

THE INDUSTRIAL TRIBUNALS

CASE REF: 1258/16

CLAIMANT: Lisa McGuckin

RESPONDENT: MDC Tiles & Bathrooms Limited

DECISION

The unanimous decision of the tribunal is that:-

- (1) The claimant's claim for unauthorised deductions of wages in respect of notice pay and/or holiday pay is dismissed following a settlement concluded between the parties, following conciliation by the Labour Relations Agency.
- (2) For the avoidance of any doubt, the claimant's claim for unfair dismissal, pursuant to Article 135 of the Employment Rights (Northern Ireland) Order 1996 (assertion of a statutory right) is dismissed following withdrawal.
- (3) The claimant's claim that she was subjected to detriment, in contravention of Article 70C of the Employment Rights (Northern Ireland) Order 1996 is not well founded and the claimant's claim pursuant to Article 71 of the said Order is dismissed.
- (4) The claimant was not unreasonably refused time off, pursuant to Article 85A of the Employment Rights (Northern Ireland) Order 1996 and the said claim is dismissed.
- (5) The claimant was unfairly dismissed by the respondent, pursuant to Article 131 of the Employment Rights (Northern Ireland) Order 1996 and the tribunal makes an award of compensation to be paid by the respondent to the claimant in the sum of £2,066.25.

Constitution of Tribunal:

Employment Judge: Employment Judge Drennan QC

Members: Mr D Walls
Mr E Grant

Appearances:

The claimant was represented by Dr L Lawrence LLB PhD FIFST.

The respondent was represented by Mr B McKee, Barrister-at-Law, instructed by O'Reilly Stewart, Solicitors.

Reasons

- 1.1 The claimant presented her claim to the tribunal on 29 April 2016, in which she made claims against the respondent of unfair dismissal, detriment under Article 85A of the Employment Rights (Northern Ireland) Order 1996 and unauthorised deduction of wages in respect of notice pay and/or holiday pay. The respondent presented a response denying liability for the said claims on 17 June 2016. Her claims against Michael McNeill the managing director of the respondent were dismissed, by consent, at a Case Management Discussion on 11 October 2016, as, at all material times, the respondent was her employer for the purposes of these proceedings.
- 1.2 Following discussion between the representatives, the tribunal was informed, at the commencement of the hearing, that the claimant's claim for unlawful deduction of wages, in respect of notice pay and/or holiday pay, had now been settled between the parties following conciliation action by the Labour Relations Agency and is now dismissed.
- 1.3 Following further discussion between the representatives, at the commencement of the hearing, the representatives identified, by agreement, the claims, which now required to be determined by the tribunal, on foot of these proceedings, namely:-
 - (i) *a claim for detriment under Article 70(C) (and insofar as relevant and material, Article 71 and 72) of the Employment Rights (Northern Ireland) Order 1996;*
 - (ii) *further, and in the alternative, a claim under Article 85A (and Article 85B insofar as relevant and material) of the Employment Rights (Northern Ireland) Order 1996;*
 - (iii) *a claim for automatic unfair dismissal under Article 131 of the Employment Rights (Northern Ireland) Order 1996.*

In relation to the said claim under Article 131 of the Employment Rights (Northern Ireland) Order 1996, this claim was allowed to be proceeded with by the claimant, following an agreed amendment of the claimant's claim, which was ordered by the tribunal, on foot of the said agreement. As this amended claim was accepted by the representatives of the respondent to be a 're-labelling exercise' the respondent did not require, by consent, in the circumstances, to formally amend its response, albeit maintaining its said denial of liability for any such claim. It was further agreed that the claimant's claim, pursuant to Article 135 of the Employment Rights (Northern Ireland) Order 1996 was withdrawn and, for the avoidance of any doubt, this claim is therefore dismissed, upon such withdrawal, by the tribunal.

2. Relevant legislation

2.1 Employment Rights (Northern Ireland) Order 1996 ('the 1996 Order')

(i) Article 70C – *Leave for family and domestic reasons:-*

(1) *An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a prescribed reason.*

(2) *A prescribed reason is one which is prescribed by regulations made by the Department and which relates to —*

...

(d) *time off under Article 85A.* [Tribunal's emphasis]

.....

(ii) *Regulation under this section may make different provision for different cases or witnesses.*

(ii) Article 71 – *Complaints to industrial tribunals:-*

(1) *An employee may present a complaint to an industrial tribunal that he has been subjected to a detriment in contravention of Article ... 70C*

...

(2) *On a complaint under this Article it is for the employer to show the ground on which any act, or deliberate failure to act, was done."*

(iii) Article 72 – *Remedies*

(1) *Where an industrial tribunal finds a complaint under Article 71 well-founded, the tribunal —*

(a) *shall make a declaration to that effect, and*

(b) *may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates.*

(2) *... the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to —*

(a) *the infringement to which the complaint relates, and*

(b) *any loss which is attributable to the act, or failure to act, which infringed the complainant's right.*

- (3) *The loss shall be taken to include —*
- (a) *any expenses reasonably incurred by the complainant in consequence of the act, or failure to act, to which the complaint relates, and*
 - (b) *loss of any benefit which he might reasonably be expected to have had but for that act or failure to act.*
- (4) *In ascertaining the loss the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of Northern Ireland.*
- (5) *Where the tribunal finds that the act, or failure to act, to which the complaint relates was to any extent caused or contributed to by action of the complainant, it shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding.”*
- (iv) *Article 85A – Time off for dependants*
- “(1) *An employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee's working hours in order to take action which is necessary —*
- (a) *to provide assistance on an occasion when a dependant falls ill, gives birth or is injured or assaulted,*
 - (b) *to make arrangements for the provision of care for a dependant who is ill or injured,*
 - (c) *in consequence of the death of a dependent,*
 - (d) *because of the unexpected disruption or termination of arrangements for the care of a dependent, or*
 - (e) *to deal with an incident which involves a child of the employee and which occurs unexpectedly in a period during which an educational establishment which the child attends is responsible for him.*
- (2) *Paragraph (1) does not apply unless the employee —*
- (a) *tells his employer the reason for his absence as soon as reasonably practicable, and*
 - (b) *except where paragraph (a) cannot be complied with until after the employee has returned to work, tells his employer for how long he expects to be absent.*
- (3) *Subject to paragraphs (4) and (5), for the purposes of this Article ‘dependant’ means, in relation to an employee —*

- (a) *a spouse or civil partner,*
 - (b) *a child,*
 - (c) *a parent,*
 - (d) *a person who lives in the same household as the employee, otherwise than by reason of being his employee, tenant, lodger or boarder.*
- (4) *For the purposes of paragraph (1)(a) or (b) ‘dependant’ includes, in addition to the persons mentioned in paragraph (3), any person who reasonably relies on the employee —*
- (a) *for assistance on an occasion when the person falls ill or is injured or assaulted, or*
 - (b) *to make arrangements for the provision of care in the event of illness or injury.*
- (5) *For the purposes of paragraph (1)(d) ‘dependant’ includes, in addition to the persons mentioned in paragraph (3), any person who reasonably relies on the employee to make arrangements for the provision of care.*
- (6) *A reference in this Article to illness or injury includes a reference to mental illness or injury.”*
- (v) *Article 85B – Complaint to an industrial tribunal*
- “(1) *An employee may present a complaint to an industrial tribunal that his employer has unreasonably refused to permit him to take time off as required by Article 85A.*
- (2) *An industrial tribunal shall not consider a complaint under this Article unless it is presented —*
- (a) *before the end of the period of three months beginning with the date when the refusal occurred, or*
 - (b) *within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.*
- (3) *Where an industrial tribunal finds a complaint under paragraph (1) well-founded, it —*
- (a) *shall make a declaration to that effect, and*

- (b) *may make an award of compensation to be paid by the employer to the employee.*
- (4) *The amount of compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to —*
 - (a) *the employer's default in refusing to permit time off to be taken by the employee, and*
 - (b) *any loss sustained by the employee which is attributable to the matters complained of.”*
- (vi) Article 131 – *Leave for family reasons*
 - “(1) *An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if —*
 - (a) *the reason or principal reason for the dismissal is of a prescribed kind, or*
 - (b) *the dismissal takes place in prescribed circumstances.*
 - (2) *In this Article ‘prescribed’ means prescribed by regulations made by the Department.*
 - (3) *A reason or set of circumstances prescribed under this Article must relate to —*
 - ...
 - (d) *time off under Article 85A;*
 - ...
 - (5) *Regulations under this Article may apply any statutory provision, in such circumstances as may be specified and subject to any conditions specified, in relation to persons regarded as unfairly dismissed by reason of this Article.”*

[Tribunal’s emphasis]
- (vii) Article 126 – *Right not to be unfairly dismissed*
 - “(1) *An employee has the right not to be unfairly dismissed by his employer.”*
- (viii) Article 145 – *Complaints to an industrial tribunal*
 - “(1) *A complaint may be presented to an industrial tribunal against an employer by any person that he was unfairly dismissed by the employer.”*
- (ix) Article 154 – *Basic Award: Minimum in Certain Cases*

(1A) *where –*

(b) *an award of compensation falls to be made under Article 146(4) and*

(c) *the amount of the award under Article 152(1)(a), before any reduction under Article 156 ... (4) is less than the amount of four week's pay, the Industrial Tribunal shall, subject to paragraph (18) increase the award under Article 152(1)(a) to the amount of 4 weeks' pay (1B). An Industrial Tribunal shall not be required by paragraph (1A) to increase the amount of an award if it considers that the increase would result in injustice to the employer.*

(x) *Article 140 – Qualifying period of employment*

“(1) Article 126 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than one year ending with the effective date of termination.

...

(3) *Paragraph (1) does not apply if –*

...

(b) *Paragraph (1) of Article 131 (read with any regulations made under that Article) applies.”*

(xi) *Article 152 – Compensation*

(1) *Where a tribunal reaches an award for compensation for unfair dismissal under Article 146(4) ... the award shall consist of –*

(a) *a basic award*

(b) *a compensatory award*

(xii) *Article 157 – Compensatory Award*

(1) *.... The amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*

2.2 Maternity and Parental Leave etc Regulations (Northern Ireland) 1999 (1999 MAPLE Regulations)

(1) *Regulation 19 – Protection from detriment*

“(1) An employee is entitled under Article 70C of the 1996 Order not to be subject to any detriment by any act, or any deliberate failure to act, by her employer done for any of the reasons specified at paragraph (2).

(2) The reasons referred to in paragraph (1) are that the employee ...

(e) took or sought to take –

...

(iii) time off under Article 85A of the 1996 Order.

...

(4) Paragraph (1) does not apply in a case where the detriment in question amounts to a dismissal within the meaning of Part XI of the 1996 Order. [Tribunal’s emphasis]

(2) Regulation 20 – Unfair Dismissal

(1) An employee who is dismissed under Article 131 of the 1996 Order to be regarded for the purposes of Part Xi of the 1996 Order as unfairly dismissed if

(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3), or ...

(3) The kinds of reasons referred to in paragraph 1 ... are connected with [Tribunal’s emphasis]

(e) the fact she took or sought to take

....

(iii) time off under Article 85 of the 1996 Order.

The said 1999 Regulations were inserted into the Employment Rights (NI) Order 1996 by the Employment Relations (NI) Order 1999 Article 10 and Schedule 4, which said order was made to make the similar/same provision for Northern Ireland, corresponding to that made by the Employment Relations Act 1999.

It is of interest to note that The Explanatory Note for the said 1999 Regulations states:-

“The Regulations also make provision under Articles 70C and 131 of the 1996 Order (both amendments introduced by the Employment Relations (Northern Ireland) Order 1999), identifying the cases where the protection against detriment or dismissal for which those Articles provide is applicable (Regulations 19 and 20). The cases are not only cases connected with maternity or parental leave

but also cases connected with the right to time off for dependents under new Article 85A of the 1996 Order.

[Tribunal's emphasis]

2.3 The Employment (Northern Ireland) Order 2003:-

Article 17 – *Non-completion of statutory procedure: Adjustment of awards by industrial tribunals*

“(1) *This Article applies to proceedings before an industrial tribunal relating to a claim under any of the jurisdictions listed in Schedule 2 by an employee.*

(2) *If, in the case of proceedings to which this Article applies, it appears to the industrial tribunal that —*

(a) *the claim to which the proceedings relate concerns a matter to which one of the statutory procedures applies,*

(b) *the statutory procedure was not completed before the proceedings were begun, and*

(c) *the non-completion of the statutory procedure was wholly or mainly attributable to failure by the employee —*

(i) *to comply with a requirement of the procedure, or*

(ii) *to exercise a right of appeal under it,*

it shall, subject to paragraph (4), reduce any award which it makes to the employee by 10 per cent, and may, if it considers it just and equitable in all the circumstances to do so, reduce it by a further amount, but not so as to make a total reduction of more than 50 per cent.

(3) *If, in the case of proceedings to which this Article applies, it appears to the industrial tribunal that —*

(a) *the claim to which the proceedings relate concerns a matter to which one of the statutory procedures applies,*

(b) *the statutory procedure was not completed before the proceedings were begun, and*

(c) *the non-completion of the statutory procedure was wholly or mainly attributable to failure by the employer to comply with a requirement of the procedure,*

it shall, subject to paragraph (4), increase any award which it makes to the employee by 10 per cent and may, if it considers it just and equitable in all the circumstances to do so, increase it by a further amount, but not so as to make a total increase of more than 50 per cent.

- (4) *The duty under paragraph (2) or (3) to make a reduction or increase of 10 per cent does not apply if there are exceptional circumstances which would make a reduction or increase of that percentage unjust or inequitable, in which case the tribunal may make no reduction or increase or a reduction or increase of such lesser percentage as it considers just and equitable in all the circumstances.*
- (5) *Where an award falls to be adjusted under this Article and under Article 27, the adjustment under this Article shall be made before the adjustment under that Article.”*

Schedule 2 – Tribunal jurisdictions to which Article 17 applies, insofar as relevant and material:-

Article 71 of that Order (detriment in employment)

Article 145 of that Order (unfair dismissal)

Schedule 1 – Statutory dispute resolution procedures

“Part 1

Dismissal and disciplinary procedures

Chapter 1

Standard procedure

Step 1 : Statement of grounds for action and invitation to meeting

- 1(1) *The employer must set out in writing the employee's alleged conduct or characteristics, or other circumstances, which lead him to contemplate dismissing or taking disciplinary action against the employee.*
- (2) *The employer must send the statement or a copy of it to the employee and invite the employee to attend a meeting to discuss the matter.*

Step 2 : meeting

- 2(1) *The meeting must take place before action is taken, except in the case where the disciplinary action consists of suspension.*
- (2) *The meeting must not take place unless —*
 - (a) *the employer has informed the employee what the basis was for including in the statement under paragraph 1(1) the ground or grounds given in it, and*
 - (b) *the employee has had a reasonable opportunity to consider his response to that information.*
- (3) *The employee must take all reasonable steps to attend the meeting.*

- (4) *After the meeting, the employer must inform the employee of his decision and notify him of the right to appeal against the decision if he is not satisfied with it.*

Step 3 : appeal

- 3(1) *If the employee does wish to appeal, he must inform the employer.*
- (2) *If the employee informs the employer of his wish to appeal, the employer must invite him to attend a further meeting.*
- (3) *The employee must take all reasonable steps to attend the meeting.*
- (4) *The appeal meeting need not take place before the dismissal or disciplinary action takes effect.*
- (5) *After the appeal meeting, the employer must inform the employee of his final decision.*

Under Regulation 12 of the Employment (Northern Ireland) Order 2003 (Dispute) Regulations (Northern Ireland) 2004, it is provided, in essence, that the failure for a party to follow the applicable DDP then releases the other party from the obligation to follow it:-

“(1) If either party fails to comply with the requirement of an applicable statutory procedure including a general requirement contained in Part III of Schedule 1 ... non-completion of the procedure shall be attributable to that party and neither party shall be under obligation to comply with any further requirement of the procedure.”

Under Regulation 3(1) of the 2004 Regulations, the standard DDP applies when the employer contemplates dismissing or taking relevant disciplinary action against an employee.

Existing contractual and dismissal procedures remain to the extent that they supplement the statutory DDPs – which are intended to give the employee certain ‘basic’ protections’.

- 2.4 During the course of submissions, both oral and written, made by the representatives at the conclusion of these proceedings a number of issues arose, in relation to the proper interpretation of Article 70C of the 1996 Order (the right not to suffer any detriment); and including, in particular, whether Regulation 19(4) of the 1999 MAPLE Regulations excludes dismissal from any claim of detriment, pursuant to a claim under Article 70C of the 1996 Order, where the prescribed reason relates to Article 85A of the 1996 Order (time off for dependants).. In the circumstances, it is therefore necessary to set out in some detail the guidance obtained from the relevant case law in relation to the proper interpretation of these provisions.
- 2.5 These legislative provisions relating to the right to time off to care for dependants were introduced into UK law, following the accession of the UK to the Social Charter, in order to comply with the obligations of the Parental Leave

Directive (1996/34), extended to the UK by Directive 97/75. Amongst other things, the Directive required the Member States to allow workers time off:-

“On grounds of “force majeure” for urgent family reasons, in cases of sickness or accidents, making the immediate presence of the worker indispensable”

It has long been recognised, in the relevant case law, the rights conferred by these legislative provisions are wider than those conferred by the said Directives. However, it is to be noted, in the case of **Royal Bank of Scotland v Harrison [2009] IRLR 28**, it was held that, whilst confirming that Section 57A of the Employment Rights Act 1996 (which is in similar terms to Article 85A of the 1996 Order, which applies in Northern Ireland,) is wider in scope than the Directive, it should be read as enacted and not subject to whatever gloss may be derived from the reference in the Directive to “force majeure” or with the addition of such words as “sudden” or “emergency”, where these do not appear in the relevant sections of the Employment Rights Act 1996. The Employment Appeal Tribunal found that, although the Directives were a useful source of guidance on the meaning of the legislation, it could not be determinative in circumstances where the legislation conferred greater rights. **Harrison** also expressed doubts whether the Ministerial guidance, when the legislation was introduced into Parliament, was admissible to interpret the legislative provisions, following the principles set out in **Pepper v Hart [1993] IRLR 33**; and, in particular, the guidance given by Lord Sainsbury, in the House of Lords, when he had suggested that, in most cases, a day or two days would be sufficient to deal with emergencies in necessitating immediate absence and the provisions “were never intended to allow employees time off to get their washing machines mended”. (However, in **Qua** – see below – the Employment Appeal Tribunal endorsed the view expressed by Lord Sainsbury).

The tribunal was satisfied, in light of the foregoing, that the relevant provision did not give a right to take time off but to be permitted to do so for one or other of the limited purposes specified, without pay; unless the employer chose to pay or there was a relevant contractual right to pay in such circumstances.

- 2.6 In the case of **Qua v John Ford Morrison Solicitors [2003] IRLR 184**, the Employment Appeal Tribunal provided some helpful guidance as to the proper interpretation of Section 57A of the 1996 Act (Article 85A of the 1996 Order), where it stated:-

“... the statutory right is, in our view, a right given to all employees to be permitted to take a reasonable amount of time off work during working hours in order to deal with a variety of unexpected or sudden events affecting their dependants, as defined, and in order to make any necessary longer term arrangements for their care ...

The right is a right to a “reasonable” amount of time off in order to take action which is “necessary”. In determining whether action was necessary, factors to be taken into account will include, for example, the nature of the incident which has occurred, the closeness of the relationship between the employee and the particular dependant and the extent to which anyone else was available to help out. We consider that, in determining what is a reasonable amount of time off work, an employer should always take account of the

individual circumstances of the employee seeking to exercise that right. It may be that, in the vast majority of cases, no more than a few hours, or at most, one or more possibly two days would be regarded as reasonable to deal with the particular problem which has arisen. Parliament chose not to limit the entitlement to a certain amount of time per year and/or per case It is not possible to specify maximum periods of time which are reasonable in any particular circumstances. This will depend on the individual circumstances in each case and it will always be a question of fact for a tribunal as to what was reasonable in every situation.”

The Employment Appeal Tribunal confirmed that, in determining the above issue, the operational needs of the employer are not relevant to the amount of time an employee reasonably needs to deal with the relevant circumstances.

In **Cortest Ltd v O’Toole (UKEAT/0470/07)**, the EAT approved **Qua** and, in particular, the right is for employees to take a reasonable amount of time off work to take necessary action in respect of “a variety of unexpected or sudden events affecting their dependants “and to make any necessary large term arrangements for their care”.

However, it should be noted, in **R.B.S v Harrison [2009] ICR 116**, the Employment Appeal Tribunal took a wider view of the circumstances in which the right is available. It emphasised it is for the tribunal in each case to find on the facts whether necessity has been established and many factors may be relevant, including urgency and time, but “there are no hard and fast rules”. It stated “... the greater the time to make alternative arrangements, the less likely it will be that necessity will be established...” In the view of the EAT, if an employee failed to take appropriate steps to make alternative arrangements but had sufficient time in which to do so, a tribunal is unlikely to find as a fact it was necessary for the employee to take the time off. If, however, the time period between learning of the risk and the risk becoming fact was very short, then it will be easier for the employer to establish it was necessary for the employee to take the time off.

There is no formal statutory limit on the number of occasions on which an employee can exercise the right to take time off (but see **MacCullough v Wallis** later).

Although the Employment Appeal Tribunal in **Qua** indicated that right to time off is not “unlimited”, as such, employers require to proceed with caution before instigating absence management procedures on the grounds the employee has exercised the right on numerous occasions (see further **Nainbett v N Power Ltd (ET2502795/12)**).

The above case law suggests that, if an employee knows in advance time off is required, it may be more difficult to establish the right and it may be more appropriate in such circumstances to see if annual leave can be arranged with the employer.

- 2.7 In **Truelove v Safeways Stores PLC (UKEAT/0295/04)** the Employment Appeal Tribunal, following **Qua**, held that, since leave for dependants is a right to be exercised in difficult circumstances, it was not necessary to articulate the reason for which leave was needed with any particular formality. Indeed, it held there is no

statutory requirement on the employee to provide evidence of the reason for the absence.

“What is required is a communication which imparts an understanding into the mind of the respondent that something has happened to cause the breakdown of what would otherwise be a stable arrangement effecting, in this case, a child, and making it necessary urgently for the employee to leave work”.

- 2.8 In relation to the requirement of notification, pursuant to Article 85A, of the 1996 Order, and the requirement to tell the employer the reason for his absence as soon as reasonably practicable and how long he expects to be absent, it was confirmed in ***Ellis v Ratcliffe Palfinger Limited (UKEAT/0438/13)***, this is a question of fact for the tribunal to determine.

In ***MacCullough and Wallis Limited v Moore (UKEAT/0051/02)***, Burton J followed ***Qua*** but also emphasised that, in determining whether an employer has unreasonably refused a request for time off, the tribunal must consider the matter by reference to the information available to the employer at the time the request was refused; but also, if the reason for continuing absence is different from the original reason, then the employee’s right to further time off work is subject to the provisions of Article 85A(ii) of the 1996 Order, requiring the employee to inform the employer of the reason for any such further absence, as soon as reasonably practicable.

Therefore, it would appear from the said case law that an unreasonable refusal to permit the employee to take time off is clearly a question of fact to be determined by the tribunal; but a relevant factor in determining such an issue is not the employer’s needs, given its exclusion in determining whether the period of time off requested is reasonable (see ***Qua***).

- 2.9 It is relevant to note, for the purposes of these proceedings, that Article 70C of the 1996 Order is in similar terms to Section 47C of the Employment Rights Act 1996 (the 1996 Act). Article 70C is contained in the 1996 Order in Part VI (and Section 47C is contained in Part V of the 1996 Act). Both are under the same Part Heading – namely “Protection from suffering detriment etc in Employment” and also under the same Chapter Heading – “Rights not to suffer Detriment.”

It is also significant that some, but not all, the claims, provided for under the said Chapter in the 1996 Order (and the 1996 Act), are in similar terms; expressly providing the prohibition against detriment under the relevant Article/Section does not include dismissal – for example, protected disclosure/health and safety cases. Neither Article 70C in the 1996 Order, (Section 47C in the 1996 Act) makes such an express provision excluding dismissal from detriment. Subject to what is set out below, prima facie, the detriment under Article 70C of the 1996 Order (in Section 47C of the 1996 Act) could therefore include dismissal.

In this context, it is also relevant to note that the different circumstances, referred to in the said Chapter, preventing detriment in employment, where such an express provision is made excluding dismissal from detriment, is set out differently to Article 70C of the 1996 Order (and Article 47C of the 1996 Act). In particular, Article 70C of the 1996 Order (and Section 47C of the 1996 Act) state an employee

has the right not to be subjected to any detriment by any act or any deliberate failure to act, by his employer done for a prescribed reason. A prescribed reason, pursuant to Article 70C of the 1996 Order (and Section 47C of the 1996 Act) is one which is prescribed by Regulations made by the Department (at that time the Department for Economic Development), for the purposes of Article 70C of the 1996 Order (the Secretary of State for the purposes of Section 47C of the 1996 Act), which relate to time off under Article 85A of the 1996 Order (Article 57A of the 1996 Act).

The Department of Economic Development, in the exercise of its powers made the Maternity and Paternal Leave etc Regulations (Northern Ireland) 1999 (the 1999 MAPLE Regulations). As set out previously, Regulation 19(1) and (4) expressly provide the detriment does not include dismissal in relation to a claim under Article 70C of the 1996 Order. In Great Britain, the Secretary of State, made similar Regulations (the Maternity and Parental Leave Etc Regulations 1999), which contained a similar provision to Regulation 19(1) and (4) of the 1999 MAPLE Regulations in Northern Ireland.

Article 85A of the 1996 Order (Section 57A of the 1996 Act) was inserted into the said Order/Act by provisions contained in Article 10 of Schedule 4 to the Employment Relations (Northern Ireland) Order 1999, in relation to Article 85A (Schedule 4 to the Employment Relations Act 1999, in relation to Section 57A.)

What clearly emerges from the foregoing, is that, in relation to the legislative provisions in respect of these matters, these provisions are similar in both Northern Ireland and Great Britain and were brought into force in the same way.

Under the heading "Leave for Family Reasons", Article 131 of the 1996 Order, as set out previously, makes provision for automatic unfair dismissal if an employee is dismissed if the reason or principal reason for dismissal is of a prescribed kind or the dismissal takes place in prescribed circumstances. Again "prescribed" means prescribed by the Regulations made by the Department and, in the present proceedings, the reason or set of circumstances prescribed relates to time off under Article 85A. (Similar provision is made in Section 99 of the 1999 Act, in relation to automatic unfair dismissal relating to time off under Section 57A of the 1996 Act, again referring to prescribed reasons/set of circumstances made under Regulations made by the Secretary of State.)

- 2.10 In light of the foregoing, it is apparent that the legislative scheme, in relation to these provisions, is the same whether the claim is brought under the 1996 Order in Northern Ireland or the 1996 Act in Great Britain. The tribunal could find no case law, or indeed text book authority where it was suggested, in relation to the said provisions under the 1996 Act, that detriment could also include dismissal for the purposes of the claim under Section 47A of the 1996 Act. There does not appear to be any relevant case law in this jurisdiction. Nor was any such relevant case law or authority brought to the attention of the tribunal by the representatives. Rather, the text book authorities indicated that any claim for dismissal could only be considered in accordance with Section 1999 of the 1996 Act (which is in similar terms to Article 131 of the 1996 Order) (see further Harvey on Industrial Relations on Employment Law Section J paragraphs 728-730.01 and Discrimination Law Section E 11.009). In the absence of any relevant case law, in Northern Ireland, the tribunal could see no reason why the relevant law in Northern Ireland should not be

similarly applied in relation to Article 70C and Article 131, when considering a claim, pursuant to Article 85A (Time off for Dependents), as is clearly the position in Great Britain, as set out above. The legislative scheme is the same and the relevant Regulations, setting out the prescribed reasons are also in similar terms.

- 2.11 In the circumstances, and for the reasons already set out in the previous subparagraphs, having considered Regulations 19 and 20 of the 1999 MAPLE Regulations and Article 10 in Schedule 4 of the Employment Relations (Northern Ireland) Order 1999, together with Article 70C and Article 131 of the 1996 Order, the tribunal also came to the conclusion that there is no lacuna in the legislation, as suggested by the claimant's representative, insofar as Article 70C of the 1996 Order excludes dismissal from detriment. Further the tribunal was not satisfied that there was any basis for the claimant's contention that Regulation 19(4) of the 1999 Regulations is in some way "ultra vires" and should be struck down.

The tribunal is satisfied the above legislative provisions properly provide, when read together and as a whole, protection for both detriment and dismissal for family related reasons, namely time off for dependents.

There is no doubt, in the opinion of the tribunal, that the relevant legislative protection might have been provided for in a different manner; for example, by expressly excluding dismissal from detriment in Article 70C itself, which was done, as referred to previously, in other provisions relating to claims for detriment in employment. The tribunal suspects that, if it had not been necessary to insert these protections into legislative provisions already in force, which required the making of the 1999 MAPLE Regulations to comply with the provisions of the said Directive and the use of the 1999 Order to effect the necessary amendments to the 1996 Order, the provisions might have been set out in a more straightforward manner. However, despite this, reading the legislation as a whole, in the tribunal's judgment, the said provisions are clear and unambiguous and, in particular, that detriment does not include dismissal, for the purposes of Article 70C of the 1996 Order.

In the course of discussion, it was suggested, by the claimant's representative, that Regulation 19 does not implement the full potential of Article 70C of the 1996 Order by not expressly providing a remedy for breach of Article 70C for any detriment including dismissal. However, in the view of the tribunal, that is not contrary to or outside the enabling Article or, as the claimant contends "ultra vires" the enabling provision (see further ***Benion on Statutory interpretation***). All the above legislative provisions came into force on the 15 December 1999 and require, in the tribunal's judgment, to be considered as a coherent unit, intrinsically linked. The relevant Article, in the 1999 MAPLE Regulations, has made clear that Article 70C does not include a remedy for detriment where that detriment is dismissal and which remedy is expressly provided for under Article 131. It might have been better if Article 70C had been drafted differently, as was done for other rights, expressly excluding dismissal from the remedy of detriment. However, since delegated legislation must be presumed to be valid unless and until declared invalid (see ***Hoffman v La Roche and Company AG v Secretary of State for Trade and Industry [1975] AC 295***), the tribunal, in the circumstances, could not see any proper basis for challenging the validity of Regulation 19(4) of the 1999 Regulations, merely because it would have been better/clearer for interpretive purposes, if the limiting provision had been expressly included in Article 70C itself;

but not least, and in particular, when both Regulation 19 and 20 of the 1999 MAPLE Regulations are considered and read together as a whole.

- 2.12 In relation to a claim for detriment, pursuant to Article 70C and 71 of the 1996 Order, as set out previously, it is for the employer to show the ground on which any act or deliberate failure to act was done, meaning that the protected act did not materially influence (in the sense of being more than a trivial influence) the employer's treatment of the employee (see ***Fecit v NHS Manchester [2012] IRLR 64***).

In relation to a claim under Articles 70C, 71 and 72 of the 1996 Order, which are in similar terms to Sections 47C, 48 and 49 of the 1996 Act, the remedy for a relevant breach, pursuant to Article 72, is for the tribunal to make a declaration and to make such an award of such an amount as it considers just and equitable having regard to (1) the infringement to which the complaint relates and any loss which is attributable to the act or failure to act, which infringed the complainant's right. Further the loss is taken to include: any expenses reasonably incurred by the claimant in consequence of the act, or failure to act, to which the complaint relates; and loss of any benefit which the claimant might reasonably be expected to have had but for the act or failure to act.

It has long been considered in a series of decisions in the Employment Appeal Tribunal that, in relation to claims under Sections 47, 48 and 49 of the 1996 Act, a tribunal, in an appropriate case, could make an award for injury to feelings. (see ***Brassington v Cauldron Wholesale Limited [1978] ICR 405*** and ***Cleveland Ambulance NHS Trust v Blane [1997] IRC 851***, ***London Borough of Hackney v Adams [2003] IRLR 402*** and ***South Yorkshire Fire and Rescue Service v Mansell [2018] UKEAT/0151/17***). Further, in decisions such as ***Virgo Videlis Senior School v Boyle [2004] IRLR 268*** followed in ***Commissioner of Police of the Metropolis v Shaw [2012] IRLR 291***, protected disclosure detriment cases, which fall within the same legislative provisions relating to "protection from suffering detriment etc in employment", it has been established a tribunal is entitled to make an award for injury to feelings and aggravated damages (see later) – on the grounds, in essence, there are similarities with a discrimination claim. Detriment is not defined in the 1996 Order. It obviously can include any financial and economic disadvantage (see ***Peake v Automatic Products Ltd [1978] 1 AER 106***). However, it is not necessary for an employee to actually suffer some form of economic or physical damage in order to establish a detriment. By analogy from the anti-discrimination legislation – the test is whether a reasonable employee would or might take the view he had thereby been disadvantaged in the circumstances in which he had thereafter had to work. An unjustified sense of grievance cannot amount to 'detriment'. (See ***Shamoon v Chief Constable of the RUC [2003] IRLR 285***. Issues of mitigation of loss and contributory fault also apply, depending on the relevant circumstances in relation to claims, pursuant to the above Articles of the 1996 Order. (See further ***Harvey*** on Industrial Relations and Employment Law B11 paragraph 466).

However, the position as outlined above, in relation to an award of compensation for injury to feelings, has recently been thrown into some doubt by the recent decision of the Court of Appeal in ***Gomes v Higher Level Care Limited [2018] EWCA Civ 418***. This case related to a decision by the Court of Appeal in England and Wales whether the tribunal had power to make an award of compensation for

injury to feelings, where there had a breach of the Working Time Regulations and the proper interpretation of Regulation 30 of the said Regulations, which was found to be in similar terms to the provisions of Section 49 of the 1996 Act (Article 72 of the 1996 Order). Singh LJ, in his judgment, reviewed all the above authorities, such as **Mansell**, **Brassington**, and **Blane** in particular concluded, for the purposes of Regulation 30 of the Working Time Regulations, that an award of compensation for injury to feelings was not payable. He decided the reasoning in the above decisions was difficult to reconcile with what was said by the House of Lords in **Dunnachie v Kingston upon Hull CC [2003] IRLR 394**, that a tribunal has no power to award compensation for non-economic loss eg injury to feelings, in an unfair dismissal claim.

Singh LJ went on to state:-

- “62 *First, the natural place where one would expect to see provision to be made for compensation for injury to feelings is in the limb of the relevant legislation that deals with the “loss” attributable to the unlawful act of an employer. After all, as I have mentioned earlier, injury to feelings is a type of loss; and an award of damages for it is compensatory in nature, not punitive.*
- 63 *Secondly, the limb in the relevant legislation that deals with the “infringement” by an employer – or, in the context of Regulation 30(4)(a), “default” – is not naturally language that is concerned with compensation at all. Rather it concerns the nature or extent of the employer’s unlawful action: for example, was it a one off incident or was it a persistent practice?*
64. *Thirdly, the phrase “just and equitable” does not confer a general power on tribunals to award what they think ought to be awarded in a form of “palm tree justice”. As Lord Steyn made clear in **Dunnachie**, that phrase simply addresses the fact that, in the relatively informal setting of an Employment Tribunal, it may not be appropriate to inspect an unrepresented litigant to produce a detail schedule of loss of the type that might be expected in ordinary civil litigation. That phrase is not broad enough to confer jurisdiction to award compensation for injury to feelings, as the EAT appears to have thought in **Brassington**. If it were that broad, there would be jurisdiction to make such an award in an unfair dismissal cases, which **Dunnachie** holds authoritatively that there is not.*
65. *Fourthly, the House of Lords in **Dunnachie** considered that some importance should be attached to the fact that, in the context of the discrimination legislation, Parliament has expressly conferred jurisdiction on tribunals to award compensation for injury to feelings, whereas in the context of unfair dismissal it had not. The same point could be made about the legislation in the present context and that considered in the EAT line of authority to which I have referred. I observed that the point emphasised by Judge Clark in **Blane**, that the discrimination legislation at the time included those provisions expressly “for the avoidance of doubt” no longer holds true: the Equality Act does not contain that phrase.*

66. Nevertheless, I would prefer to leave for decision in another case, in which the issues arises directly, whether cases such as **Brassington** and **Blane** were correctly decided in their own context. This is because (i) those cases have a long standing pedigree, going back around 40 years; (ii) there were decided by Judges with long experience of employment law; (iii) the House of Lords had the opportunity to say that the cases of **Brassington** and **Blane** were wrong since they were cited in **Dunnachie** but did not say anything about them; (iv) this Court did not have the benefit of full argument on the point, since Mr Pascall came to the hearing to distinguish the earlier EAT line of authority, not to bury it; and (v) they appear to relate to situations in which there may be no financial loss at all and so the purpose of Parliament in conferring the rights in question may be frustrated if compensation for injury to feelings were not available either. This is a point mentioned by Judge Clark in particular, in **Blane**, in a passage which I have quoted at paragraph 47 above.
67. However, even if correctly decided, that line of authority is distinguishable from the present case because it concerns breaches of employment rights which are analogous to discrimination claims. In the present context, I agree with Slade J that the wrong complained of is akin to a breach of contract.
68. In my view, in the present type of complaint, the wrong committed by an employer is in substance the failure to give a paid break during the day. The net effect of that is that the workers are required to do work for a longer period of time than they are in substance being paid for. The natural remedy for that wrong was to make a payment of compensation for that time based on their rate of pay. That is what the ET decided to do in the present case, the parties having agreed the quantum.
69. Furthermore, I do not accept Mr Barnett's submission that this is the sort of contractual claim which exceptionally can attract an award of damages for injury to feelings, for example the "spoiled holiday" cases. The rationale for that exception in breach of contract cases is that there are certain types of contract where there are underlying purposes to provide enjoyment and pleasure for a person and, if such a contract is breached, the purchaser will have been denied the very thing they contracted to buy, something for which compensation should be given. That is not the present type of case. In the present context, as I have indicated, the mischief is that an employee is in effect required to work for no pay for the period of time for which it does not have a paid break".

Singh LJ also rejected any European law argument, in particular, in relation to the issue of an effective remedy for breach of the EU law right, conferred by the relevant directive in question.

In view of the tribunal's decision, as set out later in this decision, in relation to the claimant's claim pursuant to Articles 70C, 71 and 72 of the 1996 Order, it is not

necessary, for the purposes of that claim, to consider further the issue of whether an award of compensation for injury to feelings is properly payable pursuant to such a claim. However, it is necessary to return to this issue, when considering the claimant's claim pursuant to Article 85A and 85B of the 1996 Act and whether any remedy, pursuant to that claim, can include an award for injury to feelings (see later).

- 2.13 If an employee is dismissed and the reason or principal reason is of a prescribed kind (see earlier) namely time off under Article 85A, pursuant to Article 131 of the 1996 Order, the claimant is therefore automatically unfairly dismissed.

In ***Qua v John Morrison Solicitors [2003] IRLR 184 (paragraph 25)*** the Employment Appeal Tribunal set out some helpful questions, in order to assist the tribunal in determining these issues, namely:-

- (1) did the claimant take time off or seek to take time off from work during her working hours? If, how many occasions and when?
- (2) If so, on each of those occasions did the applicant (a) as soon as reasonably practicable inform her employer of the reason for her absence; and (b) inform him how long she expected to be absent (c) if not, were the circumstances such she could not inform him of the reason until after she had returned to work? (See further ***Ellis v Radcliffe Palfinger Limited UKEAT0438/2013*** – informed after the event but it was held not to be as soon as reasonably practicable.)

If, on the facts, the tribunal finds the applicant had not complied with the requirements of Article 85A(2), then the right to time off under subsection (1) does not apply. The absences would be unauthorised and the employee would not be automatically unfairly dismissed. "Ordinary" unfair dismissal might arise, provided the claimant had the requisite service (this did not apply in the present proceedings)

- (3) If the applicant had complied with those requirements, then the following questions arise:
 - (a) did she take or seek to take time off work in order to take action which was necessary to deal with one or more of the five situations listed at paragraphs (a) to (e) of Article 85A?
 - (b) If so, was the amount of time taken or sought to be taken reasonable in the circumstances?
- (4) If the claimant satisfied question 3(a) and (b) was the reason or principal reason for her dismissal that she had taken/sought to take that time off work?

If the final question is answered by the tribunal in the affirmative, then the claimant is entitled to a finding of automatic unfair dismissal.

In ***Atkins v Coll Personnel PLC [2008] IRLR 420***, applying similar provisions relating to Parental and Adoption Leave Regulations, the Employment Appeal Tribunal, gave helpful guidance in determining the issue

of the degree of connection required between the leave and the reason for dismissal, pursuant to [Article 131 of the 1996 Order] and, in particular, whether it is causal test or some less stringent test. It considered it was a causal test and, in particular, the tribunal has to ascertain, on the facts, what the reason or principal reason for dismissal was and to then ascertain whether such reason was connected with the fact the employee took or sought to take [paternity leave]. A time connection below is not sufficient.

In the case of ***Dahu v Circo Limited [2016] EWCA Civ 832***, the Court of Appeal, when considering a claim of detrimental treatment relating to trade union activities, where it is provided the employer has to show what was the sole or main purpose for which he acted or failed to act, the Court of Appeal held that, as an employer fails to establish the reason for the detriment, it is not automatically necessary to find that the reason is as put forward by the employee; albeit it usually will. (See later).

- 2.14 In a case of automatic unfair dismissal, it was confirmed in ***Kuzel v Roche Products [2008] IRLR 530*** (protected disclosure claim) by the Court of Appeal the tribunal should not look to the burden of proof in discrimination claims to assist in determining the burden of proof in an automatic unfair dismissal claim.

The Court of Appeal, held although it is for the employer to prove the reason for the dismissal –

“57 When an employee positively asserts that there was a different and inadmissible reason for his dismissal he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in a unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason”

If the employer does not satisfy the tribunal the reason was that which he alleges, it is open for the tribunal to find the reason was as alleged by the employee. However, the tribunal is not bound to do so. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. (See ***Dahu***, applying ***Kuzel***).

- 2.15 In relation to an award for injury to feelings, where same can be awarded pursuant to 1996 Order, in the case of ***De Souza v Vinci Construction Limited [2017] EWCA Civ 879***, the Court of Appeal has recently confirmed that the 10% uplift provided for in ***Simmons v Castle [2012] EWCA Civ 1288*** should apply to an award for injury to feelings with the consequence the “Vento bands” are as follows:

- (i) upper band £19,800 to £33,000;
- (ii) middle band £6,600 to £19,800; and
- (iii) lower band £600 to £6,600

It was not disputed these Vento bands, as amended, should also apply in Northern Ireland.

In *De Souza* the Court of Appeal invited the Presidents of the Employment Tribunals in Great Britain to issue fresh guidance, adjusting the Vento figures for inflation and to incorporate these changes. No such guidance has been issued in Northern Ireland.

- 2.16 If the tribunal was to award aggravated damages, this is an aspect of injury to feelings, and awarded only on the basis of the extent the aggravating features having increased the impact of the discriminatory action to the claimant and thus her injury to feelings and are part of the award for injury to feelings (see *McConnell v Police Authority for Northern Ireland [1997] NI 224.*) Aggravated damages are compensatory and not punitive and can be awarded where the employer has acted in a “high handed, malicious, insulting or oppressive manner in committing the act of discrimination” (*Alexander v Home Office [1988] ICR 685*).
- 2.17 In relation to a claim for unfair dismissal, pursuant to Article 145 of the 1996 Order, failure to comply with the relevant statutory dismissal procedures has an impact on compensation in relation to a claim of unfair dismissal, resulting in an adjustment upwards (in the case of default by the employer) or in an adjustment downwards in the case of default by the employee). Under Article 17(2) and 17(3) of the 2003 Order, the adjustment must be at least 10% and, if the tribunal considers it just and equitable, up to 50%. However, under Article 17(4) of the 2003 Order, a tribunal can apply no such reduction or increase or a reduction or increase of such lesser percentage as it considers just and equitable exceptional circumstances which would make a reduction or increase of that percentage unjust and inequitable. Any potential uplift or reduction is limited to the compensatory award only; and there is no provision in an unfair dismissal claim to uplift the compensatory award beyond the statutory maximum (Article 158A of the 1996 Order).
- 2.18 Although the decisions of the Employment Appeal Tribunal and/or the Court of Appeal in England and Wales are not binding on this tribunal; however, the tribunal, in the absence of any relevant decisions in the Court of Appeal in Northern Ireland in relation to the said statutory dismissal procedures, subject to what is stated later in this decision, has found that the decisions of the Employment Appeal Tribunal and/or the Court of Appeal in England and Wales, in relation to such matters, persuasive and appropriate to follow – in particular, in circumstances where the decisions of the Employment Appeal Tribunal and/or the Court of Appeal in England and Wales relate to provisions, which were then applicable in Great Britain, and which are in similar terms to the relevant statutory provisions in Northern Ireland, to which reference has been made previously. *Beaufort Developments (NI) Ltd v Gilbert Ash [1997] NI 142.* The Employment Appeal Tribunal and/or the Court of Appeal in England and Wales has been reluctant to set down principles that fetter the discretion of a tribunal in relation to this issue of the uplift and reduction of a compensatory award in relation to a finding of automatic unfair dismissal (see *Cex v Lewis (UKEAT/0031/07)*).
- 2.19 In *Metrobus Ltd v Cooke [UKEAT/0490/06]* the EAT did not interfere with an uplift of 40% where the employer had ‘blatantly’ failed to comply with the obligation to send a Step 1 letter and acknowledged that the uplift provisions were more ‘penal

than compensatory in nature'. In ***Davies v Farnborough College of Technology [2008] IRLR 4***, Burton J suggested a maximum uplift could apply where there had been a complete and deliberate breach of any procedures. Subject to what is set out below, ultimately the extent of any uplift would appear to be a matter within the discretion of a tribunal, having regard to all material circumstances, which are unlimited. Further, the statutory provisions do not require the tribunal to start at an uplift of 50% and work downwards in accordance with evidence of mitigation provided by the respondent (see ***Butler v GR Carr (Essex) Ltd [UKEAT/0128/07]***). However, in the case of ***Aptuit (Edinburgh) v Kennedy [UKEATS/0057/06]***, the Employment Appeal Tribunal (in Scotland) held that, when exercising its discretion to uplift an award, the only circumstances which the tribunal may take into account are those surrounding the failure to complete the statutory procedure. In the case of ***McKindless Group v McLaughlin [2008] IRLR 678***, the Employment Appeal Tribunal (in Scotland) has again confirmed that, in exercising the discretion the tribunal must do so by reference to some particular facts and circumstances surrounding the failure to complete the statutory procedure which can properly be regarded as making it just and equitable that the employer should be penalised further. Somewhat controversially, the EAT held that an uplift should not follow if the employer does not explain the reasons for the failure to comply, on the grounds that the statutory provisions do not oblige the employer to explain the failure.

In the case of ***Virgin Media Ltd v Seddington & Another [UKEAT/0539/08]***, Underhill J applied the ***McKindless Group*** case and confirmed that a (if not the) primary factor requiring to be taken into account in exercising the discretion in relation to whether an uplift was applicable, related to how culpable the failure to employ the statutory procedures was. Underhill J accepted that, in some circumstances, failure to employ the statutory procedures might speak for itself. In addition he said that the issue of uplift should not be approached too mechanistically, as had occurred in the particular facts of that case. In ***Abbey National Ltd v Chagger [2009] IRLR 86***, Underhill J held that it was legitimate for a tribunal to take into account the overall size of an award, when deciding the amount of an uplift.

In the case of ***Wardle v Credit Agricole [2011] EWCA Civ 545***, Elias LJ reviewed all the authorities and stated:-

- “18 *Before answering this question, it is necessary to consider the principles which should inform a tribunal when exercising its Section 31(3) discretion.*
- 19 *I confess that I do not find the sub-section at all easy to apply. In Chagger the Court stated that its purpose was to operate ‘as an incentive to encourage parties to make use of the statutory procedures’. It is a stick rather than a carrot, and the sanction for failing to comply has a significant punitive element since failure leads to additional compensation irrespective of the adverse effect on the employee. It is no doubt because the penalty should be commensurate with the offence that the EAT has expressed the view on a number of occasions that the degree of culpability is a highly significant factor when assessing the appropriate uplift. Culpability will include such considerations as the extent of the breach and whether it is deliberate or inadvertent : see the observations of the*

EAT President, Underhill J, in **Virgin Media v Seddington UKEAT/00539/08**, Paragraph 20 and **Lawless v Print Plus UKEAT/0333/09**, Paragraph 10.

- 20 *Whilst I do not dissent from that analysis, I think it would be wrong to see the uplift purely in penal terms. The breach does have adverse consequences for the other party. In the case of a dismissal, the employee is deprived of the opportunity to persuade the employer, before the axe falls, that the dismissal would be inappropriate or unfair. Instead he is compelled to go to law to vindicate his position.*
- 21 *The consequences of the breach for an employee will vary from case to case. For example, it may be felt particularly harshly where the dismissal is for misconduct, and especially so if there are what turn out to be false allegations of fraud or dishonesty which can then only be successfully challenged in the tribunal, where they necessarily become aired in public. In my judgment this would render the breach more culpable than would otherwise be the case and would be a potentially important factor justifying an uplift significantly above the 10%.*
- 22 *I do not think that the ability of the wrongdoer to pay is in itself a relevant factor when considering the degree of culpability. Having said that, a large company which infringes the procedures will often be more culpable than a small business because it has less excuse for being ignorant of its obligations and the potential consequences of its actions.*
- 23 *The curiosity about these provisions - both as they affect the employer and employee - is that the sanction is defined by reference to the compensation awarded to the employee which is in turn a function of the employee's loss. Yet that depends on a whole host of factors some of which are entirely fortuitous and have no bearing on the employer's conduct at all. For example, if the employee is unfairly dismissed in flagrant and deliberate disregard of the procedures, but he secures equivalent employment immediately following the dismissal, the compensation will be very small and even the maximum uplift will only result in a very modest sum of money. By contrast, an employer who inadvertently commits a relatively minor breach in circumstances where considerable loss is suffered will have to pay much more even if the uplift is limited to 10%. The stick strikes more harshly on the wrong dog. That, however, is what Parliament has enacted, and tribunals must seek to give effect to Parliament's intention, however difficult or arbitrary the consequences may appear to be.*
- 24 *In my view, some understanding of Parliament's intention can be gleaned by a careful consideration of the structure of the sub-section. As the EAT has observed (eg in the **Lawless** case) the tribunal is not charged with fixing a percentage somewhere between 10 and 50% as it deems just and equitable. Had that been the formulation then I can see that it may well have been appropriate for a tribunal to choose*

10% for the least serious breaches and 50% for the most flagrant with the rest falling at the appropriate point within the range. Rather the tribunal is enjoined to start with 10% and it must then consider whether it is just and equitable to increase that percentage and, if so, by how much.

- 25 As Lady Smith pointed out giving the judgment of the EAT sitting in Scotland in **McKindless Group v McLaughlin** [\[2008\] IRLR 678](#), Paragraph 13, this requires a tribunal to explain what facts or circumstances surrounding the failure to comply make it just and equitable to go beyond the minimum at all. This should not be an automatic response whenever the tribunal thinks that the breach is more than minor. On the contrary, there must be something about the particular circumstances which justifies the conclusion that 10% would be inappropriate and ought to be increased. The circumstances need not be exceptional, otherwise that word would have been used here as it is in sub-section (4), but in my judgment they must be such as to clearly justify concluding that the starting point of 10% would not adequately reflect the degree of culpability.
- 26 In my opinion an increase to the maximum of 50% should be very rare indeed. It should be given only in the most egregious of cases. An example given by Lady Smith in the **McKindless** case which would at any event get close to the maximum is where there is a clear finding that the employer is determined to dismiss the employee whatever the merits and has deliberately and cynically ignored the procedures in case they get in the way of his being able to do so. However, the mere fact that the employer has ignored the procedures altogether would not in my view justify an increase to the maximum, although it would often justify some increase beyond 10%.
- 27 Once the tribunal has fixed on the appropriate uplift by focusing on the nature and gravity of the breach, but only then, it should consider how much this involves in money terms. As I have said, this must not be disproportionate, but there is no simple formula for determining when the amount should be so characterised. However, the law sets its face against sums which would not command the respect of the general public, and very large payments for purely procedural wrongdoings are at risk of doing just that. The EAT referred to the case of **HM Prison Service v Johnson** [\[1997\] ICR 275](#) when Smith J, as she then was, observed, with respect to the level of compensation for injury to feelings, that it was necessary to have regard to 'the view which members of the public would have to the amount of the award'. In my judgment, that is a fortiori the case where the award is either unrelated, or at least only partially related, to any specific injury to, or loss suffered by, the employee.
- 28 In considering the sort of sum which would be proportionate and acceptable, it is, in my view, of some relevance to have regard to the sums which the courts are willing to award for injury to feelings and for aggravated damages.

...

- 29 *I do not suggest that these are entirely analogous situations, but I think that save in very exceptional cases, most members of the public would view with some concern additional payments following an uplift for purely procedural failings which exceeded the maximum payable for injured feelings.”*

In a recent case, before the Court of Appeal in Northern Ireland, in the case of ***Brinks Ireland Ltd v Hines [2013] NICA 32***, one of the issues which the Court could have been required to consider on appeal was the uplift of 50%, in circumstances where the tribunal had found that the dismissal was unfair; but, in the event, the Court of Appeal remitted the case to the industrial tribunal to further consider the nature of the dismissal and, in light of same, the application (if relevant) of the said uplift provisions. The industrial tribunal, upon remittal, decided the claimant was expressly, deliberately and unfairly dismissed and affirmed the earlier decision of a 50% uplift of the compensatory award. This subsequent decision was not the subject of appeal. In a decision in the Court of Appeal in the Northern Ireland, in the case of ***Lewis v McWhinney’s Sausages Ltd [2013] NICA 47***, the provisions relating to an uplift, pursuant to Article 17(3) of the 2003 Order were also, inter alia, the subject-matter of the proceedings; but in the event, it was again not necessary for the Court of Appeal to make any observations on the said provisions, relating to uplift, when dismissing the appeal.

The tribunal was satisfied, which was accepted by the respondent’s representative, that the provisions relating to uplift and reduction of the compensatory award would apply to a successful claim of automatic unfair dismissal, pursuant to Article 131 of the 1996 Order, which permits a claim to be made by an employee where the employee does not otherwise satisfy the one year period of employment, pursuant to Article 140 of the 1996 Order.

- 2.20 In the case of ***Morrison v Amalgamated Transport & General Workers Union [1989] IRLR 361***, the Northern Ireland Court of Appeal held in relation to the issue of contributory fault:-

- “(i) *the tribunal must take a broad common sense view of the situation;*
- (ii) *that broad approach should not necessary be confined to a particular moment, not even the moment when the employment is terminated;*
- (iii) *what has to be looked for in such a broad approach over a period is conduct on the part of the employee which is culpable or blameworthy or otherwise unreasonable; and*
- (iv) *the employee’s culpability or unreasonable conduct must have contributed to or played a part in the dismissal.”*

In ***Allders International Ltd v Parkins [1982] IRLR 68***, it was emphasised that it is the employee’s conduct alone, which is relevant to the issue of whether the loss resulting from the dismissal should be reduced on grounds of contributory fault.

In a recent decision of the Employment Appeal Tribunal in the case of **Steen v ASP Packaging Ltd [2013] UKEAT/0023**, Langstaff P, confirmed it would be a rare case where there would be a 100% deduction for contributory fault. He also confirmed it was necessary for the tribunal to focus on what the employee did or failed to do and it is not upon the employer's assessment of how wrongful that act was; and if any such conduct, as identified by it, which it considers blameworthy, caused or contributed to the dismissal to any extent and, if so, to what extent the award should be reduced and to what extent it is just and equitable to reduce it. If the identified conduct which the tribunal considers blameworthy did not to any extent cause or contribute to the dismissal there can be no reduction, no matter how blameworthy in other respects the tribunal might think the conduct to have been. Langstaff P noted that **Polkey** deductions (see later) and deductions for contributory fault are approached on different basis and do not directly overlap:-

*“That is because the focus in a **Polkey** decision is predictive, it is not historical, as is the focus when establishing past contributory fault as a matter of fact. Second, **Polkey** focuses upon what the employer would do if acting fairly. Contributory fault is not concerned with the action of the employer but with the past actions of the employee. A finding in respect of **Polkey** thus may be of little assistance in augmenting reasons given by a tribunal in respect of contributory deduction.”*

2.21 Article 156(2) of the 1996 Order, provides, in relation to the issues of the amount of a basic award and contribution on the part of the claimant:-

“Where the tribunal considers any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.”

Article 157(6) of the 1996 Order provides in relation to the issues of the amount of a compensatory award and contribution on the part of the claimant:-

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

In the Northern Ireland Court of Appeal, in the case of **GM McFall & Company Ltd v Curran (1981) IRLR455**, which would be normally binding on this tribunal, it was held that the general rule is that both the basic and compensatory awards should be reduced by the same amounts. It should be noted, however, that the relevant legislation in Northern Ireland at the time of that decision was differently worded to that now seen in the 1996 Order. In particular, the provisions relating to both a basic award and a compensatory award were in similar terms to that now seen in Article 157(6) of the 1996 Order and both provisions, at that time, therefore had reference to causation/contribution.

Now, Article 156(2) and Article 157(6) of the 1996 Order, as set out above, are in similar terms to those set out in Sections 122(2) and 123(6) of the Employment Rights Act 1996, which applies in Great Britain. As has been made clear in a recent decision of Langstaff P in the case of **Steen v ASP Packaging Ltd (2013) UKEAT/0023/13**:-

“The two sections are subtly different. The latter calls for a finding of causation. Did the action which was mentioned in Section 123(6) cause or contribute to the dismissal to any extent? That question does not have to be addressed in dealing with any reduction in respect of the basic award. The only question posed there is whether it is just and equitable to reduce or further reduce the amount of the basic award to any extent. Both sections involve the consideration of what is just and equitable to do.”

[Tribunal’s emphasis]

He also points out that, in applying the provisions of Section 123(6) if the conduct which it has identified and which it considers blameworthy did not cause or contribute to the dismissal to any extent, then there can be no reduction, pursuant to Section 123(6), no matter how blameworthy in other respects the tribunal might consider the conduct to have been. If it did cause or contribute to the dismissal, then issues arise to be determined in relation to what extent the award should be reduced and to what extent it is just and equitable to reduce it.

Langstaff P emphasises that:-

“A separate questions arises in respect of Section 122(2) (the basic award) where the tribunal has to ask whether it is just and equitable to reduce the amount of the award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award but it does not have to do so.”

So, in light of the foregoing, it would appear that, despite the change in the wording of the legislative provisions in Northern Ireland since the decision of the Court of Appeal in Northern Ireland, in **GM McFall & Company Ltd**, was decided, in most cases the same result would still be achieved; albeit it must be remembered that, in relation to the compensatory award, issues of causation/contribution have to be considered before any issues of reduction arise. This, for the reasons set out above, is unlike the position in relation to the basic award. However, as seen above, in most cases, the same reduction will continue to be applied to the basic and compensatory awards.

2.22 In a recent decision in the case of **British Gas Trading Ltd v Price [2016] UKEAT/03267/15**, Mrs Justice Simler (P) has recently reviewed the authorities in relation to the issue of contributory fault and the statutory provisions relating to reduction of the basic and compensatory award in such circumstances, pursuant to Section 122(2) and 123(6) of the Employment Rights Act 1996 (see before re: 156(2) and 157(6) of the 1996 Order).

After emphasising the sections, focus on the conduct of the employee and not on the conduct of the employer, she relied on the guidance provided by HHJ Peter Clark in an old case of **Optikinetics Ltd v Whooley [1999] ICR 984** when he stated:-

“(1) Before making any finding of contribution the employee must be found guilty of culpable or blameworthy conduct. The inquiry is directed solely to his conduct and not that of the employer or others.

- (2) *For the purposes of Section 123(6) the employee's conduct must be known to the employer at the time of the dismissal (cf : the just and equitable provision under Section 123(1) and have been a cause of the dismissal.*
- (3) *Once blameworthy conduct causing, in whole or in part, the dismissal has been found, the tribunal must reduce the compensatory award by such proportion as it considers just and equitable. It must make a reduction ...*
- (4) *A finding of contribution under Section 122(2) does not require a finding that the conduct is causatively linked to the dismissal. It may be first discovered after dismissal. The wording of Section 122(2) grants to the tribunal a wide discretion as to whether to make any, and if so what, reduction in the basic award on the ground of the employee's conduct.*
- (5) *After some uncertainty ... it is now clear that different proportionate reductions are permissible in relation to the basic and compensatory awards ...*
- (6) *The appellate courts will rarely interfere with the employment tribunal's assessment of the percentage reduction for contribution."*

(Paragraph 5 of the guidance may require to be considered further in light of the judgment seen in **Steen** above.)

On the facts of the **Price** case, the EAT found the tribunal, when determining these issues of contributory fault and reduction of basic and/or contributory award, had wrongly focused on the conduct of the employer rather than the employee and had confused causation of the dismissal with causation of the unfairness.

It held:-

"The question for a tribunal was the statutory question – did the culpable conduct cause or contribute to any extent to the claimant's dismissal? That question involves a mixed question of law and fact, as the parties agree. In many cases, the answer will be obvious once the facts are found taking a broad common sense approach. There may be cases however, where an evaluative judgment must be made as to whether the conduct was a legal contributing or an effective cause; or to put it another way, whether dismissal was a direct and natural consequence of the conduct. Depending on the circumstances, it is open to a tribunal to determine that it was not."

In relation to *Paragraph 3* of the guidance in **Optikinetics**, where it states a tribunal must make a reduction once blameworthy conduct causing, in whole or in part, the dismissal has been found, Simler J concluded that, having found conduct did cause or contribute to the dismissal and that a tribunal is required to consider reducing the amount of the compensatory award by such proportion as it considered 'just and equitable', having regard to that finding, it would be difficult to envisage circumstances, although she did not altogether rule them out, where it would not be

just and equitable to reduce the award at all, when there was a finding the claimant's blameworthy conduct caused or contributed to the dismissal.

In the decision of the Employment Appeal Tribunal, in the case of **Tolley v Scofield (UKEAT/0324/16)**, HH Judge Eady QC stated at paragraphs 15 and 16 and 17

"15 More generally, it is open to an ET to find that a claimant's conduct has contributed to the dismissal, notwithstanding that it is a reason other than conduct (see for example **Moncus v International Paint Co Ltd (1978) IRLR 223 EAT (Phillips J Presiding)**; and **Finnie v Top Hat Frozen Foods (1985 ICR EATS (per Lord McDonald)**, albeit that was a reason where the dismissal had included the conduct of the employee). The requirement remains, however, that the employee's conduct be culpable and blameworthy in some way (see **Nelson v BBC (No 2) (1980) 1CR 110** and **Slaughter v C Brewer & Saiti (1990) 1CR 730 EAT**, which allowed that a declaration for contributory fault might still be permissible were the dismissal was by reason of capability due to ill health)

16 Even when the issue of contributory fault reduction is not raised before the ET, if it was found there was conduct on the part of the employee that was or could be regarded as blameworthy, the ET will be required, given the language of the statutory provision, to consider contributory fault (see **Swallow Security Services Ltd v Millicent (UKEAT/0297/08)**"

17 Ultimately, it is for the ET to take a broad commonsense view as to what part if any the employee's conduct played in the dismissal and then in light of that finding to determine the level of any reduction"

2.23 The amount of any reduction of the basic and/or compensatory award (see before), by a percentage on just and equitable grounds, can be as much as 100%; but such a sizeable reduction, although legally possible, is rare/unusual/exceptional (see **Lemonious v The Church Commissions (2013) UKEAT/0253/12**); and, if such a reduction is made by a tribunal, it must be justified by facts and reasons set out in the decision. In any event, the factors which help to establish a particular percentage should be, even if briefly, identified (see further **Steen v ASP Packaging (2013) UKEAT/0023/13**).

2.24 In relation to the issue of compensation, where a claimant has obtained income from a new job, following an unfair dismissal, the Employment Appeal Tribunal, in the case of **Whelan v Richardson [1988] IRLR 144**, summarised the approach to be taken by tribunals; albeit emphasising that tribunals had a discretion to do what was appropriate in individual cases:-

"(1) The assessment of loss must be judged on the basis of the facts as they appear at the date of assessment hearing ('the assessment date').

(2) Where the (claimant) has been unemployed between dismissal and the assessment date then, subject to his duty to mitigate in the operation of the recoupment rules, he will recover his net loss of earnings based on the pre-dismissal rate. Further, the Employment Appeal Tribunal will consider for how long the loss is likely to continue so as to assess future loss.

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

This guidance was described as helpful by the Court of Appeal in ***Dench v Flynn & Partners [1998] IRLR 653***, although the Court considered that the obtaining of permanent employment at the same or a greater salary would not in all cases break the chain of causation. The ***Dench*** decision was applied in ***Cowen v Rentokil Initial Facilities Service (UK) Ltd [2008] AER (D) 70***. Further, in a recent decision of the Employment Appeal Tribunal, in the case of ***Commercial Motors (Wales) Ltd v Hawley [2012] UKEAT/0636***, the Employment Appeal Tribunal cited with approval the case of ***Dench*** and, in particular, the judgment of Beldam LJ, when he stated at *Paragraph 19* of his judgment:-

- "19 *... no doubt in many cases a loss consequence upon unfair dismissal will cease when an applicant gets employment of a permanent nature at a equivalent or higher level of salary or wage than the employee enjoyed when dismissed. But to regard such an event is always and in all case putting an end to the attribution of the loss to the termination of employment, cannot lead in some cases to an award which is just and equitable.*
- 20 *Although causation is primarily a question of fact the principle to be applied in deciding whether the connection between the cause, such as unfair dismissal and its consequences, is sufficient to find a legal claim to a loss of damage, is a question of law. The question for the tribunal was whether the unfair dismissal, could be regarded as a continuing course of loss when she was consequently dismissed by her new employer with no right of compensation after a month or two in her new employment. To treat the consequences of unfair dismissal as ceasing automatically when other employment*

supervenies, is to treat the effective cause that which is simply closest in time.”

In **Salvesen Logistics Ltd v Tate [UKEAT/689/98]**, the Employment Appeal Tribunal made clear that the chain of causation will not be broken where it is clear from the outset that the employment would be on a temporary basis.

2.25 In relation to the issue of mitigation of loss, there is no dispute that the principle that a claimant is under a duty to take reasonable steps to mitigate his loss is well-established under common law and that the principles of mitigation of loss apply equally to awards of compensation by a tribunal in relation to awards of compensation for unfair dismissal (see **Fyfe v Scientific Furnishings Ltd [1989] IRLR 331**) and that therefore the employee must take reasonable steps to obtain alternative employment. In the case of **Wilding v British Telecommunications PLC [2002] IRLR 524**, the Court of Appeal ruled that the following general principles apply in determining whether a dismissed employee, who is refused an offer of employment, has breached the duty to mitigate:-

- “(a) *The duty of the employee is to act as a reasonable person unaffected by the prospect of compensation from her employer.*
- (b) *The onus is on the former employer as wrongdoer to show that the employee has failed to mitigate by unreasonably refusing the job offer.*
- (c) *The test of reasonableness is an objective one based on the totality of the evidence.*
- (d) *In applying that test, the circumstances in which the offer is made and refused, the attitude of the former employer, the way in which the employer had been treated, in all the surrounding circumstances, including the employee’s state of mind, should be taken into account.*
- (e) *The tribunal must not be too stringent in expectations of the injured party (that is, the employee).*

*The guidance in set out in the **Wilding** case has been applied in a number of recent decisions by the Employment Appeal Tribunal; but each relate to their own particular facts (see further **Harris v Tennis Together Ltd [2009] UKEAT/0358/08**, **Hibiscus Housing Association Ltd v Mackintosh [2009] UKEAT/0534/08**, and **Beijing Ton Ren Tang (UK) Ltd v Wang [2009] UKEAT/0024/09**.”*

The state of the labour market can be relevant in deciding whether an employee has made reasonable efforts to find a new job (see *Korn Employment Tribunals Remedies, Paragraphs 13 – 28*). It was held **HG Bracey v Kes [1973] IRLR 210** that the duty of mitigation does not require the dismissed employee to take the first job that comes along, irrespective of pay and job prospects.

In the recent decision of **Look Ahead Housing and Care Ltd v Chetty (2014) UKEAT/0037** Langstaff emphasised, in relation to the burden of proof by the employer:-

“But without there being evidence (whether by direct testimony or by inadequate answers given by a claimant in cross-examination) adduced by the employer on which a tribunal can be satisfied, on the balance of probabilities, that the claimant has acted unreasonably in failing to mitigate, a claim of failure to mitigate will simply not succeed”. [Tribunal’s emphasis]

- 2.26 Under Article 157(1) of the 1996 Order, the amount of a compensatory award shall be such an amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that losses attributable to action taken by the employer. In having regard to what the employee has lost in consequence of the dismissal, it may be necessary to determine what would have occurred but for the dismissal but this may require an assessment as to whether the employment would have ended but for the dismissal.

In the well-known House of Lords decision in ***Polkey v A E Dayton Services Ltd [1988] ICR 344***, it was held that, in essence, an employer who had acted unreasonably and in breach of procedures could not contend that, since the dismissal would have occurred anyway, even if proper procedures had been followed, the dismissal should be found to be a fair dismissal, indeed, it is only in limited circumstances that an employer would be able to successfully argue that compliance with fair procedures would be futile. However, although the tribunal might find that dismissal was unfair, a tribunal, following ***Polkey***, was able to reduce the employee’s compensation by a percentage to represent the chance the employee would still have been dismissed. In the case of ***Polkey***, therefore it required the employer to satisfy the tribunal and they would have dismissed the employee, even if it had complied with fair procedures. However, the ***Polkey*** decision, as now interpreted, is not confined to a dismissal rendered unfair purely by procedural failure (as happened in the facts of ***Polkey***); it can also apply in a wider range of cases, depending on the facts found by the tribunal. (See later). Article 130A(2) made a change to the law of unfair dismissal and resulted, in certain circumstances, partial reversal of the principles set out in ***Polkey***, as indicated above. However, Article 130A relates to a claim of automatic unfair dismissal where the statutory dismissal procedures have not been complied with; and the claim was pursuant to Article 126 of the 1996 Order (“ordinary unfair dismissal”). However, the claimant’s claim for automatic unfair dismissal is pursuant to Article 131 and not Article 130A, as the claimant did not satisfy the relevant qualifying period of employment for such a claim, pursuant to Article 130A and/or Article 126 of the 1996 Order. In those circumstances, since the claimant’s claim was pursuant to Article 131 of the 1996 Order, the ***Polkey*** reversal provisions in Article 130A(2) did not, in the judgement of the tribunal, apply to these proceedings. In any event, Article 130A(2) of the 1996 Order is only of assistance to an employer, when the statutory dismissal procedure has been complied with. Automatic unfairness cannot be cured by invoking Article 130A(2) (***Butt v Cafcass (UKEAT/0362/07)***). As was made clear in the case of ***Goodin v Toshiba (UKEAT/0271/08)***, there can be a ***Polkey*** reduction of up to 100% in an automatic unfair dismissal case, where the breaches of procedure would have made no difference to the dismissal. Therefore, in assessing compensation in relation to a claim of automatic unfair dismissal, pursuant to Article 131 of the 1996 Order, where the statutory dismissal procedure has not been complied with, a ***Polkey*** reduction requires to be considered by the tribunal.

In a series of decisions it has been confirmed that a **Polkey** reduction is not limited to cases that might be characterised as “procedurally unfair” (see **Lambe v 186K Ltd [2005 ICR 307]** and the recent decisions of the EAT in **Lancaster** and **Duke Ltd v Wileman [2018] UKEAT/0256/17** and **Morrisons Supermarket PLC v Kessab (UKEAT/0034/13)**). However in the case of **Firth Accountants v Law [2016] UKEAT/0108**, Laing J, in an unfair constructive dismissal case, warned of the issue of overlap between the facts taken into account in making a **Polkey** deduction and when making a deduction for contributory conduct, and that the tribunal should consider, in such circumstances, where there is significant overlap, it is just and equitable to make a finding of contributory conduct and, if so, what amount should it be and so avoid the risk of penalising a claimant twice for the same conduct; but remembering, as seen in Steen, the differences of approach between **Polkey** deduction and deductions for contributory fault, with a **Polkey** deduction being protective and focusing upon what the employer would do fairly whereas past contributory fault is a matter of fact.

2.27 In **Software 2000 Limited v Andrews [2007] UKEAT/0533/06**, Elias J gave some useful guidance in carrying out the assessment referred to above:-

- “(1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.*
- (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively it would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he intended to retire in the near future).*
- (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.*
- (4) Whether that is the position is a matter of impression and judgement for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent of which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.*

In **Brinks Ireland Limited v Hines [2013] NICA 32**, Girvan LJ followed, with approval, the guidance in **Software 2000 Limited**.

In **Hill v Governing Body of Great Tey Primary School (UKEAT/0237/12)**
Langstaff P held:-

“24 A “**Polkey deduction**” has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty that it would not) though more usefully will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if were the employer: it is assessing the chances of what another person (the actual employer) would have done ...”

In **Dev v Lloyds Asset Finance Division Limited [2014] UKEAT/0281**,
Landstaff P also stated, when confirming the approach in **Hill**:-

“6 A tribunal asked to consider a **Polkey** question must ask not what would have happened but rather what might have happened. To ask what would have happened asks for a decision, effectively on the balance of probability, with a straight yes or no answer. The second looks at the matter as one of assessment of chances within a range of 0% - 100%. It is well established the latter is the correct approach (See further **Ministry of Justice v Parry [2013] ICR 311** and **Hill v Governing Body of Great Tey Primary School ...**)”

In **Contract Bottling Limited v Cave [2014] UKEAT/0100/14**, Langstaff P emphasised that **Software 2000 Decision** has to be placed on a broader context than is apparent from the decision itself and a **Polkey** decision is part, but part of a only, complex assessment of the losses which arise as a result of a dismissal and a part only of the overall decision on the compensation; but also that the assessment of a **Polkey** deduction is a prediction exercise about which there can be no absolute and scientific certainty. Evidence is needed to inform the prediction but it is more a matter of art than a matter of science.

In **V v Hertfordshire CC [2015] UKEAT/0427/14**, Langstaff P at paragraph 23, referred to a series of decisions in relation to **Polkey** deductions confirming they are not about probability but all about chance.

2.28 Generally a **Polkey** deduction is only applicable to the compensatory award not the basic award (apart from the limited circumstances where such unfair dismissal might have taken place virtually contemporaneously with the actual dismissal) see **Granchester Construction (Eastern) Limited v Attrill [2012] UKEAT/0327**.

Following the decision in **Digital Equipment Company Limited v Clements [1997] EWCA Civ 2899**, and subsequent case law, the order in which adjustment to any compensatory award should be made has now been clarified, and is as follows:-

(i) calculate total losses suffered by the claimant

- (ii) deduct any amount received from the employer such as payment in lieu of notice or ex gratia payment made to the employee as compensation for the dismissal
- (iii) deduct earnings which have mitigated the claimant's loss or a sum which reflects any failure by the claimant to mitigate his or her loss
- (iv) a **Polkey** deduction
- (v) percentage increase or a reduction to reflect a failure by employer employed to comply with the statutory dismissal procedure
- (vi) percentage reduction for any contributory conduct on the part of the employee
- (vii) grossing up
- (viii) apply the statutory cap (if relevant).

3.1 The tribunal heard oral evidence on behalf of the respondent from Brigit Duggan and Michael McNeill; and, on behalf of the claimant, from the claimant. In addition, the witness statements of Adrian McGuckin and Stefanie Scullion, on behalf of the claimant, were admitted, by consent, in evidence without formal proof.

Having considered the evidence given to the tribunal by the parties and their witnesses, as referred to above, the documents contained in the trial bundles, as amended, to which the tribunal was referred during the course of the hearing, together with the submissions of the representatives, both oral and written, the tribunal made the following findings of fact, as set out in the following subparagraphs, in so far as relevant and necessary for the determination of the claimant said claims.

3.2 The claimant, who was born on 18 December 1975, commenced employment with the respondent on 1 August 2015. Prior to the said employment, the claimant had considerable employment experience in a sales role with other employers. The claimant applied for the post of operations manager in or about July/August 2015 and was interviewed by the managing director of the respondent, Mr Michael McNeill, with the assistance of a business consultant Mr Muldoon. The claimant, following her appointment was given the title of "general manager/operations manager" by Mr McNeill. In or about August 2015, Mr McNeill appointed, on a part-time basis, Ms Bridget Duggan, a self-employed business consultant, to implement a strategic development plan for the respondent to enable the respondent "to get to the next level", which required her to look at the overall processes of the respondent and update same, look into issues of people management and sales development. She worked on average two days a week at the respondent (usually a Monday and a Friday) but also was in regular telephone and email communication with the respondent, including Mr McNeill, the claimant and other staff. Although it was accepted, in evidence, by Mr McNeill and Ms Duggan the claimant was engaged as a "general manager" or "operations manager", no such specific job description was ever provided to the claimant with that title. However, subsequently, by in or about November 2015, Mr McNeill and Ms Duggan, following discussion, came to the conclusion the claimant was not

suitable for the role of general manager and/or operations manager and her role should be changed to a sales development role. Certainly, the claimant was provided with a job description with the title of sales development manager although Ms Duggan and Mr McNeill insisted that her role from in or about November 2015 was sales development executive. Significantly, her salary at £25,000 gross per annum did not change with any of these changes of title role and the tribunal is satisfied that, whether the claimant's role from in or about November 2015 was sales development manager or sales development executive, the claimant from in or about November 2015 had only a sales role and the title itself made no difference to the issues which required to be determined by this tribunal. Given the role of Ms Duggan was to improve/amend the company's procedures, it was unfortunate greater care was not taken by her in the provision of relevant job descriptions and any changes thereto during this period.

- 3.3 The claimant signed a contract of employment on 12 February 2016, which referred to the claimant as sales development executive, with a start date of 1 August 2015. She remained in the role of sales development manager/executive until she was dismissed by the respondent on 15 February 2016. The contract of employment provided for a probationary period of six months, which said period was due to end on 1 February 2016. The contract of employment referred to the company Handbook, which provided a detailed disciplinary and grievance procedure; but the tribunal was not satisfied the claimant actually saw a copy of the Handbook at the time she signed the contract, despite her signature on the contract saying that she had seen it. Indeed, there was some doubt whether, at the time of signing the contract, the preparation of the Handbook had been completed. Again, it was not necessary for the determination of the issues in this matter for the tribunal to resolve this issue.
- 3.4 During the period of the claimant's employment, the claimant found it necessary to take time off work for various reasons, relating to her parents' illnesses, as set out below and which are the subject matter of these proceedings. The claimant applied for annual leave on 1 February 2016 the 2 and 3 February 2016, which was granted, as she required to be at home as her child minder was not available. This was a planned period of leave and not any form of unexpected/sudden event. When she was off on leave her father fell on 2 February 2016 and broke his leg in two places, which subsequently required surgery. The claimant had been due to return to work on 4 February 2016, but this was also the date her mother, who had been suffering from serious ill health from in or about January 2016, required to attend hospital to obtain the results of a scan for suspected lung cancer. Normally, the claimant's father would have driven her mother for all such hospital appointments as her mother does not drive. The claimant, as a result of her father's fall and the necessity for the claimant to drive her mother to hospital and to look after her in the circumstances had to request leave on 4 and 5 February 2016. She had to request leave on 8 and 9 February 2016 to take her mother to another hospital appointment and to collect her father from hospital. Mr McNeill was made fully aware by claimant of all the above matters, including the claimant's confirmation of a cancer diagnosis on 4 February 2016 and her father's fall on 2 February 2016 and the attendance in hospital for his surgery. Significantly, for the purpose of these proceedings, Mr McNeill properly agreed to these days of leave requested by the claimant without any objection. The claimant returned to work 10 February 2016 and worked normally, without taking any other leave, until 15 February 2016. Early in the morning of 15 February 2016, the claimant asked

Mr McNeill if she could take 16 February 2016 off, as unpaid leave, as she now required to take her mother to hospital for a further appointment for a biopsy following her cancer diagnosis. Her father, due to his fall was unable to do so and there was no one else available to drive her mother. Mr McNeill did not give her a direct response to her request but stated he would speak to her later on. He asked, in this conversation, as he had done previously about the health of the claimant's parents. This all took place in the office, in the presence of Ms Stephanie Scullion, who had responsibility in the office for accounts. Later on 15 February 2016, at or about 4.15 pm, the claimant was asked by Mr McNeill to come into his office, where Ms Duggan was also present. He gave no indication, when inviting her into his office, what the meeting was to be about.

3.5 Before setting out what took place at this meeting in Mr McNeill's office in the late afternoon of 15 February 2016, it is necessary to set out some further background information for the purposes of that proceedings. The claimant's probationary review was due to end on 1 February 2016 and it had been intended by Mr McNeill and Ms Duggan that the claimant would have a performance/appraisal review on 2 February 2016; but, as she was on leave, as set out above, on that day, it was then intended it would take place on 4 February 2016. However, given the events of 4 February 2016, as set out above, this appraisal/review did not take place and was still outstanding on 15 February 2016, when the meeting was asked for by Mr McNeill at or about 4.15 pm. It should be noted that no such appraisal/review meeting was arranged following the claimant's return to work on 10 February 2016 and during the period prior to 15 February 2016.

3.6 Although the meeting was very short, there was considerable dispute about what was said by Mr McNeill during the course of this short meeting.

In her oral evidence to the tribunal, the claimant said that upon entering the meeting, the claimant was told by Mr McNeill as she sat down – “we were going to do your appraisal”, to which the claimant replied “right”. Mr McNeill then continued – “we are not going to there is no point” to which the claimant replied: “why is that?”. Mr McNeill then told the claimant – “you have been taking far too much time off and in light of your mother's illness you will be taking more time off, it is just not working out”.

In the course of cross-examination, the claimant accepted what she said in paragraph 19 of her witness statement was the correct wording to what Mr McNeill had said at the meeting. In paragraph 19 of the witness statement, the claimant had stated “at this meeting [Mr McNeill] said that “it is inevitable anyway due to your mother you would have been taking more time off”. There is clearly some difference in phraseology between these versions but the tribunal concluded that the differences were not as significant as suggested by the respondent's representative. The tribunal, having carefully considered the denial by both Mr McNeill and Ms Duggan that any such words were used, came to the conclusion that issue of the claimant's leave was raised by Mr McNeill and in the terms set out in paragraph 19 of the claimant's witness statement. In particular, it was confirmed in that view because, after the claimant had left Mr McNeill's office, she told Ms Scullion, clearly upset, what had happened and, in particular, what Mr McNeill had said to her. Ms Scullion, stated in her witness statement, which was admitted in evidence, by consent without formal proof, as stated previously, that the claimant had told her Mr McNeill had said to her “... it was not working out and she was

going to be taking time off due to her mother being sick". Again, there is a difference in phraseology but not as significant as suggested by the respondent's representative. In the tribunal's view, despite those differences, the meaning was the same and related to the claimant's absences from work, which had been the subject of a further request.

- 3.7 A few minutes after the claimant had left Mr McNeill's office, Mr McNeill came into the general office and handed the claimant a letter of dismissal. It was not disputed by Mr McNeill the said letter had been prepared prior to the meeting, with the assistance of Ms Duggan; but significantly, in the tribunal's view, was only prepared after the claimant had made her request for time off.

A minute of the meeting on 15 February 2016 was drawn up by Ms Duggan which stated – "after Michael McNeill informed Lisa McGuckin that her employment was being terminated" and when he gave a copy of the termination letter she made a remark smartly "did you do the letter yourself?"

In the tribunal's view this was not an accurate and full note of the meeting of what took place or what was said at the meeting itself and, insofar as it sought to give any detail, it only referred to an issue which took place after the meeting and after the claimant had returned to the general office and had questioned who had written the letter. In particular, the note of the meeting failed to refer to what Mr McNeill had said to the claimant, which is accepted by the tribunal for the reasons in the circumstances set out above.

- 3.8 The said letter of dismissal dated 15 February 2016 stated as follows

"Subject: Dismissal for Poor Performance/Unsuitability with no Option for Reassignment

Dear Lisa

You started with the company on 1 August 2015 for a fixed period of 12 Months on the basis of 26 week probationary period which was due to end on 31 January 2016. You were informed that a review meeting would take place on Friday 4 February but due to your absence from work on this day the company has not been able to complete your probationary review.

Since joining the company it has been outlined clearly to you the company vision and the reporting procedures and follow ups for your role in sales development. Despite being verbally spoken to several times and being shown what is required on a weekly basis, you have failed to comply. It was made very clear to you that the sales prospecting report was to be colour coded so that information could be easily extracted and that potential customers were to obtain regular follow-ups by email communication but these procedures was not followed. A key part of your responsibilities was obtaining sales for the company, which has not happened and as a company we have worked with you to assist you to rectify this.

This is not acceptable and you are therefore unable to fulfil your role.

It is also noted that, in your short time with the company, you have been absent from work for a number of days. I understand that on each occasion you informed me of your reasons for absence.

During your probationary period, your work performance and general suitability is assessed and if your work performance is not up to the required standard or you are considered to be generally unsuitable the company has a right to dismiss you for unsuitability, as you are on a temporary contract for a 12 month period.

Therefore for the reasons as set out above, I made the decision to dismiss you, from the date of this letter, with one month in lieu of notice due to your unsuitability of the role as you have been unable to provide a satisfactory probation and unable to fulfil the terms of your contract. You will receive any outstanding, accrued, but untaken, holiday pay in your final salary on 29 February 2016. Your P45 will be sent to you separately.

Thank you for your past efforts and all the best for the future.

Yours etc.”

- 3.9 It is necessary to note that in the respondent's response form, at paragraph 8, the respondent stated inter alia:-

“In or around this time [Mr McNeill] was becoming increasingly frustrated and concerned in respect of the claimant's absence”

Similarly, in her witness statement, Ms Duggan, at paragraph 14 referred to Mr McNeill being frustrated with Lisa's absence and performance. Up until the events of 15 February 2016, there had not been any dispute between the claimant and the respondent about the claimant's absence and, indeed, as set out above, whenever the claimant had requested time off due to the various medical issues relating to her parents in early February 2016, this time off had been properly granted without objection by the respondent. However, despite the absence of objection, it was a matter of increasing concern to the respondent and, in particular, Mr McNeill. The claimant's absences in early February 2016 in such circumstances were clearly an unexpected/sudden event; and, if refused, could have led to claims by the claimant, pursuant to Article 70C of the 1996 Order.

- 3.10 The claimant strongly disputed that there had been any issues raised during the course of her employment about her performance in the months prior to her dismissal. The tribunal were unable to accept that this was correct; albeit it did find that the evidence produced by the respondent and, in particular, Mr McNeill and Ms Duggan, about the claimant's performance difficulties somewhat contradictory and less than satisfactory. However, the tribunal is prepared to accept that there were real concerns about the claimant's performance in her sales role from in or about November 2015 until the time of her dismissal and which did not appear to have been appreciated by the claimant, which the tribunal found hard to accept. The claimant was employed, whatever her formal job title (see before) to obtain sales for the respondent and, whilst it was recognised the claimant had been seeking potential sales and making contacts with relevant persons/companies, she had not in fact actually “closed” any sale by the date of the termination of her

employment, which fact she reluctantly had to accept in evidence. She clearly had a difficult relationship with Ms Duggan who in her role to update the company's procedures and processes, required her to provide weekly reports but which she failed to do on time and/or in the required format that Ms Duggan was trying to introduce. The tribunal was satisfied there were sufficient notes of meetings in November 2015 – January 2016, where the respondent's concerns about her performance were referred to and sought to be addressed with help offered to her by Ms Duggan; but with little or no success. The claimant given these notes seems to have had no appreciation or awareness about these serious concerns about her performance as a sales person for the company and how these could put at risk her future employment with the respondent. The tribunal has no doubt that these concerns would have had to be addressed at the review/appraisal meeting which was due to take place at the beginning of February 2016 but did not take place, due to the illness of the claimant's parents and her consequential leave, as referred to before. Although the tribunal found Mr McNeill's diary entries of 3 and 4 February 2016 somewhat difficult to follow or indeed to determine when exactly they had been written up, it is prepared to accept these included reference to performance matters which he and Ms Duggan would have intended to discuss with the claimant at the appraisal/review meeting when it was able to be arranged. The tribunal, in light of the foregoing, also noted a distinct lack of awareness by the claimant of these concerns when she indicated in her appraisal performance, inter alia, that her performance was excellent in all categories bar attendance and timekeeping (which she said was "good") and material knowledge which she considered "poor". Mr McNeill considered her assessment of material knowledge was the only accurate assessment by the claimant. Although the notes of the meetings in November and January 2016 clearly were critical of the claimant's performance it was only during the course of cross-examination the claimant was prepared to accept these were an accurate record of the meetings and of the criticisms referred to, again illustrating and confirming a lack of awareness of her position in advance of the appraisal/review meeting due to take place in early February 2016.

- 3.11 Prior to the meeting on 15 February 2016, there were no disciplinary or other meetings held or warnings given in relation to the claimant's future employment with the respondent; albeit as set out above, the claimant should have been fully aware that criticisms of her performance were very much in the minds of Mr McNeill and Ms Duggan and would require to be addressed if she was to be able to continue in employment with the respondent.

At the meeting on 15 February 2016, the claimant was bluntly orally told she was dismissed and was given no opportunity to challenge the decision nor was she offered the opportunity of any appeal. She was not informed in writing before the meeting what was going to take place and was again, without any prior warning, asked to go to the office for the meeting where the dismissal took place. The appraisal/review meeting, which had been scheduled for the beginning of February 2016 never in fact took place and the claimant was orally dismissed, at the meeting in the late afternoon of 15 February 2016.

- 3.12 The claimant, following her dismissal, at the date of the hearing of these proceedings, had not obtained alternative employment. She earned £62.10 a week as a carer for her mother from on or about 11 April 2016 but otherwise received no other relevant statutory benefits, relevant to the Employment Protection

(Recoupment of Jobseeker's Allowance and Income Support) Regulations (NI) 1996, as amended. Since her dismissal, the claimant had made two job applications in April 2016 and May 2016 for sales positions but without any success. She had also submitted her CV to various recruitment agencies/NI Job Finder/NI Jobs etc but again without success for sales staff opportunities. The tribunal noted that these job applications, referred to above, were sales opportunities in the "local area". Given the claimant's understandable desire to obtain alternative employment in the local area, given her family responsibilities, it was not surprising that such job opportunities in the sales role would be more limited. In the event, no evidence was produced by the respondent of appropriate job opportunities in the relevant period and/or area which the claimant had failed to take the opportunity to apply for.

- 4.1 In light of the facts as found by the tribunal and, after applying the legislative provisions and guidance set out in the legal authorities referred to in the previous paragraphs of this decision, together with the submissions, oral and written of the representatives, the tribunal reached the following conclusions, as set out in the following sub-paragraphs.
- 4.2 The claimant required to obtain time off under Article 85A of the 1996 Order on a number of occasions, prior to 15 February 2016, all of which were properly granted by the respondent. In the circumstances, the claimant was not subjected to any detriment in contravention of Article 70C of the 1996 Order and the tribunal did not find her complaint, pursuant to Article 71 of the 1996 Order well founded, and must therefore be dismissed.
- 4.3 In relation to the claimant's claim, pursuant to Article 85B, that the respondent unreasonably refused to permit the claimant to take time off, as required by Article 85A of the 1996 Order, the tribunal is satisfied that this is a free standing and separate claim from any claim which might be brought by the claimant, pursuant to Articles 70C, 71 and 72 of the 1996 Order and/or Article 131 of the 1996 Order. Such a claim requires to be determined by the tribunal on its own merits; albeit all of the said claims referred to above, have, as part of the matters to be considered by the tribunal, under the terms of Article 85A of the 1996 Order. In particular, a claim under Article 85B of the 1996 Order, relates to such an unreasonable refusal, whereas Article 71 of the 1996 Order refers to a claimant having been subjected to a detriment in contravention of Article 70A. Where any detriment found is dismissal then a claim must be made pursuant to Article 131 of the 1996 Order. If a claimant can show such an unreasonable refusal, pursuant to Article 85B of the 1996 Order, then, in the judgment of the tribunal, any employee can obtain an award of compensation, such as the tribunal considers just and equitable in all the circumstances, having regard to the employer's default in refusing the time off and any loss sustained by the employee attributable to the matters complained of. The issue therefore arises whether in such circumstances, any such award of compensation can include injury to feelings. On the basis of the decisions in the cases of **Brassington**, **Blane** and **Mansell**, the tribunal is satisfied that such an award, if appropriate, can be made in relation to such a claim. The tribunal is mindful that in the decision in **Gomes**, the judgment of Lord Justice Singh on this issue, in relation to any such claim, is obiter; and, indeed, he declined to reach any final decision, for the reasons set out previously. The tribunal, in so concluding, was mindful of the fact that the decisions in **Brassington** and **Blane** have a long standing pedigree and were decided by Judges with long experience of

employment law, as referred to by Singh LJ. However the tribunal was particularly persuaded in reaching the said conclusion having regard to the reasons given by Judge Clark in **Cleveland Ambulance NHS Trust v Blane [1997] ICR 851, at page 858**, including, in particular when he stated

*“We are unimpressed by the argument advanced by the employer in **Natural Coal Board v Ridgway [1987] ICR 641**, and implicitly adopted by Ms Pitt before us. It is nothing to the point that an award for injury to feelings cannot be recovered in a wrongful dismissal or unfair dismissal claim. They are different claims, compensated in different ways. We do not accept that a complaint under Section 146(1) of the Act of 1992 can simply be categorised as less serious and therefore cannot allow a Head of Compensation not provided for in claims of unfair dismissal or wrongful dismissal. Apart from the wording of the section, the intention behind it is clear; and employee who was unfairly dismissed will normally suffer pecuniary loss, and that, Parliament has decided, will adequately compensate him for the wrong. In a case of action short of dismissal it may very well be that he can point to no pecuniary loss; nevertheless, Parliament has decided that he should be able to recover financial compensation (having regard to the infringement complained of”. That must, in our judgment, include injury to his feelings occasioned by the unlawful act ...”.*

In the absence of any definitive decision in the case of **Gomes**, and also of any decisions of the Northern Ireland Court of Appeal on this issue, the tribunal, for the reasons set out above, decided that it was appropriate to conclude that injury to feelings could, in an appropriate case, be awarded a claim, pursuant to Article 85B of the 1996 Order. The tribunal also considered that in the circumstances outlined by the EAT in Ridgway above, issues relating to absence of an effective remedy, pursuant to European law would also arise, where the right to a claim arises from a Directive. In view of the tribunal’s decision in this issue (see later), it was not necessary for the tribunal to consider this issue further. However, the tribunal was further satisfied that, if such an award for injury to feelings was to be made in an appropriate case, a tribunal has to be careful to avoid any issue of double recovery and also not to make any award for injury to feelings arising out of any dismissal, where such an award is not permitted, for the reasons set out previously. The principle of mitigation of loss would apply to such a claim, depending on the precise pecuniary loss claimed for.

- 4.4 In relation to the claimant’s claim, pursuant to Articles 85A/B of the 1996 Order, the claimant having asked Mr McNeill on the morning of 15 February 2016 to take 16 February 2016, as unpaid leave, to take her mother to hospital for a further appointment for a biopsy, following her previous cancer diagnosis, the tribunal is satisfied the said request fell within the terms of Article 85A of the 1996 Order. This was in the context of the claimant’s mother’s said diagnosis and consequential further visits to the hospital but, in particular, that the father, due to his fall, was unable to drive her mother to the hospital, as he had done prior to his fall and no one else was available. Indeed, it was this fall which had been relevant to the earlier requests for absence in February 2016, which the respondent had properly granted. The tribunal was satisfied the request for a day’s leave was a reasonable amount of time off to provide assistance to the mother, a dependant, who had fallen ill (see Article 85A(1)(a)). The tribunal was further satisfied that, when making the request on the morning of 15 February 2016 for leave of absence the next day, the

claimant made the request as soon as reasonably practicable, after she realised she had to take her mother to the hospital. Mr McNeill did not suggest otherwise, but did not answer her request at that time and stated he would speak to her later that day. Therefore, prior to the meeting of the late afternoon, when the claimant was dismissed, Mr McNeill had not actually refused the request for absence the next day. Since the claimant was dismissed at that meeting, it also meant the said request was refused at the same time. Albeit, it may not have been expressly stated in those particular circumstances, the tribunal could not conclude that such a refusal for absence the next day was an unreasonable, as it was an inevitable consequence of the said dismissal. If there had been no dismissal, any such refusal by the respondent would have been unreasonable and the claimant would have been entitled to a declaration and an award of compensation, pursuant to Article 85B of the 1996 Order. Therefore, any remaining claim by the claimant has to be considered, pursuant to Article 131 of the 1996 Order.

If the tribunal is wrong and there was an unreasonable refusal, regardless of the dismissal, then the claimant would have been entitled to the said declaration that there had been such an unreasonable refusal but also, in such circumstances, an award of compensation for injury to feelings. Any such award for injury to feelings would have been limited to the bottom of the lower **Vento** band, - because, in light of that immediate dismissal, no such award is available. Of course, as referred to previously, if the obiter dicta remarks of Singh LJ in **Gomes** are correct, no such award for injury to feelings would be payable in any event, in such circumstances.

- 4.5 In relation to the claimant's claim for automatic unfair dismissal, the tribunal, for the reasons set out in the previous sub-paragraphs decided the claimant had satisfied the requirements of Article 85A of the 1996 Order when she made her request for time off on 15 February 2016. In these circumstances, the tribunal had to consider what the reason or principal reason was for the dismissal and, whether such reason was connected with the said request to take time off, pursuant to Article 85A of the 1996 Order (see **Atkins v Coll Personnel PLC [2008]**). The respondent maintained the only reason for the dismissal was performance issues relating to the claimant in her sales role with the respondent. The tribunal could not accept this on the evidence. At the meeting, whatever the precise words used by Mr McNeill, he made specific and pointed reference to the claimant requiring time off work. There was also evidence, as set out in the witness statement of Mr McNeill and Ms Duggan, that the taking of time off by the claimant was causing Mr McNeill increasing frustration and concern. The tribunal came to the conclusion that the claimant's further request on the morning of 15 February 2016 was, in essence, "the straw that broke the camel's back". Certainly there were issues about the claimant's performance, which were to be addressed at the appraisal meeting; but prior to her request there had been no express suggestion she was to be dismissed or a dismissed procedure invoked. The termination letter was not prepared until after the claimant had requested time off and which Mr McNeill knew he would have to grant, which was much to his frustration and annoyance. At the meeting there was no discussion about her performance issues, rather it was only about her necessity for time off and, in such circumstances, the tribunal was satisfied the principal reason for her dismissal was the issue of the time off required by the claimant, which was connected to her request for time off on 16 February 2016, pursuant to Article 85A of the 1996 Order.

In the circumstances, the tribunal was satisfied the claimant was automatically unfairly dismissed pursuant to Article 131 of the 1996 Order.

- 4.6 The tribunal accepts that there were performance issues relating to the claimant and is satisfied that it seems unlikely these would have been able to be resolved and would have resulted in her dismissal within a short period of time. In such circumstances, the tribunal is satisfied a **Polkey** deduction required to be considered. (See **Lancaster and Duke Ltd**). This issue of a **Polkey** reduction, relating to the chance of a fair dismissal occurring has to be contrasted with the issue of contributory fault, relating to the claimant's conduct not the respondent (see **Steen v ASP Packaging Ltd**). The tribunal accepts there is some degree of overlap; albeit the matters are a reflection of different issues (see paragraph 2.26 of this decision).

In this context, the tribunal notes that even, at the hearing of their proceedings, the claimant had no awareness of these performance issues and which the tribunal accepts would have required to be resolved to enable her to continue in her employment with the respondent in a sales role. The tribunal considers the chances of resolving such performance issues in the circumstances would be remote given her lack of awareness of them. Although these performance issues had been drawn to the attention in the preceding months, the claimant's performance had not improved and showed no sign of doing so. In the circumstances, the tribunal was satisfied there required to be a **Polkey** reduction, to reflect the choice that within a period of 4 weeks, after applying proper procedures, the claimant would have been fairly dismissed.

- 4.7 The respondent in dismissing the claimant, pursuant to Article 131 of the 1996 Order failed to follow the statutory dismissal procedure, which is relevant to any such finding. The tribunal concluded any such uplift to the compensatory award for such failure should be 25 per cent, in circumstances where there was no attempt whatsoever to comply with the procedures. The fact the respondent genuinely believed the procedures did not apply, given the claimant's short period of service and the inability to bring to a claim of "ordinary" unfair dismissal, was not sufficient reason to refuse to make any uplift; but, in the tribunal's view, the failure arose from a genuine misunderstanding of the legislative provisions required to be reflected in the amount of the said uplift.
- 4.8 The tribunal considered whether there should also be a reduction for contributory fault. Although the tribunal did not accept the performance of the claimant was the principal reason for her dismissal, it did accept those issues, which she had failed to address, contributed to her dismissal and decided it was just and equitable in the circumstances that any award of compensation should be reduced by 50 per cent, which should be applied to both the basic and the compensatory award. In assessing the reduction at 50 per cent the tribunal has reflected the degree of some limited overlap with the conduct that has resulted, in the final analysis, in the **Polkey** reduction. If the tribunal had not also made a **Polkey** reduction, its funding of contributory fault would have been greater.
- 4.9 In light of the tribunal's conclusions, as set out as above, in relation to issues of compensation, it was not necessary for the tribunal to consider further any issue relating to mitigation of loss.

5.1 In light of the foregoing the tribunal assessed the compensation to be paid by the respondent, as follows, in relation to the claimant's claim of unfair dismissal.

A. **Basic Award**

4 x 480	£1920.00
Less 50% for Contributory fault	<u>£ 960.00</u>
Total	£ 960.00

B. **Compensatory Award**

(i) 4 weeks loss of earnings From 15 February 2016 (taking Account of Polkey reductions) At £1270.00 per month	£1270.00
(ii) Loss of statutory rights	<u>£ 500.00</u> <u>£1,770.00</u>
<u>Uplift</u> of 25% for breach of Statutory dismissal procedures	<u>£ 442.50</u>
Total	<u>£2,212.50</u>
Less 50% for contributory fault	£1,106.25
Total	<u>£1,106.25</u>
Total Monetary Award (A and B)	£2,066.25

5.2 This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

5.3 The Employment Protection (Recoupment of Job Seeker's Allowance and Income Support) Regulations (NI) 1996, as amended, do not apply to this decision (see before).

Employment Judge:

Date and place of hearing: 14, 15, 16 February 2017, 15 March 2017, Belfast

Date decision recorded in register and issued to parties: