EMPLOYMENT TRIBUNALS

Claimant: **Mr T Tamponi**

Respondent: **Medequip Assistive Technology Ltd**

Heard at: London South **On:** 9th June 2025

Before: Employment Judge Reed, Ms J Jerram and Mr C Rogers

Representation
Claimant: Did not attend
Respondent: Mr Kemp KC

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 60 of the Employment Tribunals Rules of Procedure, the following reasons are provided:

REASONS

Background

1. This hearing was listed to consider remedy following our earlier judgment in this matter, which concluded that Mr Tamponi had been unfairly dismissed. These reasons should be read together with the reasons for the liability decision.

The hearing

2. In addition to the material that had been provided for the liability hearing, the Tribunal had regard to the following additional documents provided by the parties:
    a. A skeleton argument provided by Mr Tamponi
    b. A skeleton argument provided by Mr Kemp KC
    c. An authorities bundle provided by Mr Kemp KC
    d. Witness statements from Mr Andrew Firth and Mr Nigel Cook on behalf of Medequip
    e. A remedy bundle produced by Mr Tamponi running to 85 pages
    f. A spreadsheet provided by Mr Tamponi resulting from his FOI requests
    g. A Medequip internal vacancy bulletin dated 4th June 2025 produced by Mr Tamponi

h. A contract between Medequip and a number of Councils provided by Medequip
i. A document titled 'Letter about the list of issues' provided by Mr Tamponi
j. A letter of 5th September 2022 between Medequip and the City of Westminster provided by Medequip

3. On the morning of the hearing, the tribunal received two emails from Mr Tamponi. The first was sent to the Tribunal at 5.32am. That email contained the supplementary bundle of evidence that Mr Tamponi wished to rely on and the internal vacancy bulletin. The email also set out a number of submissions in support of Mr Tamponi's case.

4. The second email was sent to the tribunal at 7:35 am. It read as follows:

> Dear Madams/Sirs,
>
> with the present, and with huge regret, I inform you that I will not attend the hearing listed for this morning at 10.
>
> Following my submission from last week, and my request for a clarification, I thought I could gain a better idea of the List of issues regarding remedy that the Tribunal is asked to sort, and I'm afraid I have not.
>
> I'm aware that my decision could have a negative impact on the end of my claim, but I feel that my attendance today could cause an even worse outcome.
>
> I apologise for any inconvenience caused and I will wait to know the Tribunal decision via email.
>
> Yours Sincerely
>
> Tancredi Tamponi - Claimant

5. The Tribunal did not consider that email in isolation, but read it in context with a number of other documents and communications. This included the ''Letter about the list of issues' referred to above. This had been sent to the Tribunal on 4th June 2025. The main part of that letter reads as follows:

> Dear Madams/Sirs,
> while reviewing my submission for the Remedy hearing, I've noticed that as of today the Tribunal has not yet clarified in full details what are the issues to be decided: in the Judgement and reasons letter regarding Remedy the List of issues were omitted, and for this reason I remind the two lists proposed before the Tribunal by me and the Respondent in advance of the Liability hearings held in August 2023: the difference between the two versions is minimal, and I think that the Tribunal might want to confirm what is going to be discussed during next week's hearing, unless minded produce a different List of issues; should that be the case, I believe that both I and the Respondent could find useful to know it and be provided this document a few days in advance:

6. The letter then goes on, as Mr Tamponi indicated, to set out a list of issues as proposed by the claimant and a list proposed by the respondent. The two list

are almost identical. The respondent's list is the issues relating to remedy set out in their draft list of issues on page 60-63 of the liability bundle. It identifies four issues as follows:

a. Has the Claimant failed to properly mitigate his loss, and, if so, to what extent should the Claimant's compensation be reduced accordingly?
b. Should any compensation be reduced by reason of contributory fault on the part of the Claimant?
c. Has either party failed to comply with the ACAS code, and if so, what adjustment to any award would be appropriate?
d. Should a Polkey key adjustment be made to any award?

7. The draft list of issues also briefly summarises each party's position on these questions.

8. Mr Tamponi's proposed version sets out the same questions, but makes minor adjustments to the wording used to summaries the party's positions.

9. In relation to the possibility of a reduction for contributory fault, the respondent's version sets out three contentions made by Mr Tamponi and then goes on to set out his position that 'for this reason there is no fault on his part'. Mr Tamponi's version pluralises that statement, referring to 'for these reasons'. This a minor difference of grammar, not any substantive disagreement about the issues the Tribunal would need to consider.

10. In relation to the possibility of a Polkey reduction, the respondent's version contains the note that the respondent will argue that the claimant would have been dismissed in any event. The next line asks 'Does it imply that the decision to dismiss him had been previously made and was independent form the controversy about the DBS check?' In context, this is a rhetorical question, indicating an argument on behalf of Mr Tamponi that the Tribunal should infer from the respondent's position that the dismissal was a) predetermined and b) on the basis of some other reason than the one put forward by the respondent. Mr Tamponi's version elaborates on this briefly to add the additional question 'If so, what were the main reasons behind that decision?' Again, there is no difference of substance between the two versions so far as the issues for the Tribunal is concerned. In any event, the issue of the reason for Mr Tamponi's dismissal had already been determined at the liability stage.

11. Mr Tamponi's email indicating that he would not attend the tribunal must also be read in connection with his earlier email of the same day. There he argues that:

> It is my position that, with its last submissions to the Tribunal, the Respondent is trying to introduce from the back door elements that should eventually have been contended before and/or during the liability hearing: i refer in particular to the fact that the Respondent would have had a contract with the London Consortium, which was not a contracting authority and had no power to award the Respondent a contract.

12. The Tribunal understood this to be a reference to Medequip's argument, dealt with in more detail below, that its contracts required it to carry out DBS checks; that Mr Tamponi would have remained unwilling to comply with these; that therefore his dismissal was inevitable and therefore a *Polkey* reduction should

be applied.

13. A final important part of the context is that, prior to the hearing both parties had exchanged their written submissions. Both parties sent these to the Tribunal on 4th June 2025, copying each other (Mr Kemp KC's submissions are dated 5th June 2025, but this must be a typo since they were attached to the 4th June 2025 email from his solicitor to the Tribunal).

14. Although Mr Tamponi's submissions were not drafted in the style that would be used by a qualified lawyer, it is clear from them that he appreciated the issues that the Tribunal would be examining. He presented arguments as to why he had not contributed to his dismissal and why a Polkey reduction should not be made. In so far as there had been any lack of clarity as to the positions taken by the respondent, this would have been resolved by Mr Kemp KC's written submissions.

15. Overall, it was unclear to the Tribunal the nature of the uncertainty that Mr Tamponi was suggesting existed over the issues that the Tribunal would need to address at the remedies hearing. There was plainly disagreement as to the correct outcome in relation to the issues, but that is an inevitable aspect of a contested hearing. The Tribunal also understood that Mr Tamponi's position was that the Medequip were seeking to reopen issues that either had been resolved or should have been raised at the liability stage. That type of dispute is a common element of remedy hearings.

16. If Mr Tamponi was unclear about the issues to be dealt with by the Tribunal or there was a dispute between the parties as to the live questions before the Tribunal, those were matters that could and should have been addressed at the hearing. The Tribunal concluded that there was nothing in the documents / correspondence that demonstrated that Mr Tamponi had a good reason not to attend the hearing.

17. The Tribunal considered whether to adjourn the hearing, in order to give Mr Tamponi a further opportunity to attend. The respondent opposed any adjournment. The Tribunal concluded that adjournment would not be in the interests of justice. Adjournment would have delayed the resolution of the case and caused delay in other cases. The prejudice suffered by the respondent in adjourning would have been greater than that suffered by Mr Tamponi in continuing in circumstances where he had chosen not to attend.

The law

Re-employment orders

18. This is a case in which the claimant sought a re-employment order, i.e. an order that the respondent re-instate him into the same role from which he was dismissed or appoint him to a comparable role.

19. The Employment Rights Act 1996 deals with such orders in sections 113 to 117 as follows:

Orders for reinstatement or re-engagement
113 The orders

An order under this section may be—

(a) an order for reinstatement (in accordance with section 114), or

(b) an order for re-engagement (in accordance with section 115),

as the tribunal may decide.

114 Order for reinstatement
(1) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed.

(2) On making an order for reinstatement the tribunal shall specify—

(a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement,

(b) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and

(c) the date by which the order must be complied with.

(3) If the complainant would have benefited from an improvement in his terms and conditions of employment had he not been dismissed, an order for reinstatement shall require him to be treated as if he had benefited from that improvement from the date on which he would have done so but for being dismissed.

(4) In calculating for the purposes of subsection (2)(a) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of reinstatement by way of—

(a) wages in lieu of notice or ex gratia payments paid by the employer, or

(b) remuneration paid in respect of employment with another employer,

and such other benefits as the tribunal thinks appropriate in the circumstances.

115 Order for re-engagement
(1) An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment.

(2) On making an order for re-engagement the tribunal shall specify the terms on which re-engagement is to take place, including—

(a) the identity of the employer,

(b) the nature of the employment,

(c) the remuneration for the employment,

(d) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of

employment and the date of re-engagement,

(e) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and

(f) the date by which the order must be complied with.

(3) In calculating for the purposes of subsection (2)(d) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of re-engagement by way of—

(a) wages in lieu of notice or ex gratia payments paid by the employer, or

(b) remuneration paid in respect of employment with another employer,

and such other benefits as the tribunal thinks appropriate in the circumstances.

116 Choice of order and its terms

(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—

(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.

117 Enforcement of order and compensation
(1) An [employment tribunal] shall make an award of compensation, to be paid by the employer to the employee, if—

(a) an order under section 113 is made and the complainant is reinstated or re-engaged, but

(b) the terms of the order are not fully complied with.

(2) Subject to section 124, the amount of the compensation shall be such as the tribunal thinks fit having regard to the loss sustained by the complainant in consequence of the failure to comply fully with the terms of the order.

(2A) There shall be deducted from any award under subsection (1) the amount of any award made under section 112(5) at the time of the order under section 113.

(3) Subject to subsections (1) and (2), if an order under section 113 is made but the complainant is not reinstated or re-engaged in accordance with the order, the tribunal shall make—

(a) an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 126), and

(b) except where this paragraph does not apply, an additional award of compensation of [an amount not less than twenty-six nor more than fifty-two weeks' pay],

to be paid by the employer to the employee.

(4) Subsection (3)(b) does not apply where—

(a) the employer satisfies the tribunal that it was not practicable to comply with the order, . . .

(7) 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 (4)(a) whether it was practicable to comply with the order for reinstatement or re-engagement unless the employer shows that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement.

(8) Where in any case an [employment tribunal] finds that the complainant has unreasonably prevented an order under section 113 from being complied with, in making an award of compensation for unfair dismissal . . . it shall take that conduct into account as a failure on the part of the complainant to mitigate his loss.

20. The Tribunal must begin by considering whether an order for reinstatement is appropriate (i.e. an order to reinstate the employee to the job from which they

were dismissed). In examining that issue the Tribunal must take into account whether the employee wishes to be reinstated; whether it would be practical for the employer to comply with the order if made and where the employee caused or contributed to the dismissal, whether it would be just to reinstate them.

21. If the Tribunal does not make an order for reinstatement, it must then go on to consider whether to make an order for re-engagement and, if so, on what terms. In examining that issue the Tribunal must take into account any wish the employee expresses about the order to be made; whether it would be practicable for the employer to comply with an order for re-engagement and, where the claimant caused or contributed to the dismissal, whether it would be just to reinstate them.

22. Practicability in the context of re-employment orders means not only that re-instatement or re-engagment is possible, but that it is capable of being carried into effect with success, see *Coleman v Magnet Joinery Ltd* [1975] ICR 46. The Tribunal must bear in mind that an employment relationship must be workable in practical and human terms, see *Kelly v PGA European Tour* [2021] ICR 1124

23. This means that the likelihood that an employee and employer can work together in the future will often be a key part of the consideration in relation to practicability.

Compensation

24. If the Tribunal does not make a re-employment order, it will make an award of compensation in accordance with section 118 to 126 of the Employment Rights Act 1996. These provide for a basic award and a compensatory award.

25. The basic award is calculated in accordance with sections 119-122. It is based on an arithmetic calculation on the basis of the employee's age, length of service and weekly pay. Section 122(2) allows for a reduction to the basic award where the Tribunal considers that the conduct of the employee prior to the dismissal was such that it would be just and equitable to reduce the amount of the basic award.

26. In relation to the compensatory award, the Tribunal is required to award such amount as it 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. In essence the purpose of the compensatory award is to place the employee in the financial position that they would have been, but for the unfairness of the dismissal.

Mitigation

27. Calculation of the loss flowing from a dismissal must be approached on the basis that the employee is required to act reasonably in order to mitigate that loss. If an employee has not done so, the Tribunal must determine what loss they would have suffered had they done so. Deciding whether an employee has failed to mitigate their loss will often require examination of their efforts to locate new employment.

28. The burden of showing there has been a failure to mitigate is on the employer, see *Fyfe v Scientific Furnishings Ltd* [1989] IRLR 331. They must show that the employee has acted unreasonably; it is insufficient to demonstrate that there are reasonable actions that the employee might have taken that they have not done, *Wilding v British Telecommunications plc* [2002] ICR 179.

Polkey Reduction

29. It is also open to a Tribunal to reduce any compensatory award to reflect the possibility that the employee might have been dismissed had the employer acted fairly. This is described as a Polkey reduction, following the case of *Polkey v AE Dayton Serviced Ltd* [1988] ICR 142.

30. As in relation to unfair dismissal, the Tribunal must not substitute its own view for that of the employer, the key questions are a) Whether the employee could have been fairly dismissed? and b) Would the actual employer have done so? See *Hill v Governing Body Great Tey Primary School* [2013] IRLR 274.

31. The assessment of a Polkey reduction is an inherently uncertain exercise, since it inevitably involves an element of speculation. Although there are cases in which the evidence related to any potential reduction is so riddled with uncertainty that no sensible assessment can be made, this is unusual. Tribunals should only proceed on the basis that employment would have continued indefinitely where the evidence that it would not have done so can properly be ignored, see *Software 2000 v Andrews* [2007] IRLR 568.

Contributory fault

32. Section 123(6) of the Employment Rights Act 1996 provides that, where the Tribunal finds that an employee caused or contributed to the dismissal it shall reduce the amount of compensatory award by such proportionate as it considers just and equitable.

33. Although a reduction under section 123(6) requires an element of causation, this does not apply to the similar reduction to the basic award under section 122(2). Further, conduct by the employee that does not fall within section 123(6) may be considered by the Tribunal when it considers what compensatory award is just and equitable.

34. A reduction should only be made, however, where there has been culpable or blameworthy conduct by the employee. And, where that conduct was known about prior to dismissal, the Tribunal must generally be satisfied that the conduct caused or contributed to the dismissal to some extent, see *Nelson v BBC (No.2)* [1980] ICR 110.

ACAS Uplift

35. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 allows for an increase or reduction to the compensatory award on the basis that either the employer or employee has unreasonably failed to follow

the ACAS Code of Practice on Disciplinary and Grievance Procedures and the Tribunal considers it just and equitable to make the increase / reduction.

36. A failure to comply with the ACAS code may arise not only because the steps required under the Code have not been done, but also where an apparently compliant approach was a sham or conducted in bad faith, see *Rentplus UK Ltd v Coulson* [2022] IRLR 664.

Findings of fact and conclusions

37. The Tribunal reached the following findings of fact and conclusions.

38. As in the liability decision, the Tribunal made its findings of fact on the basis of the civil standard of proof.

The need for a DBS check

39. The related questions of whether a DBS check was required for Medequip's employees and whether Medequip genuinely believed that such a check was required are relevant to a number of the issues relating to remedy. It is therefore convenient to deal with them here.

40. So far as the statutory DBS regime is concerned, the evidence and submissions presented at the remedies stage did not take the matter beyond what is set out in the liability judgment. Medequip did not make submissions by reference to the statutes and regulations governing the DBS. It did not seek to establish that the statutory regime required or permitted an Enhanced DBS check in relation to Mr Tamponi, either prior to his dismissal or in order to carry out the any of the roles that were considered in connection with a possible re-employment order.

41. Medequip did produce a contract between it and a number of local authorities. The Tribunal accepted that this was a contract that related to the work being done at the Emersons Green depot. The contract was based on a standard contract produced by the NHS. The Tribunal accepted that the contract was broadly representative of the contracts that Medequip had with other local authorities.

42. The Tribunal was referred in particular to clause 7.5 of that contract that dealt with safeguarding. This was as follows:

> The Provider must develop, document, publish, promote and adhere to their own written policies covering safeguarding in order to protect from abuse vulnerable Service Users, carers and families (adults and children).
>
> The Commissioners have in place local safeguarding policies and procedures to protect Adults at Risk and Children from abuse. The Provider will ensure that their safeguarding policy and procedure takes account of and works in conjunction with these policies.
>
> The Provider will ensure that their staff understand what action to take if they are informed about or encounter abuse or suspected abuse.

The Provider will ensure that their staff have access to guidance, training and support.

The Provider will ensure that all staff, including any volunteers, involved in delivering the Service:

- Have in place an up to date clear Disclosure and Barring Service enhanced CRB check where required under the Contract terms;
- Understand and follow safeguarding policies and procedures taking into account the requirements of each of the Commissioners' safeguarding policies and procedures;
- Have undertaken safeguarding Training relevant to both children and adults at risk;
- Maintain safeguarding practice in line with policy updates/changes;

43. DBS checks are also mentioned in clause 2.3, which deals with staffing. That includes a provision as follows:

    The Provider will have policies and procedures to ensure that all staff have a Disclosure and Barring Service (DBS) check at the level appropriate to their role.

    Any failure to comply with DBS requirements which leads to an actual or perceived risk to members of the public will be reported to the Contract Manager as a Serious Incident.

44. Both Mr Firth and Mr Cook's gave evidence about what Medequip's contractual obligations to their customers were in relation to DBS. Both believed that these required that their employees have an enhanced DBS check. Both agreed that this was their understanding of clause 7.5 above and that Medequip's other contracts invariably included a similar contractual requirement to carry out DBS checks. Both indicated that, in their view, Medequip had no practical power to change this requirement. In their view it was something required by their customers, who would insist on it in circumstances where Medequip had no negotiating power.

45. Mr Cook elaborated to say that the majority of these contracts also required that these checks be updated every few years.

46. He went on to suggest that an enhanced check was required for all employees because they were required to work flexibly. Even if an employee was normally working in a warehouse where they would not encounter members of the public, they would be likely, on occasion, be required to fill in for or assist drivers with the delivery of equipment to end users. This would mean they would encounter vulnerable people and be involved in giving them guidance/instruction. Therefore, Mr Cook suggested, they required the same levels of DBS clearance as the drivers.

47. The Tribunal concluded that none of this established that an enhanced DBS check was required in respect of Mr Tamponi, either in the role from which he was dismissed or for him to take up any of the roles considered in relation to a re-employment order. First, whatever the contractual position might have been,

it could not be determinative of whether it was lawful to require an enhanced DBS check. As summarised in the liability reasons, the DBS regime is a statutory regime that sets out strict controls about when an enhanced DBS check may be carried out. That statutory regime does not allow a party to justify an enhanced DBS check of an employee on the basis that they have entered into a contract with a third party that requires one.

48. Second, the contract provided by Medequip, which the Tribunal accepted was likely to be typical of such contracts, does not bear out the interpretation that Mr Firth and Mr Cook suggested. It does not state that Medequip was required to carry out enhanced DBS checks of all its staff. Rather, it requires that Medequip must ensure that its staff have 'an up to date clear Disclosure and Barring Service enhanced CRB check where required under the Contract terms'. That leaves unanswered the question of where that will be required. The only further provision, at clause 2.3, says on that staff must have a DBS check at the level appropriate to their role. That takes the matter no further forward.

49. The Tribunal therefore found that Medequip had not established that it was entitled to require Mr Tamponi to undergo an enhanced DBS check, either in his previous roles or any other role he might undertake at Medequip.

50. The Tribunal accepted, however, that both Mr Firth and Mr Cook were honest witnesses on this point who genuinely believed that Medequip's contracts required it to carry out enhanced DBS checks.

Did Mr Tamponi contribute to his dismissal?

51. The question of whether Mr Tamponi contributed to his dismissal is relevant to a number of the issues related to remedy. It is therefore convenient to deal with it here.

52. Medequip relied on two main points in support of their submission that Mr Tamponi had contributed to his dismissal. First, that he had previously received a written warning, as detailed in the liability judgment. Second, that there was in general an element of bloody-mindedness or unreasonableness in his approach to the employment relationship.

53. The Tribunal concluded that Mr Tamponi did not contribute to his dismissal.

54. So far as the written warning was concerned, the tribunal concluded that this had no real impact on the decision to dismiss Mr Tamponi. That decision was taken because a Medequip had taken the view that an enhanced criminal records check was required, and that if Mr Tamponi did not agree to have such a check conducted, he was refusing a reasonable management order. In its view, given Medequip's obligations to its customers, dismissal was then the only possible outcome. Medequip's view, as articulated by Mr Cook and Mr Firth, remained that an enhanced DBS check was required. In these circumstances, whether Mr. Tamponi had or did not have a written warning played no part in the decision to dismiss him. It could therefore not be said to have contributed to his dismissal.

55. In relation to whether Mr Tamponi was unreasonable in his approach to the

employment relationship, the Tribunal reminded itself that its task was to consider whether Mr Tamponi was guilty of culpable or blameworthy conduct that contributed to his dismissal. The Tribunal is not charged with carrying out a general assessment of an employee's behaviour throughout their employment (or, for that matter, a general assessment of an employer's behaviour). It is no part of the Tribunal's task to weigh the moral position of the parties in any overall sense.

56. As in relation to the written warning, it is important to recognise that Medequip had reached a firm view both that it was essential that Mr Tamponi undergo an enhanced DBS check and that he was unreasonably refusing to do so. That was the basis of the dismissal and Medequip was not materially influenced any other factor.

57. Further, in relation to the DBS check, Mr Tamponi had not committed any blameworthy or culpable action that would justify a finding that he had contributed to his dismissal in a way that would impact upon remedy. The most that might be said against him was that he had 'stood on his rights' in relation to the DBS regime and that he had, at some points in the process been somewhat abrasive.

58. So far as insisting on his rights in relation to the DBS regime, the Tribunal did not find that this was blameworthy or culpable. Put shortly, Mr Tamponi had every right to seek to insist that the law in relation to DBS checks was followed and that his employer behaved reasonably when seeking to carry out such checks. His request that he be provided with a proper explanation as to the need for the check and a copy of Medequip's relevant policy were reasonable. The fact that other employees at Medequip appear to have taken a far more casual view does not mean that Mr Tamponi was wrong or unreasonable in taking a different approach.

59. There are some parts of Mr Tamponi's behaviour during the disciplinary process that can be criticised. During the meeting with Mr Harris he was direct to the point of bluntness and his response when Mr Harris misspoke by describing Medequip as an employment sector crossed the line into rudeness. The Tribunal concluded, however, that this did not amount to the sort of culpable behaviour that could justify a finding that Mr Tamponi had contributed to his dismissal. An employee is not required to be a paragon of virtue in order to avoid reduction to their compensation. Moments of impatience and anger are not unusual in the course of a disciplinary process. It was not unreasonable for Mr Tamponi to be annoyed that, having raised reasonable concerns about the DBS check, he had not been provided with Medequip's policy. He was not wrong that Mr Harris' statements about Medequip being an employment sector suggested that Mr Harris did not have any detailed understanding of the DBS regime. Taken as a whole his behaviour was not such to have contributed to his dismissal in any significant way or to justify a reduction of any part of the award.

Reinstatement

60. The tribunal concluded that it was inappropriate to make an order for reinstatement.

61. An order for reinstatement requires that the employer treat the claimant in all respects as if he had not been dismissed. The Tribunal accepted the evidence of Mr Firth and Mr Cook that Medequip no longer operated from the Madela Way depot where Mr Tamponi had been employed and had not done so since 1st April 2023. The role in which Mr Tamponi had been employed therefore no longer existed. This made it, in practical terms, impossible for him to be reinstated.

62. The Tribunal did not have any information about whether Mr Tamponi wished to be reinstated and so this was not a factor that could be given any weight. Even, however, if Mr Tamponi had wished to be reinstated, the Tribunal would have concluded that it was not practicable, because the depot at which he had worked no longer existed.

63. For the reasons set out above, the Tribunal conclude that Mr Tamponi had not contributed to his dismissal.

64. Taking these factors together, it was clear that reinstatement was not an appropriate remedy, because it would be impossible for Medequip to carry out such an order.

Re-engagement

65. The tribunal concluded that it was inappropriate to make an order for reinstatement.

66. The Tribunal accepted the evidence of Mr Cook that that Medequip operated four depots reasonably close to Mr Tamponi's home address: Rochester, Woodford Green, Braintree and West Drayton. None of these depots had any currently vacant roles. No vacancies were anticipated. A vacancy in those depots would only come about if an employee left and needed to be replaced. It would not, therefore, have been practicable to appoint Mr Tamponi to one of these locations. Mr Tamponi had not identified any potential post at these locations or expressed any wish to be re-engaged there.

67. In his 9th June / 5.32am email Mr Tamponi had identified one of the roles in the Medequip Vacancy Bulletin as a possible role for reengagement. This was the Emersons Green Warehouse and Cleaning Operative post. Emersons Green is part of the Greater Bristol area. In his email he noted that Warehouse / Cleaning Operative had been his role prior to dismissal and then went on: 'Should the Tribunal believe that reinstatement is a viable solution, and should I not need to start immediately (I would need a bit of time to plan my relocation), I could consider that position'.

68. The Tribunal noted that this statement fell well short of a clear indication that Mr Tamponi wished to be re-engaged into this role. His email goes no further than stating that he would consider working in that post, after a delay of unspecified length to arrange his relocation. The Tribunal found that his was an indication pointing toward re-engagement, but it was a much weaker indication than a clear and unambiguous statement that a claimant wished to be re-engaged in a particular role would be. If Mr Tamponi had attended the hearing some of these points could have been clarified with him, but his absence prevented this. The Tribunal was therefore required to do its best with the

relatively limited information available to it.

69. This also had implications for the question of whether it would be practicable for Mr Tamponi to be re-engaged in this role. It was not clear that it would be practicable for a re-engagement order to be effective, given the uncertainty, both as to whether he would accept and when he might be able to take up the post. The Tribunal accepted Mr Firth's evidence that the recruitment for the role was far advanced, with one candidate expected to shortly attend for a final interview.

70. The Tribunal also considered the implication of Medequip's maintained view that it would be necessary for Mr Tamponi to undergo an enhanced DBS check if he was to be re-employed. As noted above, the Tribunal had concluded that this was the genuine view of both Mr Firth and Mr Cook. It could not, however, be said to be a reasonable view. It was not based on any analysis of the relevant law, but on a fundamentally misconceived view of what Medequip's contracts with their customers provided for and the impact that such contracts had on the ability to justify an enhanced DBS check.

71. The Tribunal concluded that Medequip would refuse to re-employ Mr Tamponi if he refused to carry out an enhanced DBS check. Mr Tamponi was unlikely to agree to do so, unless Medequip could provide some proper justification for this, which it could not.

72. The Tribunal did not, however, accept that this could be determinative of the question of practicability. It would be wrong for an employer to be able to render it not practicable to comply with a re-engagement order on the basis that it had reached a view, however genuinely held, which was not rationally reached.

73. At the same time, the Tribunal concluded that it was a factor that the Tribunal should consider as part of deciding whether re-engagement was an appropriate order. There was, realistically, little prospect of Mr Tamponi successfully returning to employment. That did not mean that a re-engagement order could not or should not be made. But it was a factor against such an order, particularly when Mr Tamponi's wishes were unclear and the practicability of such an order unclear on other grounds.

74. Taking all of this together, the Tribunal concluded that it was not appropriate to make any re-engagement order.

Basic award

75. The parties agreed that the appropriate basic award was £1,695.24, subject to any reduction for contributory fault on behalf of Mr Tamponi.

76. The Tribunal concluded that no such reduction was appropriate. As set out above, the Tribunal concluded that Mr Tamponi had not contributed to his dismissal. While a reduction to the basic award does not require such a causal connection, the Tribunal also concluded that Mr Tamponi's actions did not justify any such reduction.

Compensatory award

77. The parties agreed that the compensatory award should be calculated on the basis that Mr Tamponi's financial loss was his loss of earnings (£1,355 per month) and loss of pension contributions (£51.83). The parties also agreed that the compensatory award should include a loss of £500 in respect of loss of statutory rights. They also agreed that the compensatory award should be reduced by £1,124.08 to reflect the pay in lieu of notice that had been received by Mr Tamponi.

78. For the reasons set out above, the Tribunal concluded that there should not be any reduction in respect of contributory fault.

Polkey

79. The Tribunal considered whether any *Polkey* reduction should be applied. Medequip argued that Mr Tamponi had not given any indication that he would have agreed to an updated DBS check and that it would have inevitably have required him to do so, in order to comply with its contractual obligations to its clients. Therefore, it suggested there should be a 100% *Polkey* reduction.

80. The Tribunal, however, concluded that it had not been established that Medequip could have reached a reasonable view that it was required to carry out an enhanced DBS check of Mr Tamponi. Given this, it had not been established that any dismissal on the basis of him refusing to do so could have been fair.

Mitigation of loss

81. The respondent argued that Mr Tamponi had failed to mitigate his loss.

82. The bundle produced by Mr Tamponi for this hearing contained a number of documents relating to his attempts to secure alternative work.

83. Most significantly, it included a table showing the jobs that he had applied for, page 12-34. The Tribunal accepted that this accurately summarised the applications Mr Tamponi made. The summary shows that the first application Mr Tamponi made was on 23rd July 2021. That same week (21st to the 27th) he applied for eight jobs. The following week (28th July to 4th August) he did not apply for any jobs. In the rest of August he applied for 10 jobs. In September he applied for 6 jobs. In October he applied for four jobs. In November he applied for five jobs. In December he applied for one. He did not apply for any jobs in January.

84. The tribunal concluded that Medequip had established that Mr Tamponi had failed to mitigate the losses he suffered as a consequence of his unfair dismissal. Although he had made efforts to seek alternative work, he had not done enough. There was a significant delay between Mr Tamponi's dismissal on 25th May 2021 and him seeking any alternative work. The Tribunal bore in mind that Mr Tamponi was also seeking to appeal his dismissal and this would have taken time and attention, but it is nonetheless an excessive delay. There was then a flurry of activity in late July and early August. But after that point Mr

Tamponi was applying to something like one job per week, with significant gaps (for example between 17th December 2021 to 2nd February 2022 and 2nd March 2022 to 5th May 2022) when he did not apply for any jobs at all.

85. Mr Tamponi applied for a mixture of roles, in particular as a warehouse operator or jobs requiring Italian language skills. There is nothing to criticise in the types of roles applied for. They are not, however, roles where applications would require extensive effort or time. In those circumstances, the Tribunal would have expected a claimant to be applying for a significantly higher number of roles per week. The Tribunal concluded that Mr Tamponi had not made sufficient efforts to mitigate his loss.

86. The Tribunal therefore needed to estimate when Mr Tamponi could have secured broadly equivalent alternative income, had be made reasonable efforts to mitigate his loss. This is inevitably a speculative exercise, but doing the best it could with the evidence available, the Tribunal conclude that this would have occurred three months after his dismissal and awarded compensation on that basis.

Stigma loss

87. As is implicit in the above finding, the Tribunal concluded that Mr Tamponi had not suffered loss on the basis that his dismissal had resulted in him being stigmatised in the job market. Since, however, Mr Tamponi raised the possibility of career long loss on the basis of stigma it is worth addressing this argument explicitly.

88. The Tribunal accepted that, if an unfair dismissal had resulted in stigma of the employee that had an impact on their ability to obtain or maintain employment, compensation should be assessed on that basis. It is a facet of the loss sustained by the employee as a result of the dismissal.

89. There must, however, be sufficient evidence for the Tribunal to reach the conclusion that the dismissal has had that effect. A mere assertion is insufficient, although the Tribunal may draw inferences from evidence that might not directly suggest that the employee has been stigmatised, see *Ur-Rehman v Ahmad (on behalf of Doncaster Jamia Mosque)* [2013] ICR 28.

90. There was no significant evidence that suggested that Mr Tamponi had been stigmatised in the job market. The Tribunal considered whether it should draw an inference from the fact that he had been unsuccessful in obtaining new employment. The Tribunal concluded that it should not. As set out above, the Tribunal concluded that Mr Tamponi had not made reasonable efforts to secure new employment. This was the more likely explanation for the fact that he had not obtained a role, rather than the possibility he had been stigmatised.

ACAS uplift

91. Mr Tamponi sought an ACAS uplift to the award of 25%. The Tribunal concluded that there should not be any increase on this basis.

92. A number of the matters relied upon by Mr Tamponi related to issues outside

the scope of the disciplinary process that lead to his dismissal. In order for s207A to apply the claim must relate to matters to which the Code of Practice applies, and the employer must have failed to comply with that Code in relation to that matter. There is therefore no scope within s207A for there to be an increase in an award because an employer has failed to comply with the Code in relation to a matter other than the dismissal. Matters relating to Mr Tamponi's written warning, suspension and grievance cannot found any uplift.

93. The Tribunal concluded that there had not been a failure to follow the ACAS Code. As set out in the liability reasons Medequip had complied with the requirements of the ACAS Code, by inviting Mr Tamponi to a disciplinary meeting, carrying out that meeting and providing him with an appeal. That exercise was carried out in good faith. Although the Tribunal concluded that the dismissal was unfair, this was not as a result of a failure to follow the Code.

Approved by:

Employment Judge Reed

17th September 2025

JUDGMENT SENT TO THE PARTIES ON

25th September 2025

O.Miranda
FOR THE TRIBUNAL OFFICE

EMPLOYMENT TRIBUNALS

Claimant: **Mr T Tamponi**

Respondent: **Medequip Assistive Technology Ltd**

Heard at: London South **On:** 9th June 2025

Before: Employment Judge Reed, Ms J Jerram and Mr C Rogers

Representation
Claimant: Did not attend
Respondent: Mr Kemp KC

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 60 of the Employment Tribunals Rules of Procedure, the following reasons are provided:

REASONS

Background

1. This hearing was listed to consider remedy following our earlier judgment in this matter, which concluded that Mr Tamponi had been unfairly dismissed. These reasons should be read together with the reasons for the liability decision.

The hearing

2. In addition to the material that had been provided for the liability hearing, the Tribunal had regard to the following additional documents provided by the parties:
    a. A skeleton argument provided by Mr Tamponi
    b. A skeleton argument provided by Mr Kemp KC
    c. An authorities bundle provided by Mr Kemp KC
    d. Witness statements from Mr Andrew Firth and Mr Nigel Cook on behalf of Medequip
    e. A remedy bundle produced by Mr Tamponi running to 85 pages
    f. A spreadsheet provided by Mr Tamponi resulting from his FOI requests
    g. A Medequip internal vacancy bulletin dated 4th June 2025 produced by Mr Tamponi

h. A contract between Medequip and a number of Councils provided by Medequip
i. A document titled 'Letter about the list of issues' provided by Mr Tamponi
j. A letter of 5th September 2022 between Medequip and the City of Westminster provided by Medequip

3. On the morning of the hearing, the tribunal received two emails from Mr Tamponi. The first was sent to the Tribunal at 5.32am. That email contained the supplementary bundle of evidence that Mr Tamponi wished to rely on and the internal vacancy bulletin. The email also set out a number of submissions in support of Mr Tamponi's case.

4. The second email was sent to the tribunal at 7:35 am. It read as follows:

> Dear Madams/Sirs,
>
> with the present, and with huge regret, I inform you that I will not attend the hearing listed for this morning at 10.
>
> Following my submission from last week, and my request for a clarification, I thought I could gain a better idea of the List of issues regarding remedy that the Tribunal is asked to sort, and I'm afraid I have not.
>
> I'm aware that my decision could have a negative impact on the end of my claim, but I feel that my attendance today could cause an even worse outcome.
>
> I apologise for any inconvenience caused and I will wait to know the Tribunal decision via email.
>
> Yours Sincerely
>
> Tancredi Tamponi - Claimant

5. The Tribunal did not consider that email in isolation, but read it in context with a number of other documents and communications. This included the ''Letter about the list of issues' referred to above. This had been sent to the Tribunal on 4th June 2025. The main part of that letter reads as follows:

> Dear Madams/Sirs,
> while reviewing my submission for the Remedy hearing, I've noticed that as of today the Tribunal has not yet clarified in full details what are the issues to be decided: in the Judgement and reasons letter regarding Remedy the List of issues were omitted, and for this reason I remind the two lists proposed before the Tribunal by me and the Respondent in advance of the Liability hearings held in August 2023: the difference between the two versions is minimal, and I think that the Tribunal might want to confirm what is going to be discussed during next week's hearing, unless minded produce a different List of issues; should that be the case, I believe that both I and the Respondent could find useful to know it and be provided this document a few days in advance:

6. The letter then goes on, as Mr Tamponi indicated, to set out a list of issues as proposed by the claimant and a list proposed by the respondent. The two list

are almost identical. The respondent's list is the issues relating to remedy set out in their draft list of issues on page 60-63 of the liability bundle. It identifies four issues as follows:

a. Has the Claimant failed to properly mitigate his loss, and, if so, to what extent should the Claimant's compensation be reduced accordingly?
b. Should any compensation be reduced by reason of contributory fault on the part of the Claimant?
c. Has either party failed to comply with the ACAS code, and if so, what adjustment to any award would be appropriate?
d. Should a Polkey key adjustment be made to any award?

7. The draft list of issues also briefly summarises each party's position on these questions.

8. Mr Tamponi's proposed version sets out the same questions, but makes minor adjustments to the wording used to summaries the party's positions.

9. In relation to the possibility of a reduction for contributory fault, the respondent's version sets out three contentions made by Mr Tamponi and then goes on to set out his position that 'for this reason there is no fault on his part'. Mr Tamponi's version pluralises that statement, referring to 'for these reasons'. This a minor difference of grammar, not any substantive disagreement about the issues the Tribunal would need to consider.

10. In relation to the possibility of a Polkey reduction, the respondent's version contains the note that the respondent will argue that the claimant would have been dismissed in any event. The next line asks 'Does it imply that the decision to dismiss him had been previously made and was independent form the controversy about the DBS check?' In context, this is a rhetorical question, indicating an argument on behalf of Mr Tamponi that the Tribunal should infer from the respondent's position that the dismissal was a) predetermined and b) on the basis of some other reason than the one put forward by the respondent. Mr Tamponi's version elaborates on this briefly to add the additional question 'If so, what were the main reasons behind that decision?' Again, there is no difference of substance between the two versions so far as the issues for the Tribunal is concerned. In any event, the issue of the reason for Mr Tamponi's dismissal had already been determined at the liability stage.

11. Mr Tamponi's email indicating that he would not attend the tribunal must also be read in connection with his earlier email of the same day. There he argues that:

> It is my position that, with its last submissions to the Tribunal, the Respondent is trying to introduce from the back door elements that should eventually have been contended before and/or during the liability hearing: i refer in particular to the fact that the Respondent would have had a contract with the London Consortium, which was not a contracting authority and had no power to award the Respondent a contract.

12. The Tribunal understood this to be a reference to Medequip's argument, dealt with in more detail below, that its contracts required it to carry out DBS checks; that Mr Tamponi would have remained unwilling to comply with these; that therefore his dismissal was inevitable and therefore a *Polkey* reduction should

be applied.

13. A final important part of the context is that, prior to the hearing both parties had exchanged their written submissions. Both parties sent these to the Tribunal on 4th June 2025, copying each other (Mr Kemp KC's submissions are dated 5th June 2025, but this must be a typo since they were attached to the 4th June 2025 email from his solicitor to the Tribunal).

14. Although Mr Tamponi's submissions were not drafted in the style that would be used by a qualified lawyer, it is clear from them that he appreciated the issues that the Tribunal would be examining. He presented arguments as to why he had not contributed to his dismissal and why a Polkey reduction should not be made. In so far as there had been any lack of clarity as to the positions taken by the respondent, this would have been resolved by Mr Kemp KC's written submissions.

15. Overall, it was unclear to the Tribunal the nature of the uncertainty that Mr Tamponi was suggesting existed over the issues that the Tribunal would need to address at the remedies hearing. There was plainly disagreement as to the correct outcome in relation to the issues, but that is an inevitable aspect of a contested hearing. The Tribunal also understood that Mr Tamponi's position was that the Medequip were seeking to reopen issues that either had been resolved or should have been raised at the liability stage. That type of dispute is a common element of remedy hearings.

16. If Mr Tamponi was unclear about the issues to be dealt with by the Tribunal or there was a dispute between the parties as to the live questions before the Tribunal, those were matters that could and should have been addressed at the hearing. The Tribunal concluded that there was nothing in the documents / correspondence that demonstrated that Mr Tamponi had a good reason not to attend the hearing.

17. The Tribunal considered whether to adjourn the hearing, in order to give Mr Tamponi a further opportunity to attend. The respondent opposed any adjournment. The Tribunal concluded that adjournment would not be in the interests of justice. Adjournment would have delayed the resolution of the case and caused delay in other cases. The prejudice suffered by the respondent in adjourning would have been greater than that suffered by Mr Tamponi in continuing in circumstances where he had chosen not to attend.

The law

Re-employment orders

18. This is a case in which the claimant sought a re-employment order, i.e. an order that the respondent re-instate him into the same role from which he was dismissed or appoint him to a comparable role.

19. The Employment Rights Act 1996 deals with such orders in sections 113 to 117 as follows:

Orders for reinstatement or re-engagement
113 The orders

An order under this section may be—

(a) an order for reinstatement (in accordance with section 114), or

(b) an order for re-engagement (in accordance with section 115),

as the tribunal may decide.

114 Order for reinstatement
(1) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed.

(2) On making an order for reinstatement the tribunal shall specify—

(a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement,

(b) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and

(c) the date by which the order must be complied with.

(3) If the complainant would have benefited from an improvement in his terms and conditions of employment had he not been dismissed, an order for reinstatement shall require him to be treated as if he had benefited from that improvement from the date on which he would have done so but for being dismissed.

(4) In calculating for the purposes of subsection (2)(a) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of reinstatement by way of—

(a) wages in lieu of notice or ex gratia payments paid by the employer, or

(b) remuneration paid in respect of employment with another employer,

and such other benefits as the tribunal thinks appropriate in the circumstances.

115 Order for re-engagement
(1) An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment.

(2) On making an order for re-engagement the tribunal shall specify the terms on which re-engagement is to take place, including—

(a) the identity of the employer,

(b) the nature of the employment,

(c) the remuneration for the employment,

(d) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of

employment and the date of re-engagement,

(e) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and

(f) the date by which the order must be complied with.

(3) In calculating for the purposes of subsection (2)(d) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of re-engagement by way of—

(a) wages in lieu of notice or ex gratia payments paid by the employer, or

(b) remuneration paid in respect of employment with another employer,

and such other benefits as the tribunal thinks appropriate in the circumstances.

116 Choice of order and its terms

(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—

(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.

117 Enforcement of order and compensation
(1) An [employment tribunal] shall make an award of compensation, to be paid by the employer to the employee, if—

(a) an order under section 113 is made and the complainant is reinstated or re-engaged, but

(b) the terms of the order are not fully complied with.

(2) Subject to section 124, the amount of the compensation shall be such as the tribunal thinks fit having regard to the loss sustained by the complainant in consequence of the failure to comply fully with the terms of the order.

(2A) There shall be deducted from any award under subsection (1) the amount of any award made under section 112(5) at the time of the order under section 113.

(3) Subject to subsections (1) and (2), if an order under section 113 is made but the complainant is not reinstated or re-engaged in accordance with the order, the tribunal shall make—

(a) an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 126), and

(b) except where this paragraph does not apply, an additional award of compensation of [an amount not less than twenty-six nor more than fifty-two weeks' pay],

to be paid by the employer to the employee.

(4) Subsection (3)(b) does not apply where—

(a) the employer satisfies the tribunal that it was not practicable to comply with the order, . . .

(7) 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 (4)(a) whether it was practicable to comply with the order for reinstatement or re-engagement unless the employer shows that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement.

(8) Where in any case an [employment tribunal] finds that the complainant has unreasonably prevented an order under section 113 from being complied with, in making an award of compensation for unfair dismissal . . . it shall take that conduct into account as a failure on the part of the complainant to mitigate his loss.

20. The Tribunal must begin by considering whether an order for reinstatement is appropriate (i.e. an order to reinstate the employee to the job from which they

were dismissed). In examining that issue the Tribunal must take into account whether the employee wishes to be reinstated; whether it would be practical for the employer to comply with the order if made and where the employee caused or contributed to the dismissal, whether it would be just to reinstate them.

21. If the Tribunal does not make an order for reinstatement, it must then go on to consider whether to make an order for re-engagement and, if so, on what terms. In examining that issue the Tribunal must take into account any wish the employee expresses about the order to be made; whether it would be practicable for the employer to comply with an order for re-engagement and, where the claimant caused or contributed to the dismissal, whether it would be just to reinstate them.

22. Practicability in the context of re-employment orders means not only that re-instatement or re-engagment is possible, but that it is capable of being carried into effect with success, see *Coleman v Magnet Joinery Ltd* [1975] ICR 46. The Tribunal must bear in mind that an employment relationship must be workable in practical and human terms, see *Kelly v PGA European Tour* [2021] ICR 1124

23. This means that the likelihood that an employee and employer can work together in the future will often be a key part of the consideration in relation to practicability.

Compensation

24. If the Tribunal does not make a re-employment order, it will make an award of compensation in accordance with section 118 to 126 of the Employment Rights Act 1996. These provide for a basic award and a compensatory award.

25. The basic award is calculated in accordance with sections 119-122. It is based on an arithmetic calculation on the basis of the employee's age, length of service and weekly pay. Section 122(2) allows for a reduction to the basic award where the Tribunal considers that the conduct of the employee prior to the dismissal was such that it would be just and equitable to reduce the amount of the basic award.

26. In relation to the compensatory award, the Tribunal is required to award such amount as it 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. In essence the purpose of the compensatory award is to place the employee in the financial position that they would have been, but for the unfairness of the dismissal.

Mitigation

27. Calculation of the loss flowing from a dismissal must be approached on the basis that the employee is required to act reasonably in order to mitigate that loss. If an employee has not done so, the Tribunal must determine what loss they would have suffered had they done so. Deciding whether an employee has failed to mitigate their loss will often require examination of their efforts to locate new employment.

28. The burden of showing there has been a failure to mitigate is on the employer, see *Fyfe v Scientific Furnishings Ltd* [1989] IRLR 331. They must show that the employee has acted unreasonably; it is insufficient to demonstrate that there are reasonable actions that the employee might have taken that they have not done, *Wilding v British Telecommunications plc* [2002] ICR 179.

Polkey Reduction

29. It is also open to a Tribunal to reduce any compensatory award to reflect the possibility that the employee might have been dismissed had the employer acted fairly. This is described as a Polkey reduction, following the case of *Polkey v AE Dayton Serviced Ltd* [1988] ICR 142.

30. As in relation to unfair dismissal, the Tribunal must not substitute its own view for that of the employer, the key questions are a) Whether the employee could have been fairly dismissed? and b) Would the actual employer have done so? See *Hill v Governing Body Great Tey Primary School* [2013] IRLR 274.

31. The assessment of a Polkey reduction is an inherently uncertain exercise, since it inevitably involves an element of speculation. Although there are cases in which the evidence related to any potential reduction is so riddled with uncertainty that no sensible assessment can be made, this is unusual. Tribunals should only proceed on the basis that employment would have continued indefinitely where the evidence that it would not have done so can properly be ignored, see *Software 2000 v Andrews* [2007] IRLR 568.

Contributory fault

32. Section 123(6) of the Employment Rights Act 1996 provides that, where the Tribunal finds that an employee caused or contributed to the dismissal it shall reduce the amount of compensatory award by such proportionate as it considers just and equitable.

33. Although a reduction under section 123(6) requires an element of causation, this does not apply to the similar reduction to the basic award under section 122(2). Further, conduct by the employee that does not fall within section 123(6) may be considered by the Tribunal when it considers what compensatory award is just and equitable.

34. A reduction should only be made, however, where there has been culpable or blameworthy conduct by the employee. And, where that conduct was known about prior to dismissal, the Tribunal must generally be satisfied that the conduct caused or contributed to the dismissal to some extent, see *Nelson v BBC (No.2)* [1980] ICR 110.

ACAS Uplift

35. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 allows for an increase or reduction to the compensatory award on the basis that either the employer or employee has unreasonably failed to follow

the ACAS Code of Practice on Disciplinary and Grievance Procedures and the Tribunal considers it just and equitable to make the increase / reduction.

36. A failure to comply with the ACAS code may arise not only because the steps required under the Code have not been done, but also where an apparently compliant approach was a sham or conducted in bad faith, see *Rentplus UK Ltd v Coulson* [2022] IRLR 664.

Findings of fact and conclusions

37. The Tribunal reached the following findings of fact and conclusions.

38. As in the liability decision, the Tribunal made its findings of fact on the basis of the civil standard of proof.

The need for a DBS check

39. The related questions of whether a DBS check was required for Medequip's employees and whether Medequip genuinely believed that such a check was required are relevant to a number of the issues relating to remedy. It is therefore convenient to deal with them here.

40. So far as the statutory DBS regime is concerned, the evidence and submissions presented at the remedies stage did not take the matter beyond what is set out in the liability judgment. Medequip did not make submissions by reference to the statutes and regulations governing the DBS. It did not seek to establish that the statutory regime required or permitted an Enhanced DBS check in relation to Mr Tamponi, either prior to his dismissal or in order to carry out the any of the roles that were considered in connection with a possible re-employment order.

41. Medequip did produce a contract between it and a number of local authorities. The Tribunal accepted that this was a contract that related to the work being done at the Emersons Green depot. The contract was based on a standard contract produced by the NHS. The Tribunal accepted that the contract was broadly representative of the contracts that Medequip had with other local authorities.

42. The Tribunal was referred in particular to clause 7.5 of that contract that dealt with safeguarding. This was as follows:

> The Provider must develop, document, publish, promote and adhere to their own written policies covering safeguarding in order to protect from abuse vulnerable Service Users, carers and families (adults and children).
>
> The Commissioners have in place local safeguarding policies and procedures to protect Adults at Risk and Children from abuse. The Provider will ensure that their safeguarding policy and procedure takes account of and works in conjunction with these policies.
>
> The Provider will ensure that their staff understand what action to take if they are informed about or encounter abuse or suspected abuse.

The Provider will ensure that their staff have access to guidance, training and support.

The Provider will ensure that all staff, including any volunteers, involved in delivering the Service:

- Have in place an up to date clear Disclosure and Barring Service enhanced CRB check where required under the Contract terms;
- Understand and follow safeguarding policies and procedures taking into account the requirements of each of the Commissioners' safeguarding policies and procedures;
- Have undertaken safeguarding Training relevant to both children and adults at risk;
- Maintain safeguarding practice in line with policy updates/changes;

43. DBS checks are also mentioned in clause 2.3, which deals with staffing. That includes a provision as follows:

    The Provider will have policies and procedures to ensure that all staff have a Disclosure and Barring Service (DBS) check at the level appropriate to their role.

    Any failure to comply with DBS requirements which leads to an actual or perceived risk to members of the public will be reported to the Contract Manager as a Serious Incident.

44. Both Mr Firth and Mr Cook's gave evidence about what Medequip's contractual obligations to their customers were in relation to DBS. Both believed that these required that their employees have an enhanced DBS check. Both agreed that this was their understanding of clause 7.5 above and that Medequip's other contracts invariably included a similar contractual requirement to carry out DBS checks. Both indicated that, in their view, Medequip had no practical power to change this requirement. In their view it was something required by their customers, who would insist on it in circumstances where Medequip had no negotiating power.

45. Mr Cook elaborated to say that the majority of these contracts also required that these checks be updated every few years.

46. He went on to suggest that an enhanced check was required for all employees because they were required to work flexibly. Even if an employee was normally working in a warehouse where they would not encounter members of the public, they would be likely, on occasion, be required to fill in for or assist drivers with the delivery of equipment to end users. This would mean they would encounter vulnerable people and be involved in giving them guidance/instruction. Therefore, Mr Cook suggested, they required the same levels of DBS clearance as the drivers.

47. The Tribunal concluded that none of this established that an enhanced DBS check was required in respect of Mr Tamponi, either in the role from which he was dismissed or for him to take up any of the roles considered in relation to a re-employment order. First, whatever the contractual position might have been,

it could not be determinative of whether it was lawful to require an enhanced DBS check. As summarised in the liability reasons, the DBS regime is a statutory regime that sets out strict controls about when an enhanced DBS check may be carried out. That statutory regime does not allow a party to justify an enhanced DBS check of an employee on the basis that they have entered into a contract with a third party that requires one.

48. Second, the contract provided by Medequip, which the Tribunal accepted was likely to be typical of such contracts, does not bear out the interpretation that Mr Firth and Mr Cook suggested. It does not state that Medequip was required to carry out enhanced DBS checks of all its staff. Rather, it requires that Medequip must ensure that its staff have 'an up to date clear Disclosure and Barring Service enhanced CRB check where required under the Contract terms'. That leaves unanswered the question of where that will be required. The only further provision, at clause 2.3, says on that staff must have a DBS check at the level appropriate to their role. That takes the matter no further forward.

49. The Tribunal therefore found that Medequip had not established that it was entitled to require Mr Tamponi to undergo an enhanced DBS check, either in his previous roles or any other role he might undertake at Medequip.

50. The Tribunal accepted, however, that both Mr Firth and Mr Cook were honest witnesses on this point who genuinely believed that Medequip's contracts required it to carry out enhanced DBS checks.

Did Mr Tamponi contribute to his dismissal?

51. The question of whether Mr Tamponi contributed to his dismissal is relevant to a number of the issues related to remedy. It is therefore convenient to deal with it here.

52. Medequip relied on two main points in support of their submission that Mr Tamponi had contributed to his dismissal. First, that he had previously received a written warning, as detailed in the liability judgment. Second, that there was in general an element of bloody-mindedness or unreasonableness in his approach to the employment relationship.

53. The Tribunal concluded that Mr Tamponi did not contribute to his dismissal.

54. So far as the written warning was concerned, the tribunal concluded that this had no real impact on the decision to dismiss Mr Tamponi. That decision was taken because a Medequip had taken the view that an enhanced criminal records check was required, and that if Mr Tamponi did not agree to have such a check conducted, he was refusing a reasonable management order. In its view, given Medequip's obligations to its customers, dismissal was then the only possible outcome. Medequip's view, as articulated by Mr Cook and Mr Firth, remained that an enhanced DBS check was required. In these circumstances, whether Mr. Tamponi had or did not have a written warning played no part in the decision to dismiss him. It could therefore not be said to have contributed to his dismissal.

55. In relation to whether Mr Tamponi was unreasonable in his approach to the

employment relationship, the Tribunal reminded itself that its task was to consider whether Mr Tamponi was guilty of culpable or blameworthy conduct that contributed to his dismissal. The Tribunal is not charged with carrying out a general assessment of an employee's behaviour throughout their employment (or, for that matter, a general assessment of an employer's behaviour). It is no part of the Tribunal's task to weigh the moral position of the parties in any overall sense.

56. As in relation to the written warning, it is important to recognise that Medequip had reached a firm view both that it was essential that Mr Tamponi undergo an enhanced DBS check and that he was unreasonably refusing to do so. That was the basis of the dismissal and Medequip was not materially influenced any other factor.

57. Further, in relation to the DBS check, Mr Tamponi had not committed any blameworthy or culpable action that would justify a finding that he had contributed to his dismissal in a way that would impact upon remedy. The most that might be said against him was that he had 'stood on his rights' in relation to the DBS regime and that he had, at some points in the process been somewhat abrasive.

58. So far as insisting on his rights in relation to the DBS regime, the Tribunal did not find that this was blameworthy or culpable. Put shortly, Mr Tamponi had every right to seek to insist that the law in relation to DBS checks was followed and that his employer behaved reasonably when seeking to carry out such checks. His request that he be provided with a proper explanation as to the need for the check and a copy of Medequip's relevant policy were reasonable. The fact that other employees at Medequip appear to have taken a far more casual view does not mean that Mr Tamponi was wrong or unreasonable in taking a different approach.

59. There are some parts of Mr Tamponi's behaviour during the disciplinary process that can be criticised. During the meeting with Mr Harris he was direct to the point of bluntness and his response when Mr Harris misspoke by describing Medequip as an employment sector crossed the line into rudeness. The Tribunal concluded, however, that this did not amount to the sort of culpable behaviour that could justify a finding that Mr Tamponi had contributed to his dismissal. An employee is not required to be a paragon of virtue in order to avoid reduction to their compensation. Moments of impatience and anger are not unusual in the course of a disciplinary process. It was not unreasonable for Mr Tamponi to be annoyed that, having raised reasonable concerns about the DBS check, he had not been provided with Medequip's policy. He was not wrong that Mr Harris' statements about Medequip being an employment sector suggested that Mr Harris did not have any detailed understanding of the DBS regime. Taken as a whole his behaviour was not such to have contributed to his dismissal in any significant way or to justify a reduction of any part of the award.

Reinstatement

60. The tribunal concluded that it was inappropriate to make an order for reinstatement.

61. An order for reinstatement requires that the employer treat the claimant in all respects as if he had not been dismissed. The Tribunal accepted the evidence of Mr Firth and Mr Cook that Medequip no longer operated from the Madela Way depot where Mr Tamponi had been employed and had not done so since 1st April 2023. The role in which Mr Tamponi had been employed therefore no longer existed. This made it, in practical terms, impossible for him to be reinstated.

62. The Tribunal did not have any information about whether Mr Tamponi wished to be reinstated and so this was not a factor that could be given any weight. Even, however, if Mr Tamponi had wished to be reinstated, the Tribunal would have concluded that it was not practicable, because the depot at which he had worked no longer existed.

63. For the reasons set out above, the Tribunal conclude that Mr Tamponi had not contributed to his dismissal.

64. Taking these factors together, it was clear that reinstatement was not an appropriate remedy, because it would be impossible for Medequip to carry out such an order.

Re-engagement

65. The tribunal concluded that it was inappropriate to make an order for reinstatement.

66. The Tribunal accepted the evidence of Mr Cook that that Medequip operated four depots reasonably close to Mr Tamponi's home address: Rochester, Woodford Green, Braintree and West Drayton. None of these depots had any currently vacant roles. No vacancies were anticipated. A vacancy in those depots would only come about if an employee left and needed to be replaced. It would not, therefore, have been practicable to appoint Mr Tamponi to one of these locations. Mr Tamponi had not identified any potential post at these locations or expressed any wish to be re-engaged there.

67. In his 9th June / 5.32am email Mr Tamponi had identified one of the roles in the Medequip Vacancy Bulletin as a possible role for reengagement. This was the Emersons Green Warehouse and Cleaning Operative post. Emersons Green is part of the Greater Bristol area. In his email he noted that Warehouse / Cleaning Operative had been his role prior to dismissal and then went on: 'Should the Tribunal believe that reinstatement is a viable solution, and should I not need to start immediately (I would need a bit of time to plan my relocation), I could consider that position'.

68. The Tribunal noted that this statement fell well short of a clear indication that Mr Tamponi wished to be re-engaged into this role. His email goes no further than stating that he would consider working in that post, after a delay of unspecified length to arrange his relocation. The Tribunal found that his was an indication pointing toward re-engagement, but it was a much weaker indication than a clear and unambiguous statement that a claimant wished to be re-engaged in a particular role would be. If Mr Tamponi had attended the hearing some of these points could have been clarified with him, but his absence prevented this. The Tribunal was therefore required to do its best with the

relatively limited information available to it.

69. This also had implications for the question of whether it would be practicable for Mr Tamponi to be re-engaged in this role. It was not clear that it would be practicable for a re-engagement order to be effective, given the uncertainty, both as to whether he would accept and when he might be able to take up the post. The Tribunal accepted Mr Firth's evidence that the recruitment for the role was far advanced, with one candidate expected to shortly attend for a final interview.

70. The Tribunal also considered the implication of Medequip's maintained view that it would be necessary for Mr Tamponi to undergo an enhanced DBS check if he was to be re-employed. As noted above, the Tribunal had concluded that this was the genuine view of both Mr Firth and Mr Cook. It could not, however, be said to be a reasonable view. It was not based on any analysis of the relevant law, but on a fundamentally misconceived view of what Medequip's contracts with their customers provided for and the impact that such contracts had on the ability to justify an enhanced DBS check.

71. The Tribunal concluded that Medequip would refuse to re-employ Mr Tamponi if he refused to carry out an enhanced DBS check. Mr Tamponi was unlikely to agree to do so, unless Medequip could provide some proper justification for this, which it could not.

72. The Tribunal did not, however, accept that this could be determinative of the question of practicability. It would be wrong for an employer to be able to render it not practicable to comply with a re-engagement order on the basis that it had reached a view, however genuinely held, which was not rationally reached.

73. At the same time, the Tribunal concluded that it was a factor that the Tribunal should consider as part of deciding whether re-engagement was an appropriate order. There was, realistically, little prospect of Mr Tamponi successfully returning to employment. That did not mean that a re-engagement order could not or should not be made. But it was a factor against such an order, particularly when Mr Tamponi's wishes were unclear and the practicability of such an order unclear on other grounds.

74. Taking all of this together, the Tribunal concluded that it was not appropriate to make any re-engagement order.

Basic award

75. The parties agreed that the appropriate basic award was £1,695.24, subject to any reduction for contributory fault on behalf of Mr Tamponi.

76. The Tribunal concluded that no such reduction was appropriate. As set out above, the Tribunal concluded that Mr Tamponi had not contributed to his dismissal. While a reduction to the basic award does not require such a causal connection, the Tribunal also concluded that Mr Tamponi's actions did not justify any such reduction.

Compensatory award

77. The parties agreed that the compensatory award should be calculated on the basis that Mr Tamponi's financial loss was his loss of earnings (£1,355 per month) and loss of pension contributions (£51.83). The parties also agreed that the compensatory award should include a loss of £500 in respect of loss of statutory rights. They also agreed that the compensatory award should be reduced by £1,124.08 to reflect the pay in lieu of notice that had been received by Mr Tamponi.

78. For the reasons set out above, the Tribunal concluded that there should not be any reduction in respect of contributory fault.

Polkey

79. The Tribunal considered whether any *Polkey* reduction should be applied. Medequip argued that Mr Tamponi had not given any indication that he would have agreed to an updated DBS check and that it would have inevitably have required him to do so, in order to comply with its contractual obligations to its clients. Therefore, it suggested there should be a 100% *Polkey* reduction.

80. The Tribunal, however, concluded that it had not been established that Medequip could have reached a reasonable view that it was required to carry out an enhanced DBS check of Mr Tamponi. Given this, it had not been established that any dismissal on the basis of him refusing to do so could have been fair.

Mitigation of loss

81. The respondent argued that Mr Tamponi had failed to mitigate his loss.

82. The bundle produced by Mr Tamponi for this hearing contained a number of documents relating to his attempts to secure alternative work.

83. Most significantly, it included a table showing the jobs that he had applied for, page 12-34. The Tribunal accepted that this accurately summarised the applications Mr Tamponi made. The summary shows that the first application Mr Tamponi made was on 23rd July 2021. That same week (21st to the 27th) he applied for eight jobs. The following week (28th July to 4th August) he did not apply for any jobs. In the rest of August he applied for 10 jobs. In September he applied for 6 jobs. In October he applied for four jobs. In November he applied for five jobs. In December he applied for one. He did not apply for any jobs in January.

84. The tribunal concluded that Medequip had established that Mr Tamponi had failed to mitigate the losses he suffered as a consequence of his unfair dismissal. Although he had made efforts to seek alternative work, he had not done enough. There was a significant delay between Mr Tamponi's dismissal on 25th May 2021 and him seeking any alternative work. The Tribunal bore in mind that Mr Tamponi was also seeking to appeal his dismissal and this would have taken time and attention, but it is nonetheless an excessive delay. There was then a flurry of activity in late July and early August. But after that point Mr

Tamponi was applying to something like one job per week, with significant gaps (for example between 17th December 2021 to 2nd February 2022 and 2nd March 2022 to 5th May 2022) when he did not apply for any jobs at all.

85. Mr Tamponi applied for a mixture of roles, in particular as a warehouse operator or jobs requiring Italian language skills. There is nothing to criticise in the types of roles applied for. They are not, however, roles where applications would require extensive effort or time. In those circumstances, the Tribunal would have expected a claimant to be applying for a significantly higher number of roles per week. The Tribunal concluded that Mr Tamponi had not made sufficient efforts to mitigate his loss.

86. The Tribunal therefore needed to estimate when Mr Tamponi could have secured broadly equivalent alternative income, had be made reasonable efforts to mitigate his loss. This is inevitably a speculative exercise, but doing the best it could with the evidence available, the Tribunal conclude that this would have occurred three months after his dismissal and awarded compensation on that basis.

Stigma loss

87. As is implicit in the above finding, the Tribunal concluded that Mr Tamponi had not suffered loss on the basis that his dismissal had resulted in him being stigmatised in the job market. Since, however, Mr Tamponi raised the possibility of career long loss on the basis of stigma it is worth addressing this argument explicitly.

88. The Tribunal accepted that, if an unfair dismissal had resulted in stigma of the employee that had an impact on their ability to obtain or maintain employment, compensation should be assessed on that basis. It is a facet of the loss sustained by the employee as a result of the dismissal.

89. There must, however, be sufficient evidence for the Tribunal to reach the conclusion that the dismissal has had that effect. A mere assertion is insufficient, although the Tribunal may draw inferences from evidence that might not directly suggest that the employee has been stigmatised, see *Ur-Rehman v Ahmad (on behalf of Doncaster Jamia Mosque)* [2013] ICR 28.

90. There was no significant evidence that suggested that Mr Tamponi had been stigmatised in the job market. The Tribunal considered whether it should draw an inference from the fact that he had been unsuccessful in obtaining new employment. The Tribunal concluded that it should not. As set out above, the Tribunal concluded that Mr Tamponi had not made reasonable efforts to secure new employment. This was the more likely explanation for the fact that he had not obtained a role, rather than the possibility he had been stigmatised.

ACAS uplift

91. Mr Tamponi sought an ACAS uplift to the award of 25%. The Tribunal concluded that there should not be any increase on this basis.

92. A number of the matters relied upon by Mr Tamponi related to issues outside

the scope of the disciplinary process that lead to his dismissal. In order for s207A to apply the claim must relate to matters to which the Code of Practice applies, and the employer must have failed to comply with that Code in relation to that matter. There is therefore no scope within s207A for there to be an increase in an award because an employer has failed to comply with the Code in relation to a matter other than the dismissal. Matters relating to Mr Tamponi's written warning, suspension and grievance cannot found any uplift.

93. The Tribunal concluded that there had not been a failure to follow the ACAS Code. As set out in the liability reasons Medequip had complied with the requirements of the ACAS Code, by inviting Mr Tamponi to a disciplinary meeting, carrying out that meeting and providing him with an appeal. That exercise was carried out in good faith. Although the Tribunal concluded that the dismissal was unfair, this was not as a result of a failure to follow the Code.

Approved by:

Employment Judge Reed

17th September 2025

JUDGMENT SENT TO THE PARTIES ON

25th September 2025

O.Miranda
FOR THE TRIBUNAL OFFICE