ contributory conduct under S.123(6) ERA are very different. In particular, the evidence that is germane to whether or not an employee has ‘caused or contributed’ to his or her dismissal may not be the same as that relevant to assessing what is ‘just and equitable’ to award the complainant having regard to the loss sustained in consequence of the unfair dismissal.
54. In cases of discriminatory dismissal, employment tribunals may also need to consider whether, were it not for the discriminatory dismissal, there could have been a non-discriminatory dismissal at the same time, or whether there would have been a non-discriminatory dismissal at some definable point in the future. Similar considerations apply to the possibility that, had the discrimination not occurred, the claimant would have voluntarily resigned his or her employment in any event. The chance that the claimant could or would have been dismissed or resigned in any event, with no discrimination, can be recognised by making a proportionate reduction in compensation for future loss. This entails making an assessment of the percentage chance of such an event occurring and adjusting compensation accordingly. If the period of loss is a long one, then a more sophisticated ‘sliding scale’ approach might be appropriate whereby the period of loss is divided into slices of time in respect of which, as the chance of a dismissal or resignation (or, for that matter, retrain to work) gradually increases, so the amount of compensation awarded in respect that particular slice of time correspondingly decreases. This approach is especially apposite to cases where a tribunal concludes that awarding career-long loss is appropriate.
55. The application of the so-called ‘Polkey reduction’ principle in discrimination cases has long been recognised and one example was provided above in **O’Donoghue**. The main authority in this area is **Abbey National plc v Chagger 2010 ICR 397** where the Court of Appeal had to consider a claim for career-long loss. Lord Justice Elias, giving the judgment of the Court of appeal, stated that if there was a chance that, apart from the discrimination,

the Claimant would have been dismissed in any event, that possibility had to be factored into the measure of loss. Clearly on the facts of the case, there was such a chance. The claimant was unlawfully dismissed in the context of a genuine redundancy situation, which affected only two candidates, one of whom had to be selected. Thus, there was plainly a realistic prospect that the Claimant would have been dismissed even if the selection procedure had been conducted on a non-discriminatory basis. The Court remitted the case to enable the employment tribunal to assess that prospect.

56. The Chagger case therefore makes it clear that a reduction in compensation along Polkey lines might serve to reduce future loss all the way down to zero. The circumstances justifying such an approach must, though, be regarded as rare. Indeed, in order to limit compensation to a period up to the date when a fair dismissal (or voluntary resignation) would have occurred, the evidence must establish that the dismissal by the particular employer would inevitably have occurred. In consequence, it is only open to a tribunal to decline to award any compensation for loss of earnings, or to limit compensation to a period (as opposed to making a percentage deduction) where the tribunal is 100 per cent confident that a non-discriminatory dismissal or resignation would have occurred either on the same date as the dismissal or an identified later date or period.
57. Otherwise, the correct approach is for it to make the assessment on a percentage basis reflecting the degree of chance that non-discriminatory dismissal or resignation would have occurred. This approach was also endorsed by the EAT in **Shittu v South London and Maudsley NHS Foundation Trust 2022 ICR**, where Mrs Justice Stacey confirmed that a 'loss of a chance' assessed in terms of percentages was the correct approach when assessing both unfair dismissal and discrimination compensation, as opposed to an all or nothing 'balance of probabilities' approach by which, based on the evidence before it, the tribunal determines whether or not an event would have occurred. In **Shittu**, the employment tribunal found that there was a 100 per cent chance that the claimant would have resigned when he did in any event for other non-discriminatory reasons and regardless of whether or not the specific circumstances which led to a discriminatory constructive dismissal had occurred. It therefore made no award for loss of earnings in respect of his disability discrimination claim and simply awarded a sum of £5,000 on account of the non-pecuniary loss for injury to feelings. Although Stacey J upheld the tribunal's decision, she also made it clear that, in the absence of the 100 per cent chance finding, it would have been appropriate for the tribunal to have made an award for pecuniary loss on the basis of an assessment of the percentage chance that the claimant would have resigned in any event.

Parties representations on Polkey / Chagger

58. The Respondent asserted that it was inevitable that the Claimant would have been dismissed by fair and non-discriminatory means in the future were it not

for the unfair and discriminatory dismissal that was found by the Tribunal (C4) and that it would have taken place within a relatively short time frame i.e., within 6-12 months and by August 2022 at the latest.

59. The Respondent posits two scenarios that together or in combination would have led to this state of affairs. They are:
- a) The Claimant's appointment would not have been confirmed and therefore the Claimant would not have been dismissed during or at the conclusion of her extended probation period in fair / non-discriminatory circumstances;
 - b) The Claimant would have been dismissed fairly and in non-discriminatory circumstances on ill-health capability grounds on account of long-term sickness;
60. So far as (a) is concerned the Respondent's submissions are at R 10-20 of the submissions. What would have happened if Professor Scholtz had taken a different course rather than terminating the Claimant's employment in May 2021 by allowing the Claimant further time to recover, acting as Reid had suggested by pausing the Claimant's probation until her return and then restarting it on her return with proper probation support and scrutiny (perhaps even a new line manager and appropriate adjustments? The Respondent suggests that it was ***"highly probable, if not inevitable that a fair and non-discriminatory dismissal would have been made on grounds of SOSR, conduct and/or capability, would have occurred"*** (R-11). The Respondent identifies that the key matters were ***"the tone of the Claimant's emails / communications and "lack of collegiality"*** would have remained. The Respondent sets out a number of findings made which it asserts are supportive of this point at R13 which it is asserted:
- "... demonstrates that the claimant had a long standing tendency to react or communicate in an abrasive and / or provocative and / or unprofessional manner and tone particularly to those in positions of authority particularly to those in positions of seniority to her, along with an insistence that in all matters her way was the best way. This meant she was very difficult to manage from an early stage. It is an inescapable conclusion that this trait would have continued during any future period of employment with the Respondent and in all likelihood would have been heightened as and when any attempt was made to revisit performance / conduct issues, restart the probation process or bring her end of probation review back into focus. Put simply, there is a wealth of evidence to suggest this relationship employment relationship was most unlikely to have stood the test of time."*** R-14
61. The Respondent then goes on to cite the Claimant's closing submissions (paras 8 and 105) that the Claimant had not undertaken any research work since March 2019 and that this was 40% of her job description. That, when

revealed would have been a further difficulty for the Claimant and one which the Respondent would have taken very seriously.

62. The Respondent deals with likely timescales at R16. It goes with taking the Claimant's evidence (and that of OH and Professor Stopa) that she would have been able to return on a phased return in May / June 2021 and then would be back up to full time hours by August 2021 in time for the 2021/2022 academic year (R-16). At that point it is suggested that the Claimant's probation would have recommenced and so it would have been February 2022 when the Claimant's confirmation in post would have taken place. Alternatively, as the Claimant had been off sick for a year she would have been granted a year's extension to her probation and that would be a probation review in August 2022. Whichever date is suggested the Respondent suggests that it was inevitable that the Claimant would have failed her probation after that time due to conduct / capability / the relationships in the Land Law department (SOSR).
63. So far as (b) is concerned the Respondent suggests that the Claimant's health would not have been in a position to return to work or to engage sufficiently in the probation process if she did return and so the Claimant would have been dismissed on ill-health grounds between 6-12 months after her actual dismissal i.e. by May 2022 at the latest and with the Claimant being at nil pay from July 2021 onwards.
64. As an alternative to above suggestion the Respondent suggests that even if the Claimant had have been able to return in May / June 2021 then even with the required support and if the Claimant had have been actively managed the Claimant would have led to the Claimant going off sick again with an attendance management process following and a dismissal in circa August 2022.
65. The Respondent concludes by asking the Tribunal to conclude that
- "It is inevitable that the Claimants employment would have terminated in fair and non-discriminatory circumstances, by reason of either of the above scenarios, by a defined point in time that being August 2022 at the latest such that the level of deduction on Polkey / Chagger grounds should be set at 100% from whatever point in time the tribunal considers termination would have occurred"**
- Alternatively, if the Tribunal cannot be so satisfied then it should make an assessment of the chance of it happening from certain point so that a percentage reduction can be made from certain point in the future. The Respondent suggests that percentage should be relatively high – 75%.
66. At C-6 the Claimant's counsel suggested that having regard to the original findings then the conclusion should be for no reduction on a Polkey/ Chagger basis or alternatively a **"nominal reduction"**.

67. At C-37 it is suggested there is no room for a reduction for the following reasons which are all suggested to be supported by findings within the Judgment which had been set out earlier in the submissions in detail:
- a) A general expectation that all would pass probation.
 - b) There was little of substance to complaints re the Claimant's conduct and performance.
 - c) Little effort to engage in the Claimant's well-being.
 - d) No attempts had been made to redress interpersonal difficulties with Nield who had been found to have equal culpability.
 - e) Investigation would have found fault with Nield and ways to accommodate both would need to be found.
 - f) No capability issues in the Claimant simply suggesting alternative ways of working.
 - g) There was nothing the Claimant could have done to prevent her pre-ordained dismissal.
 - h) The instigation of the dismissal process was an act of harassment.
 - i) The whole dismissal process was closed minded.
 - j) A reasonable employer would have pressed reset.
68. The Respondent submitted that the Claimant's management was tainted from an early stage in terms of not addressing inter departmental issues and the abject failings of the probation supervision and the failure to make any real form of investigation.

Conclusions on Polkey / Chagger

69. I start with the proposition that the Claimant would inevitably have been dismissed at some point in the future on account of her ill health. There is no evidence that the Claimant had suffered from psychiatric ill health before and that fed into the decision that the Claimant only became disabled from March 2020. It is likely that the Claimant's treatment at work was a substantial contributing factor to that. I have recorded in my Judgment (# 309) that the Claimant's condition worsened between March and July 2020 and then she was absent sick from July onwards.
70. The Claimant's probation was two years and she was engaged from November 2018. In December 2020 she was told that her probation had been paused during her current sickness and so that would appear to be paused at the 20 month stage i.e., there were 4 months left to go. At #311 I accepted that the letter from Davey exacerbated her condition.
71. There were various updates from OH as follows:

17 December 2020

- i) The Claimant had made gradual progress since the previous consultation but the progress had been hindered in part by the issues around the management meeting and student complaint;
- ii) The need to explore and address the work-related concerns was emphasised and indicated as being a delaying factor.
- iii) The Claimant was unfit for a management meeting in any guise at that time, including answering questions;
- iv) There was a likely return date of March 2021, if she was able to focus upon her recovery moving forwards;
- v) Performance concerns should be dealt with after a phased return.
- vi) Further review in 4-6 weeks.

25 February 2021

A further OH report indicated gradual improvement since the previous month and her ***“day to day functionality was mild-moderately limited”*** and varied from day to day. Further improvement was expected. It was suggested that in 4-6 weeks, the Claimant may be in a position to discuss a return-to-work plan perhaps with a trusted colleague.

15 March 2021

The Claimant provided another sick note which was to last until 10 May 2021. On 29 March, the Claimant contacted Ms Steele to see if she would be prepared to speak with her as suggested by OH around the end of March to discuss a return-to-work plan. Ms Steele suggested on 1 April after a bit of two-way correspondence that she would contact Scholtz after the university reopened on 12 April in order to put forward that suggestion.

- 72. On 7 April, the Claimant received from Professor Scholtz that indicated that she was going to have a probation review and her employment may be terminated. I accept that was a grievous blow to the Claimant. On 15 April 2021 the Claimant saw OH again. The advice was that the Claimant was temporarily unfit for work on account of low mood and anxiety and to facilitate a return it would help for her to discuss with a trusted friend about a return to work (the Steele plan). Once underlying issues had been addressed a return to work was likely. Prof Stopa saw the Claimant just after that meeting and found that since receiving notification of the meeting the Claimant had suffered an acute exacerbation of her condition. From that point on with certain delays the dismissal meeting was undertaken and the Claimant was dismissed, further affecting her health.
- 73. The OH evidence was in my view very clear that whilst the Claimant was not fit to work at that given time if the work-related concerns were explored and addressed then she would be able to return especially with the Steele conduit. It is also relevant that the Claimant had already sought to put the same in place i.e., was seeking to return to work. I find that when returning from a

break caused by psychiatric issues the desire or willingness of an individual to return is likely to be a key factor in its success or otherwise.

74. I have clearly set out in my previous Reasons the unreasonableness of the Respondent's actions in moving to a dismissal process when the Claimant had previously been told the same was paused and I accept that the Claimant's long term ill health moving forward was greatly contributed to by that unreasonable behaviour. I do not accept that the Claimant's health would have been the same had an alternative course been charted.
75. The reasonable counter factual must be that the Respondent would have followed OH advice and over time utilising the services of Steele I find that the Claimant would have been in a position to make a graduated return to the work place and I consider that would have been slower than the Respondent suggests but I consider a phased return from around the start of term and then back full time from January 2022. I do not accept the Respondent's position that the Claimant would not have been able to return at all and so would have been subject to an attendance management process and then dismissed around the start of 2022.
76. In order to achieve that so as to be in a position to dismiss the Claimant fairly at a later point the Respondent must be acting reasonably and must be in a position to explore and discuss the work related concerns. What would that have looked like?
77. It would have needed to address the Respondent's failings in the probation process with an acknowledgment of Davey's wholesale failings. Whilst it would not have been necessary to start the probation process again, it might certainly have been appropriate to allow the Claimant a full academic year in order to ensure that with proper support and monitoring the Claimant was performing to the required level. It must be remembered, of course, that the Respondent were now constrained in what they did vis a vis probation because of the Claimant's length of service and so would have to ensure that the necessary processes required in unfair dismissal claims were met before dismissing the Claimant fairly.
78. Further it would have to look into the dynamics of the Land Law team in an even handed way in order to seek to discover where the dynamics had not worked in the past and to put forward proposals and processes for those being improved in the future. The default position of the respondent as found was they were all professional adults and were expected to act in that way. To the extent that was not possible then a plan would have to be executed moving forward. It may be that some form of mediation would need to be held between Nield / Hannigan / the Claimant as required. Such enquiry were it to be even handed and open would have seen that the problem was not simply down to the Claimant as Hannigan had assumed.

79. There is no evidence to suggest that the Claimant had had difficulties at other places where she had worked and in the event that the management was fair and reasonable as opposed being skewed against her I am unable to conclude that she would have been dismissed on ill health grounds fairly at any time in the future. A fair process would have to consider the reasons why the Claimant was ill on this lengthy occasion which fairness would demand would be treated leniently and I do not accept that there is evidence which I can draw from that suggests that if the Claimant was being dealt with fairly in the workplace she would have such sickness absence that she would be dismissed fairly from a certain date and I am unable even to reflect that there is a percentage chance of the same happening so as to make a Polkey reduction that way. I reject the Respondent's contentions on their "sickness absence dismissal" contention in relation to Polkey.
80. I now move onto the contention that the Claimant would have been dismissed anyway on conduct / capability / SOSR grounds in any event at a certain date or there was a percentage chance of that happening. This is not a simple situation where there is a relatively straightforward failing on the part of the Respondent, such as a failure to consult in a redundancy case or a procedural breach in a conduct case where the counterfactual is simple matter of assessing what would have taken place in the event that a missing step had been introduced. On the findings within the Written Reasons the Respondent failed comprehensively from an early stage to deal with the Claimant fairly and reasonably and I agree with the contention put forward at R38 of the submissions that this is a problem for them.
81. I bear in mind each of the principles of the **Software 2000** case and consider each in turn bearing in mind the burden lies upon the Respondent to demonstrate that the Claimant would have been dismissed at some point in any event or alternatively there was a chance of dismissal in the future.
82. Had there been a fair and proper enquiry into the Claimant's situation then the failings that I have identified in my Judgment would have been identified or at the very least contextualised. It was inevitable that the employer, to be fair and reasonable, would have as I put in my Judgment "**pressed reset.**" There would have had to have been an acknowledgment of the management failings in relation to the probation policy and the largely misplaced negativity that had arisen around the Claimant.
83. The Claimant had not got everything right in her employment, although much of her tone in emails etc flowed from the defensive position she was forced into because of Nield's negativity and thereafter Hannigan's negativity towards her. There were other who complained about her but that was normally through a distorted lens. There were times when the Claimant could have been more helpful but by and large I found her capability to be acceptable and her

relations with many was fine so long as the well was not poisoned. Whilst the Claimant must take some responsibility for some of her responses and she herself accepted that there were times where she fell below what was required, those were comparatively limited.

84. In a working world where the Claimant was not marginalised by others and there was rational debate about how things might be done; in a working world where the probation process was used to try and retain and guide a member of staff as opposed to being solely used as a means to exit them; in a working world where conflict did arise the Claimant's view was not marginalised and ignored, where there was a balanced consideration of everybody's position and where there was proper proactive management of the situation I am satisfied that the issues with the Claimant would not have escalated to a situation where the Claimant would have been dismissed at any specific point in the future with 100% certainty.
85. There is no evidence to suggest that the Claimant was an individual who could not under any circumstances work competently and without misconduct in a university department. The evidence which was unchallenged from Manchester demonstrates that it was possible and feasible. It may well be that the Claimant had the capacity to be prickly and a propensity to send a brusque email. It may well be that colloquially she may not have been everybody's cup of tea and that some may not have got on with the Claimant. But even if that is so, it falls far short of being grounds for dismissal and is really little different to many people in many jobs up and down the country.
86. In this case I am satisfied that there is nothing that would permit me to say that had the Claimant returned to work that because of her future conduct, capability, and/or relations with others that she could have been fairly dismissed on any of the dates suggested by the Respondent. I find that it is no more likely than for any individual in any job. Her past conduct and capability must be seen in the context of the way she was being treated. I am mindful of my duty to ensure that I consider the evidence carefully to see whether a proper prediction can be made. I have gone back to consider the words of Elias P cited above:

“Rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience, and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment

must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise.”

87. Engaging my common sense, experience, and sense of justice I do not consider that I can say that I can conclude that there was a realistic chance in a universe where the Respondent was acting sufficiently reasonably for any dismissal to be fair that the Claimant would have been dismissed in the future nor that there was even a percentage chance of that happening. I have tried but there was so much fault that I do not consider it is possible, despite long consideration, an alternative path with any reliability at all. Accordingly, no Polkey reduction or Chagger reduction will be made.
88. I also consider that no reduction is required in relation to the Claimant's admitted failure to undertake her research work. The Claimant had produced papers in the past and had complied with her obligations previously. Had she returned and been properly supported I can see no reason why she would not have got back on track with that aspect of her work.

Contributory Fault

88. Section 123(6) of the Employment Rights Act 1996 (ERA) states that:

“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.”

89. In the event that the employee's conduct has been shown to have caused or contributed to the dismissal for the purpose of S.123(6), a tribunal has no option but to make such a reduction, since the relevant provision stipulates that the tribunal ***“shall”*** reduce the amount of the compensatory award. Any discretion lies only in the amount of the reduction, which must be ***“such proportion as it considers just and equitable”***
90. In **Nelson v BBC (No.2) 1980 ICR 110**, the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct, namely that the conduct must be culpable or blameworthy, the conduct must have actually caused or contributed to the dismissal, and finally it must be just and equitable to reduce the award by the proportion specified. The first two factors focus on the nature of the conduct that is said to have caused or contributed to the unfairly dismissed employee's dismissal. The third factor in effect deals with quantum: by how much should the tribunal reduce the compensatory award once it has found that such a reduction is appropriate?
91. What is deemed to be blameworthy and culpable conduct? The tribunal is obliged to focus on what the employee did or failed to do, not on the employer's assessment of how wrongful the employee's conduct and is for the

tribunal to establish and subsequently evaluate. Relevant conduct is not limited to actions that amount to breaches of contract or that are illegal in nature and in **Nelson** the Court of Appeal said that it could also include conduct that was “*perverse or foolish*,” “*bloody-minded*” or merely “*unreasonable in all the circumstances*.”

92. In order for a deduction to be made under S.123(6) ERA, a causal link between the employee’s conduct and the dismissal must be shown. This means that the conduct must have taken place before the dismissal, the employer must have been aware of the conduct, and the employer must have dismissed the employee at least partly in consequence of that conduct.
93. When considering the issue of contributory fault, tribunals are entitled to rely on a broad view of the employee’s conduct, including behaviour which, although not relating to the main reason for dismissal, nonetheless played a material part in the dismissal.
94. Once the element of contributory fault has been established, the amount of any reduction is a matter of fact and degree for the tribunal’s discretion. In **Hollier v Plysu Ltd 1983 IRLR 260**, the EAT suggested that the contribution should be assessed broadly and should generally fall within the following categories: wholly to blame (100 per cent); largely to blame (75 per cent); employer and employee equally to blame (50 per cent); slightly to blame (25 per cent). This may provide guidance but Tribunals retain their discretion to assert any percentage they deem fit.
95. The above deals with contributory fault arising from a specific statutory provision in the Employment Rights Act 1996 applicable to unfair dismissal. The question arose in **First Great Western v Waiyego EAT/0056/18** as to whether such a deduction could arise in a discrimination claim.
95. Kerr J noted the following:
 - a) There is no provision in the EqA 2010 for reducing the amount of compensation by reason of contributory fault, as there is in the unfair dismissal jurisdiction.
 - b) The wording of section 1(1) of the Law Reform (Contributory Negligence) Act 1945 on its face could apply to some discrimination claims under the EqA 2010 . It is not restricted in its application and plainly applies where compensation for a tort is awarded in a county court.
 - c) Tribunals should be very wary of accepting invitations to reduce compensation for discriminatory acts by reason of contributory negligence under the 1945 Act and Kerr J would expect such cases rarely if ever to arise, for at least the following reasons:

- i) The creators of the 1945 Act had no idea it might be applied to discrimination claims as none were in existence at the time;
 - ii) The second reason is that discrimination may not necessarily involve **"the fault of any other person or persons"** within the wording of the 1945 Act , section 1(1) . Discrimination can, at least arguably, be committed without fault in any ordinary sense of that word. It can be unconscious; it can be committed deliberately but misguidedly, with good intentions, and so forth.
 - iii) The obiter statement in **Way v Crouch [2005] ICR 1362** , in the EAT at paragraph 11 that **"compensation in a sex discrimination case (and by analogy in other discrimination claims) is subject to the [1945] Act "** is too broad.
 - iv) If a discriminator acts without "fault" within section 1(1) of the 1945 Act , the victim is better off, not being at risk of a contributory fault reduction, than if the discriminator is at fault. That may or may not be a good thing but the proposition has an arbitrary air about it and is surely an unintended consequence of aligning the compensation jurisdiction of the ET with that of the county court.
 - v) The discrimination statutes do not, as already noted, include a bespoke statutory provision dealing with contributory fault and it is likely that one would have been enacted if the legislature had intended there to be a power to reduce compensation by reason of the victim's conduct.
 - vi) The notion of contributory negligence in the context of discrimination is perilous and difficult to apply. It presupposes that the victim has by blameworthy conduct contributed to or encouraged the unlawful act of discrimination against a Claimant. One has only to consider the example of a sexual harassment case to see how dangerous such a notion is. There is a real danger that the essence of the right not to be discriminated against could be impaired if allegations of contributory negligence are readily made and entertained.
 - vii) It was suggested that contributory negligence might arise, for example, from a failure to keep an appointment for medical or other treatment such as CBT, offered by way of a reasonable adjustment which the employer has failed to provide in timely fashion. However, Kerr J considered that due to the conceptual difficulties it would normally be better to treat such cases as failure to mitigate loss rather than trying to shoehorn them into the 1945 Act.
96. At #372 and #382 of the Judgment findings are made that part of the reasoning behind the instigation of the dismissal process, the dismissal itself and the rejection of the appeal was the Claimant's sickness absence and her alleged lack of cooperation with the sickness absence process. It is those matters that go on to form part of the reasoning for dismissal, although as I have said numerous times the process will still have taken place with the same outcome even without the discrimination elements.

97. I note that there is no specific section of the Equality Act 2010 relating to a reduction for contributory fault but note that section 124 of the EqA states that the Tribunal powers are as per section 119 that states the county court has power to grant any remedy which could be granted by the High Court in any proceedings in tort. In those circumstances I am satisfied that whilst a deduction for contributory fault may be rare in a discrimination context there is no reason why the Law Reform (Contributory Negligence) Act 1945 could not be applied at all as a matter of law. Section 1 (1) of that Act reads:
- “Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the Claimant’s share in the responsibility for the damage.”**
98. Dealing with the contributory fault in relation to the unfair dismissal award I am satisfied that there is relevant blameworthy and culpable conduct. The Respondent sets out a lengthy list of conduct that it contends I should take into account at R10 and cites a number of findings I made within my Judgment. The principal conduct that I consider that meets the required criteria is the email exchange on 25 March 2020. I described the Claimant’s contribution as being prickly, defensive, unhelpful, pernicky, and antagonistic and indicated that she had instigated this unfortunate exchange and that she should have simply complied with the management instruction. This is my assessment of the conduct as required in **Steen v ASP Packaging Limited (2014) ICR 56**.
99. I further accept that this incident led Professor Hannigan to determine that the Claimant was not going to be a long term fixture of the Team and that she was to be managed out via the probation system. I am satisfied in itself that this particular discussion would not have been sufficient to found any form of dismissal. Hannigan’s decision came about on the basis that she had singularly failed to investigate / enquire into why it was that there had been previous issues. Had she done so she would have discovered the context in which many of the Claimant’s alleged indiscretions were made and would have understood that many were in response to inappropriate conduct by Nield. Professor Hannigan’s view that the Claimant would not fit in and had to go must be seen in the context of acting on skewed information and a willingness to only listen to the side contrary to the Claimant. Had she done what she should have done, listened, investigated, made the correct determination, and worked at seeking to resolve the issues or to put it another way actually proactively managed the situation then it is likely, in my view, that a different course would have been enjoyed.
100. There were other emails that were terse, inappropriate and /or inadvisable from the Claimant over time but to a large extent whilst acknowledging them

for what they are, it is right to view them in context of the dismissive treatment the Claimant was getting from Nield / Hannigan. As I said in my Judgment much of the time the Claimant was simply putting forward views of alternative ways of working which were then ignored or ridiculed by Nield. The Claimant did have the capacity to be hyperbolic and over dramatic and certainly said things as she saw them. Having a forthright and direct character is not of itself wrong, however.

101. My view is that there was blameworthy and culpable conduct but that the scope of it is substantially less when placed in context than suggested by the Respondent. I indicated at #257 that there were matters from the Claimant that did lead to Hannigan coming to the view the Claimant would not fit in but would observe that there were also a large number of matters and views that she held when coming to that conclusion which would not have been objectively justified had there been a proper enquiry.
102. I am satisfied that the conduct complained of did contribute to the decision to embark on the course towards dismissal and the dismissal itself. That is an inescapable conclusion particularly in relation to the March correspondence cited above.
103. Having satisfied myself of the first two limbs of the test I now need to consider what reduction would be just and equitable in this Claim. I take into account that there has been no Polkey reduction as there is always a risk of double penalising a party. In my view a reduction of 20% is reflective of the fact that I consider that whilst there is blameworthy and culpable conduct it does fall at the bottom end of the scale. That is the reduction that will be applied to the unfair dismissal compensatory award.
104. I am not satisfied that it is right to make any reduction in relation to any award for disability discrimination. None of the matters which the Respondent relies upon at R10 are matters that pertain to aspects of disability. The Claimant cannot be criticised for being off sick when she was ill and that is supported by medical certificates. To the extent that fed into her dismissal i.e., the fact of the Claimant being on long term sick leave no reduction would be permissible. It is possible that the Claimant's conduct whilst on sick leave could be something from which a contributory deduction could be made pursuant to the statutory provision set out above at para. 97 but the Respondent does not specifically cite any as being reasons why the Claimant contributed to this aspect at R10.
105. I have looked back at the findings from my Judgment and can find nothing that would signal that any reduction for contributory fault should be made. There was some criticism by the Respondent that the Claimant had failed to keep in contact adequately but taking into account the nature of the Claimant's illness and what was actually going on I do not consider that would amount to fault on the part of the Claimant but a consequence of her illness which she was not responsible for. No contributory reduction should be made on any discrimination compensation.

106. In summary:
- a) 25% ACAS uplift where appropriate (subject to sense check)
 - b) No Polkey / Chagger reduction
 - c) 20% deduction for contributory fault on unfair dismissal only.
107. An Order giving directions for the future conduct of this Claim will follow shortly as will a listing for the next stage of the remedy process. The parties are encouraged to consider whether they are able to resolve issues of compensation without further hearings.

Employment Judge Self
Date: 14 October 2025

Sent to the parties on
14 October 2025

Jade Lobb
For the Tribunal Office: