Appeal No. UKEAT/0284/17/OO
UKEAT/0058/18/OO

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
31 January 2019
Judgment handed down on 5 July 2019

Before

HIS HONOUR DAVID RICHARDSON

MR D G SMITH

DR G SMITH MBE

PHOENIX HOUSE LIMITED — APPELLANT

MRS TATIANA STOCKMAN — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL & CROSS APPEAL

APPEARANCES

For the Appellant	MR CHRISTOPHER MILSOM (of Counsel) Instructed by: Trowers Hamlins LLP 3 Bunhill Row London EC1Y 8YZ
For the Respondent	MRS TATIANA STOCKMAN (The Respondent in Person)

SUMMARY

VICTIMISATION DISCRIMINATION – Detriment

UNFAIR DISMISSAL – Reinstatement/re-engagement

UNFAIR DISMISSAL - Compensation

The ET did not err in law in –

(1) concluding that in one respect the Respondent had committed an act of victimisation and public interest disclosure detriment

(2) declining to order re-instatement or re-engagement for unfair dismissal

(3) its approach to the question whether and to what extent a reduction should be made under section 122(2) or section 123(1) of the Employment Rights Act 1996 where the Claimant had, without the knowledge of the Respondent, recorded a meeting.

HIS HONOUR DAVID RICHARDSON

Introduction

1. Between 29 March and 28 November 2013 Ms Tatiana Stockman ("the Claimant") was employed by Phoenix House Limited ("the Respondent"). Following her dismissal, she brought a claim which has been heard by the Employment Tribunal sitting in London South (EJ Freer, Ms Bailey and Mr Shaw). This appeal is concerned with aspect of those proceedings.

2. The Claimant's complaints encompassed (1) "ordinary" unfair dismissal, (2) unfair dismissal and detriment for making public interest disclosures ("whistleblowing"), (3) race discrimination and victimisation and (4) breach of contract. The ET heard the complaints over some 9 days in December 2014. By a reserved judgment dated 24 April 2015 the ET upheld the complaint of unfair dismissal. This finding is no longer the subject of any challenge.

3. The ET also upheld the complaints of "whistleblowing" detriment and victimisation in respect of two specific allegations of detriment. On 17 May 2016 the EAT allowed an appeal in respect of those matters and remitted them to the ET. The ET held a hearing in April 2017. By a judgment dated 24 May 2017 the ET upheld its previous decision in part: it found that sending a letter dated 25 November 2013 amounted to detriment for "whistleblowing" and victimisation. The Respondent has appealed against that conclusion. Mr Christopher Milsom, who appears for the Respondent, has argued that the ET made errors of law relating to the burden of proof and causation, or else reached a finding which was insufficiently reasoned or perverse.

4. The ET proceeded to deal with issues of remedy. The Claimant sought re-instatement and compensation. A hearing took place in June 2017. By its reserved judgment dated 26

A September 2017 the ET declined to order re-instatement or re-engagement. The Claimant, who has represented herself on this appeal, has challenged that decision by a cross appeal. She has argued that the ET's conclusion was erroneous in law or at the very least not adequately reasoned.

B

5. The ET went on by the same judgment to award compensation for unfair dismissal and the detriment. It made a basic award of £947, a compensatory award of £9,709 and an award for injury to feelings with interest of £5,110. In reaching these figures the ET made a deduction of

C 30%. On behalf of the Respondent Mr Milsom focussed the Respondent's appeal on a single issue. It emerged during the ET proceedings that the Claimant had made a covert recording of a particular meeting on 13 May 2013; he submitted that the ET erred in law in the way it addressed

D that issue.

6. In this judgment we will first outline the background facts in so far as they are relevant to the issues before us. We will then deal with the issue relating to detriment. We will then turn to

E the issues arising out of the remedy judgment. First, we will address the Claimant's cross appeal, which relates to re-instatement and re-engagement; and then we will turn to the Respondent's remedy appeal relating to the covert recording.

F

The Background Facts

7. The Respondent is a charity which provides support to people with drug and alcohol

G problems. The Claimant, who is a Russian national, first worked within the Respondent's organisation as a payroll officer. With effect from 29 March 2010 she was employed by the Respondent in the position of financial accountant. She reported to the Head of the Finance

H Department, Mr Andre Betha. He reported in turn to Mr George Lambis, the Director of Finance.

8. In 2013 Mr Betha devised and proposed a restructuring of the Finance Department to address a number of issues, including increased complexity of pension administration and a new real-time information system. The restructuring involved the deletion of some posts, including that of the Claimant, and the creation of others. The Claimant made alternative proposals to Mr Betha; he rejected them for reasons which the ET found were reasonable. The Claimant applied for other posts and was successful in obtaining the post of payroll officer. She accepted the offer on 22 May 2013.

9. The events of 23 May are critical to what followed. The Claimant complained to Mr Betha about Mr Lambis. She felt that he was treating her differently and that the restructuring process was biased against her. She said that another employee, Mr Mistry, agreed with her view. Mr Betha spoke to Mr Mistry. Mr Mistry said that Mr Lambis did sometimes not speak to the Claimant. Mr Betha said he would raise her concerns with Mr Lambis; and he did so, later in the day.

10. When Mr Betha spoke to Mr Lambis, Mr Lambis asked to speak to Mr Mistry as well. In this way all three came to be in the office of Mr Lambis together. The discussion between them was good-natured. Mr Mistry was not being reprimanded. But the Claimant walked into the room. She forcefully demanded that Mr Lambis should tell her what the conversation was about. He told her that the meeting was private and she should leave the office. She refused to do so. The request was repeated at least twice more before the Claimant eventually left, saying she would speak to the Chief Executive and raise a grievance. She was distressed. Another member of staff involved the HR Department.

11. Ms Paula Logan, Director of Resources, ultimately responsible for the HR Department, became involved. She spoke to the Claimant. She said she would investigate what happened and meet the Claimant again at 3.30pm. It was this meeting which the Claimant covertly recorded. Ms Logan told her that the action of interrupting a meeting and failing to leave would be made the subject of disciplinary action. The Claimant said she would lodge a grievance.

12. On 30 May the Claimant lodged her grievance. This is the document which is said to contain a protected disclosure. Paragraphs 1-25 of the grievance asserted the following: she had not been provided with a safe place of work or safe system of work under health and safety legislation; she had been unlawfully harassed by Mr Lambis; as a result, her mental and physical well-being was affected; she could no longer work with him; and she wished to be separated with immediate effect because she believed his behaviour was unpredictable. She referred to statutory provisions and quoted from decided cases. These paragraphs, however, did not descent into any detail of her allegations against Mr Lambis.

13. In paragraphs 26 onwards, however, the Claimant set out in detail her version of what happened on 23 May. She alleged that Mr Mistry had earlier said that Mr Lambis was "ignoring Tanya all the time"; that Mr Lambis was reprimanding Mr Mistry in a raised voice for this; that she felt compelled to defend him; and that Mr Lambis shouted "leave my office", which she considered further humiliation.

14. The Respondent charged the Claimant with a disciplinary offence arising from the incident on 23 May. It made arrangements for the disciplinary matter to be heard along with her grievance. A new head of HR, Ms Jayn Bond, became involved after she joined the Respondent in June 2013. The Claimant was off work and would not consent to disclosure of information

about her current state of health. Eventually the Respondent held the hearing in her absence on 16 August. The disciplinary offence was found proved. A 12-month formal written warning was issued. The Claimant appealed. The grievance was adjourned for further investigation and eventually rejected by letter dated 28 August 2013. She appealed again. On 6 September the Claimant told the Respondent that she intended to return to work, but the Respondent placed her on authorised leave until her grievance appeal was concluded.

15. The hearing of the appeals took place on 16 September. The Claimant repeated her allegations of unlawful harassment by Mr Lambis. The appeals were rejected. The Claimant was informed of the outcome by letters dated 23 and 24 September. The Claimant remained off work pending a mediation meeting on 15 November attended by Mr Lambis. The mediation was unsuccessful.

16. Following this unsuccessful mediation Ms Bond decided to schedule a meeting to consider whether the working relationship between the Claimant and the Respondent had broken down to such an extent that it was irretrievable. She wrote a letter dated 25 November inviting the Claimant to a meeting just 3 days later. The meeting was chaired by Ms Zacharias, a newly employed manager in another department.

17. It was the Claimant's position at this meeting that she wished to return to work and would be able to put the grievance behind her. She said she and Mr Lambis could work together professionally and conduct themselves in a professional way. The new role as payroll officer would be less stressful for her. She did not intend to take the grievance any further. She still believed the restructuring was a sham but she felt she could put it all behind her and there would be no problems.

18. Ms Zacharias did not accept this position. She said she thought that the relationship had broken down irretrievably. She said that what she had heard from the Claimant had not changed her mind. The Claimant was dismissed with immediate effect. An appeal was rejected on 10 January 2014.

The ET's Overall Reasons

19. Before we turn to the grounds of appeal it is important to summarise some conclusions of the ET which are not in issue for the purposes of this appeal – either because they have not been appealed or because they have been appealed unsuccessfully. They are important background to the issues we have to decide.

20. Firstly, the ET found that the dismissal was unfair. Its reasons, set out in paragraphs 198 to 260 of its liability judgment, may be summarised as follows. (1) The process was not fair: the Claimant was given only 3 days notice of the hearing and did not have any real indication of the basis of the case against her, whereas Ms Zacharias had a detailed file of relevant documents. (2) The hearing was not even-handed: Ms Zacharias was both prosecutor and judge. (3) Ms Zacharias took into account matters which the Claimant had no opportunity to consider, including observations of Mr Lambis about the mediation meeting. (4) Most fundamentally of all, the conclusion that there had been an irretrievable breakdown was unreasonable, given that the Claimant had only pursued a single grievance and had said that she was prepared to put the matter behind her.

21. Secondly, the ET entirely rejected the Claimant's complaints of racial harassment against Mr Lambis. It concluded that a number of allegation she made were unfounded. In particular it specifically rejected an allegation that he had ignored the Claimant from 22 April 2013 when he

A came into the finance office. It also rejected in a number of respects the account she gave of events on 23 May. Mr Mistry did not say that Mr Lambis ignored the Claimant all the time; he only said that Mr Lambis sometimes did not speak to her. Mr Lambis did not reprimand Mr Mistry in a raised voice or at all. Mr Lambis did not shout at the Claimant; he asked her to leave repeatedly but without shouting.

22. Thirdly, although the ET found the dismissal to be unfair it did not find it to be an act of victimisation, nor did it find the dismissal to be automatically unfair on the basis that the principal reason was the making of protected disclosures. The dismissal was carried out by Ms Zacharias; although the ET criticised her decision it found that she was not motivated by such considerations. The findings of public interest disclosure detriment and victimisation were concerned with the sending of the letter dated 25 November by Ms Bond prior to dismissal.

Public Interest Disclosure Detriment and Victimisation

The ET's Reasons

23. In its original decision the ET concluded that the grievance letter dated 30 May 2013 contained or amounted to a protected disclosure. The EAT remitted this matter for reconsideration. On remission the ET found that, in part only, the grievance letter contained a protected disclosure.

24. The ET analysed the terms of the written grievance into four elements. It set these out in paragraph 14 of the remitted reasons.

"**(i) the Claimant considered that she was being unlawfully harassed on the basis of unprofessional remarks made about her by Mr Lambis and other colleagues; (ii) the Claimant considered she was being unlawfully harassed on the basis of unfair treatment of her by Mr Lambis;(iii) there was no genuine reason for the restructure of the Finance Department; and (iv) the Respondent had infringed the Health and Safety Act by not protecting her from the alleged harassment**.

25. The ET found that the Claimant did not have the relevant requisite reasonable belief in respect of (iii), but it found that it was objectively reasonable for the Claimant to believe (i), (ii) and (iv) (although, as we have seen the ET did not ultimately accept that any harassment took place). This finding, contained in paragraph 21-22 of its reasons, is the basis upon which the appeal must proceed. A ground of appeal relating to it was dismissed by Her Honour Judge Eady QC at a preliminary hearing.

26. The ET had also found in its original decision that there were two protected acts for the purposes of section 27 of the Equality Act 2010. The first was the allegation of harassment in the grievance letter. The second was the repetition of that allegation orally during the internal appeal hearing on 16 September.

27. In its original decision the ET found that Ms Logan was responsible for the letter dated 25 November 2013 and that it was detrimental to the Claimant. It went on to find that the sending of the letter was significantly influenced by the protected disclosure and the protected acts. It had therefore upheld her complaints in respect of the letter dated 25 November.

28. The EAT allowed an appeal against that aspect of its decision and remitted it for re-hearing. It pointed out that a key consideration for the ET was whether it accepted that Ms Bond was telling the truth about her motivation. The ET had to a significant extent relied on the burden of proof without explaining why Ms Bond's evidence had not satisfied it about her motivation.

29. On remission the ET did not hear any further evidence: it decided the matter on the basis of its notes, recollection and further submissions. It set out relevant principles of law; and it is pertinent to note that it cited **Hewage v Grampian Health Board** [2012] ICR 1054 on the

question of the burden of proof provisions. It turned to its conclusions in paragraphs 24 to 41. It repeated its conclusions from the original decision that the content of the letter was objectively unreasonable and that Ms Bond was responsible for it: see paragraphs 29-33.

30. The ET then turned to the reasons given by Ms Bond for writing the letter. It repeated a finding from its earlier reasons.

> **"39. Ms Bond gave her account in her witness statement of why the letter was written (paragraph 74) and this account was not challenged in evidence by the Claimant. Ms Bond states: "As a result of the mediation failing I had to assume that the Claimant still had a clear distrust of senior management including the Chief Executive. In her meetings with me and the Chief Executive the Claimant had expressed opinions that suggested to me that she had no respect for her employer and she still completely believed that her grievance was well founded …. I decided on this course because I had serious doubts about the reality of the Claimant returning to the workplace". The meetings with the Chief Executive at this time must refer to the grievance and disciplinary appeals."**

31. Building on this, it summarised its key conclusions in paragraphs 36 and 37 of its reasons.

> **"36. The Tribunal concludes with respect to the Claimant's protected disclosure claim that to invite the Claimant to a meeting where her future employment would be considered is, on an objective view, a detriment and it was "materially influenced" (by an extent that was more than minor or trivial) because the Claimant had made a protected act of unfair treatment through her written grievance.**
>
> **37. The arrangement of the meeting and the invite to it was a decision made by Ms Bond. The Tribunal concludes that she did not make this decision simply on the basis that a grievance had been made or solely because of an assumed distrust of management. The decision was made because of the content of the grievance. The Tribunal does not consider this conclusion to be inconsistent with paragraph 309 above. As written: "and she completely believed that her grievance was well-founded". The content of that grievance amounted to a protected disclosure as found by the Tribunal. It is a matter which quite clearly influenced Ms Bond's decision in a material way, certainly in a way that was more than minor or trivial."**

32. In subsequent paragraphs the ET dealt with some specific arguments put forward by Mr Milson. He argued that it was relevant that the Claimant's substantive complaints of race discrimination and harassment had been rejected. The ET said (paragraph 39)

> **"It is not uncommon in Tribunal discrimination claims for an employer to lose patience during a process and commit an act of unlawful victimisation even though the surrounding events did not amount to discrimination."**

Submissions

33. On behalf of the Respondent Mr Milsom submitted that the Claimant did not establish facts from which the ET could properly draw an inference that the letter was significantly influenced by the complaints of harassment. The bare facts of a protected act and detrimental treatment cannot give rise to a prima facie case on their own. Nor can unreasonable treatment alone justify an inference. In this case there were obstacles which logically precluded the establishment of a prima facie case. These were: the failure of other complaints by the Claimant; the fact that in other respects Ms Bond had not acted detrimentally to the Claimant when she could have; and the fact that Ms Bond was not even shown to have known of the remark at the grievance appeal hearing. Ms Bond's unchallenged evidence was incapable of giving rise to a prima facie case. If Ms Zacharias had not been materially influenced by the allegation in her decision a few days later, there was no basis for finding that Ms Bond was influenced in this way. In considering the reason why Ms Bond acted as she did a distinction could and should have been drawn between the protected disclosure/act itself and the manner in which it was made or pursued: see **Panayiotou v Chief Constable of Hampshire Police and another** [2014] IRLR 500 at paragraphs 49-55 and the cases there cited. In short he submitted that either there was an error of law relating to the burden of proof and causation, or the ET's finding was unreasoned and perverse.

34. The Claimant submitted in response that the ET had applied the law correctly and reached findings on the evidence, including Ms Bond's own evidence as to the reason why she wrote the letter. Paragraph 74 of Ms Bond's witness statement was powerful support for her case, since her allegation that Mr Lambis had harassed her was a key part of her grievance. Ms Bond had always taken her grievance to be a serious matter, arranging the meetings at which it had been determined and then the mediation meeting.

Discussion and Conclusions

35. This is a convenient moment to remind ourselves of the EAT's statutory remit. This is restricted to hearing appeals on questions of law: see section 21(1) of the Employment Tribunals Act 1996. The EAT is concerned to see whether the ET has applied correct legal principles and reached findings and conclusions which are sufficiently reasoned and supportable, that is to say not perverse, if the correct legal principles are applied. A finding or conclusion is perverse if and only if it is one which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. Subject to this limited appeal Parliament has made ETs the arbiters of all questions of fact.

36. For the purposes of the law relating to victimisation the ET was required by section 27 of the Equality Act 2010 to decide whether Ms Bond subjected the Claimant to a detriment because the Claimant had done a protected act: see section 27(1) of the Equality Act 2010. The burden of proof provision is contained in section 136(2): if there are facts from which the ET could decide, in the absence of any explanation, that Ms Bond contravened the provision, it must hold that the contravention occurred. For the purposes of the law relating to public interest disclosure detriment, the ET was required by section 47B(1) to decide whether Ms Bond subjected the Claimant to a detriment on the ground that the Claimant had made a protected disclosure. The burden of proof provision is contained in section 48(2): it is for the employer to show the ground on which the letter was sent.

37. Although we have quoted the applicable burden of proof provisions, we do not think they played any important part in the ET's reasoning concerning the letter dated 25 November, for reasons we will now explain.

38. In drawing the conclusion that Ms Bond's decision to write the letter dated 25 November was materially influenced by the Claimant's complaints of harassment the ET relied principally on Ms Bond's own witness statement at paragraph 309: see paragraph 37 of its reasons, which follows shortly after its quotation of that witness statement. To this point it added its own observation that it is not uncommon in discrimination cases for an employer to lose patience during a process and commit an act of unlawful victimisation even though the surrounding events did not amount to discrimination. This latter observation is pertinent because, as we have seen, by the letter dated 25 November Ms Bond had arranged a hasty and unsatisfactory process leading to an unfair dismissal: the circumstances were indicative of a loss of patience on her part.

39. We do not think there is any error of law in the ET's reasoning. Ms Bond's witness statement indeed suggests that she wrote the letter and thereby set up the process because the Claimant "completely believed" that her grievance was well founded and because in subsequent meetings she had expressed this as well as other opinions. The ET was entitled to accept what her witness statement said at face value.

40. This being so, the ET's decision did not turn upon the application of the burden of proof provisions. It had primary evidence from the Respondent's own witness which it was entitled to, and did, accept. It was in a position to make a positive finding on the evidence: see **Hewage** at paragraph 32 where Lord Hope said:

> **"Furthermore, as Underhill J pointed out in Martin v Devonshires Solicitors [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other. That was the position that the tribunal found itself in in this case."**

41. Elsewhere in its reasons, where it regarded the burden of proof provisions as important to its reasoning, the ET addressed them specifically (see paragraphs 53 and 54, which it is not necessary to quote in this judgment). We are confident that it did not do so in paragraph 37 precisely because it was in a position to make a positive finding. It is true that the ET's reasoning at this point is different from the reasoning given for its original judgment; but the matter was remitted for reconsideration and the ET was entitled to reason differently.

42. Nor was the ET required as a matter of law, when it considered the reason why Ms Bond wrote the letter, to find the kind of distinction which was discussed in **Panayiotou** between the making of the protected disclosure/act and other surrounding circumstances, such as the manner in which the protected disclosure/act was made. In principle an ET is entitled to draw such a distinction, but it is not bound to do so – indeed an ET should be careful before doing so. The position was explained by Underhill P in **Martin v Devonshires Solicitors** [2011] ICR 352 - followed in **Panayiotou** - in the following way (paragraph 22):

> **"In such cases it is neither artificial nor contrary to the policy of the anti-victimisation provisions for the employer to say "I am taking action against you not because you have complained of discrimination but because of the way in which you did it". Indeed, it would be extraordinary if those provisions gave employees absolute immunity in respect of anything said or done in the context of a protected complaint… Of course, such a line of argument is capable of abuse. Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had say, used intemperate language or made inaccurate statements. An employer who purports to object to "ordinary" unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact that the distinction may be illegitimately advanced made in some cases does not mean that it is wrong in principle."**

43. In this case the ET was not bound to find that Ms Bond, in taking the hasty decision to bring unfair proceedings against the Claimant at short notice, only considered the manner and not

A the content of the Claimant's complaint. The ET was entitled, having regard to Ms Bond's own witness statement, to conclude that Ms Bond was influenced by the content of the grievance.

B 44. We do not accept Mr Milsom's submissions to the effect that the ET gave insufficient reasons or reached a perverse conclusion. We will not lengthen this judgment with detailed consideration of factual points. We will, however, deal succinctly with the main points he made. It does not follow that because other complaints by the Claimant failed, this one must: there was

C a marked difference between the sending of the letter dated 25 November, indicative of a loss of patience by Ms Bond, and the Respondent's earlier treatment of the Claimant. Ms Bond's own statement showed that she was well aware of the Claimant's stance at the grievance appeal

D hearing – see the last sentence of paragraph 309 of the ET's reasons, quoted above. The ET was also entitled to draw a distinction between Ms Bond, who had been intimately involved in the Claimant's case for some time, and Ms Zacharias, fresh to the scene. For the reasons we have

E explained, Ms Bond's witness statement was capable of supporting the ET's finding.

45. We therefore reject the Respondent's appeal against the findings of public interest disclosure detriment and victimisation.

F

Re-Instatement and Re-Engagement

The ET's Reasons

G 46. At the remedy hearing the Claimant confirmed that she was applying for re-instatement as her primary remedy. She wished to be re-instated to the role of Senior Payroll Officer – a role created as a result of a re-organisation in 2014. She gave evidence. The Respondent called Mr

H Lambis and also Mr Tony Pearson, Director of Human Resources. The ET reserved judgment.

47. In its reasons the ET quoted appositely from sections 113 to 116 on the question of re-instatement and re-engagement. It found that the Senior Payroll Officer position was one which she could have undertaken and which she would probably have secured. But it declined to make an order for re-instatement. The ET's reasoning was as follows.

> **"13. The Claimant's claim against the Respondent was not a stand-alone unfair dismissal complaint. It was a complaint that was made with significant various claims of discrimination and protected interest disclosure in respect of which the majority of those complaints were not well-founded and not made out on the evidence.**
>
> **14. The Tribunal accepts [the] Respondent's evidence, as set out in the witness statement of Mr Lambis, Director of Finance, at paragraphs 31 and 32 regarding the effects of those complaints. The complaints have clearly had a significant impact and the relationship between the Claimant and Respondent has significantly soured. In this respect the Tribunal refers to the Court of Appeal authority of Coleman and Stephenson v Magnet Joinery Ltd [1974] IRLR 343.**
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> **15. Having considered all the circumstances and the relevant authorities, the Tribunal concludes that it is not practicable to re-instate the Claimant into the Senior Payroll Officer post generally, made even less practicable given that the position reports into Mr Lambis as Director of Finance.**
>
> **16. In addition, as set out below, the Tribunal has made a finding that the Claimant contributed to her dismissal and taking account of that matter and the surrounding circumstances, the Tribunal also concludes that it would not be just and equitable to reinstate the Claimant as argued.**
>
> **17. By way of completeness, although not expressly argued by the Claimant in submissions, for the same reasons expressed above the Tribunal also concludes not to exercise its discretion to make a re-engagement order. No suggestion has been made of the alternative position to which the Claimant is seeking to be re-engaged and it is almost inevitable that it would entail a financial element and report to Mr Lambis."**

Submissions

48. The Claimant made submissions in support of her cross-appeal which may be summarised in the following way. The finding that it was not practicable to re-instate or re-engage rested only on the relationship between the Claimant and Mr Lambis; but the ET ought to have considered the position of the Respondent as an employer and asked itself whether it was reasonably practicable for the Respondent, as the employer, to re-instate or re-engage. As at the remedy hearing the finance department consisted of 11 team members, 7 of whom were new; and

the Head of Finance, Mr Betha, was a person with whom she had enjoyed a positive relationship. The mere fact that some of her allegations had been unfounded was not necessarily a bar: she gave as an example **Cruickshank v London Borough of Richmond** EAT 483/97. Likewise, the finding of a relatively low amount of contribution - some 20% - did not require the ET to find that it was not just and equitable to re-instate or re-engage. Moreover, Ms Bond's decision to invoke the process leading to dismissal had been unlawful. Against this background the ET did not sufficiently explain why it reached its decision: the decision was not **Meek** compliant.

49. In responding to these submissions Mr Milsom took us, principally in his skeleton argument, through various reported decisions concerning the principles applicable to re-instatement and re-engagement. Ultimately, however, his submission was that the ET reached a decision which applied the correct principles and was sufficiently reasoned.

Discussion and Conclusions

50. Sections 113 to 117 of the Employment Rights Act 1996 provide the statutory framework within which the ET was required to consider the question of re-instatement and re-engagement. The ET is given a discretion whether to make either of these orders: see section 113 and section 116(1). It must consider re-instatement and re-engagement successively: see sections 116(1)(3). In both cases it must take into account whether it is practicable for the employer to comply with the order: see section 116(1)(b) and section 116(3)(b). In both cases, if it has found that the employee caused or contributed to some extent to the dismissal, it must consider whether it would be just to make the order: see section 116(1)(c) and section 116(3)(c). If the employer does not comply with an order, the ET must make not only an award of compensation but also an additional award of between 26 and 52 weeks' pay: see section 117(3)(b). However, this additional award is not payable if the employer satisfies the ET that it was not practicable to comply with the order:

see section 117(4)(a). So, the question of practicability may have to be considered at two stages in the process. In **McBride v Scottish Police Authority** [2016] ICR 288 the Supreme Court endorsed the view that at the first stage the determination was a provisional determination – a prospective assessment of the practicability of compliance: see Lord Hodge at paragraph 37 and the cases there cited.

51. It is well established that, in considering whether it is practicable to make an order, the ET is entitled to take account of its impact on workplace relationships. The ET cited **Coleman and Stephenson**; and some of the more recent decisions on this question are summarised and discussed in the judgment of Her Honour Judge Eady QC in **United Linconshire Hospitals NHS Foundation Trust v Farren** [2016] UKEAT/0198/16 at paragraphs 22-27. We note that she said (paragraph 27):

> **"… (1) questions of practicability under section 116 are primarily for the ET and are likely to be difficult to challenge on appeal (see Clancy v Cannock Chase Technical College [2001] IRLR 331 EAT); and (2) ETs have a wide discretion in determining whether or not to order reinstatement or re-engagement; it is essentially a question of fact (see Central & North West London NHS Foundation Trust v Abimbola UKEAT/0542/08, at paragraph 15)."**

52. Despite the Claimant's careful argument to us, we are satisfied that the ET not only stated but also applied the correct legal test and gave sufficient reasons for its decision. Given the position of Mr Lambis as the Director of Finance, and given the relatively small team concerned, the ET was entitled to focus on the impact of the Claimant's conduct as it affected him. The Claimant had made strong allegations against him which the ET entirely rejected. He had found those allegations "personally devastating". The ET's reasoning, taken with the passage in the witness statement to which the ET referred, was more than sufficient to explain why it reached its decision. On the question of contribution, it is important to keep in mind that the ET did not make its decision by reason of contributory conduct alone; rather it brought this conduct into

account as an additional factor, having already determined that it would not be practicable to make an order. Again, in our judgment the reasoning discloses no error of law and is sufficient to explain the result the ET reached.

53. It follows that the cross appeal will be dismissed. For the sake of completeness, we should mention that Mr Milsom questioned whether the cross appeal was valid. He referred to **Basildon & Thurrock NHS Foundation Trust v Weerasinghe** [2016] ICR 305. Mr Milsom did not press this submission; and it seems to us that the cross appeal, arising like the Respondent's remedy appeal out of the judgment dated 26 September 2017, met the description of a cross appeal set out in **Weerasinghe**.

The Covert Recording Issue

The ET's Reasons

54. As we have seen, the Claimant secretly recorded her discussions with Ms Logan on the afternoon of 23 May 2013. The Respondent was unaware of this recording at the time of dismissal. At the remedy hearing the Respondent argued that had it known about the recording it would have dismissed the Claimant for gross misconduct and that it was not just and equitable to make any award. It further argued that the basic award should be reduced to nil under section 122(2) of the Employment Rights Act 1996.

55. The ET made some important findings in the course of its reasons. We will summarise them as follows. It found that the Claimant did not make the recording for the purpose of entrapment or attempted entrapment: it noted that the Claimant asked no questions which gave the impression of being made in order to obtain a favourable answer. Rather, the ET found, the Claimant was flustered at the time and uncertain even if the device would record. She did not

make any use of the recordings as part of the internal proceedings with the Respondent. She created a transcript because of her legal obligations under the ET's disclosure process. In one respect the transcript was detrimental to her argument at the original liability hearing. The making of a covert recording was not set out specifically in the Respondent's disciplinary policy as amounting to gross misconduct; and the Respondent had not, even at the date of the remedy hearing, amended its policy in the light of the ET proceedings. The Respondent's witnesses at the ET hearing would not have been those who dealt with any gross misconduct disciplinary proceedings if they had been brought: Mr Lambis would have been inappropriate by reason of his involvement, and Mr Pearson was not then in post.

56. The ET set out relevant provisions of section 122 and 123 of the Employment Rights Act 1996. It accepted that section 122(2) entitled it to reduce the basic award where the conduct of the employee before the dismissal was such that it would be just and equitable to do so. It drew upon the decision of the House of Lords in **Devis v Atkins** [1977] AC 931 while making it clear that it did not regard the Claimant's conduct as falling in the same category as cheating an employer and profiting from dishonesty. It summarised and explained the principle in **Polkey v A E Dayton Services Limited** [1987] IRLR 503.

57. Before it turned to the question of covert recording the ET had already decided to reduce the basic award and compensatory award by 20% for reasons with which we are not concerned on this appeal. The ET's conclusions concerning the covert recording are expressed in the following paragraphs.

> **"43. The Tribunal concludes that this matter, whether more properly addressed under Devis, Polkey, or pure statutory "just and equitable" principles, is one of assessing the chance of the Claimant being dismissed fairly had the Respondent known about the Claimant's conduct at any time before her actual dismissal and then adjusting any amount of the Compensatory Award in line with that conclusion as is just and equitable ..**

45. The Tribunal concludes that when weighing all the circumstances and assessing whether or not the Respondent would have fairly dismissed the Claimant had it known of the recordings, it is just and equitable to reduce the Compensatory award by 10% to fully reflect the circumstances relating to the covert recordings. It is possible that once the reasonably available facts were known, the Respondent may objectively and fairly have considered this to be a misconduct matter which then fairly led to dismissal. The Tribunal considers in the circumstances that this is a low percentage chance.

46. The Tribunal further concludes that given the terms of the statutory Basic Award contribution provisions it is just and equitable to further increase the Basic Award reduction by the same amount to a total of 30%."

Submissions

58. On behalf of the Respondent Mr Milsom's submissions may be summarised as follows.

59. Firstly, Mr Milsom argued that the ET erred in law in regarding the exercise which it had to undertake as being in any way akin to a **Polkey** exercise. Both under section 122(1) and section 123(6) the ET was required to make an objective assessment of the conduct in issue. Evidence as to the approach the employer would have taken may be of relevance in assessing the gravity of the conduct; but that was the limit of its value.

60. Secondly, Mr Milsom argued that the ET was bound to hold that any covert recording of a confidential conversation in the absence of a pressing justification was a breach of the implied term of trust and confidence because it is of its nature dishonest conduct designed to obtain an advantage for the employee and place another at a disadvantage. He sought to draw a parallel with **Brandeaux Advisers (UK) Limited v Chadwick** [2011] IRLR 224; and he referred for comparison to the decision of the European Court of Human Rights in **Lopez Ribalda and others v Spain** [2018] IRLR 358. If it had made this finding the ET would then have been bound to make findings for the purposes of section 122(1) and section 123(6) to the effect that no compensation should be awarded to the Claimant. The ET was wrong to place reliance on the absence of covert recording from the disciplinary policy.

61. Thirdly, Mr Milsom argued that the ET reached perverse and inadequately reasoned conclusions about the covert recordings. It was impossible to reach any conclusion other than that the Claimant wished to entrap Ms Logan. The fact of recording should have been disclosed during employment; it was nothing to the point that the Claimant disclosed the recording during litigation. He quoted an earlier decision of the same Employment Judge (**Nandra v Royal Borough of Greenwich** 2300102/2014) where she said:

> **"The Tribunal takes a dim view of covert recordings of confidential discussions. Such action is a one way process usually with the intention of securing for the benefit of the person making the recordings an unguarded remark by those being covertly recorded. An obvious advantage is that the person making the recording can steer the process to elicit a comment from the participant/s without any chance that they too may be similarly vulnerable."**

62. The Claimant submitted in reply that the ET applied correct principles and reached a permissible and properly reasoned conclusion. At the original liability hearing Ms Logan did not suggest that she had any concerns about the Claimant making the recording: she described the meeting as "pleasant and in no way confrontational". There was no rule that any covert recording, whatever the circumstances, amounted to gross misconduct; and the Respondent cannot have considered the matter of great importance if it did not alter its disciplinary process to cover it.

Discussion and Conclusions

63. An award of compensation for unfair dismissal is governed by sections 118 to 126 of the Employment Rights Act 1996. The ET will have to consider a basic award and a compensatory award. Both are liable to be reduced or extinguished if an employee committed misconduct during his employment even if the employer did not know of that misconduct prior to dismissal.

64. As regards the basic award, the relevant provision is section 122(2). This provides:

> **"(2). Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal may reduce or further reduce that amount accordingly."**

65. As regards the compensatory award, the relevant provision is section 123(1). This provides that

> **"… the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."**

66. The former provision was added to the unfair dismissal legislation following the decision of the House of Lords in **Devis**. The latter provision (or, more precisely, the statutory predecessor of the latter provision) was confirmed in **Devis** to be applicable to misconduct committed during employment even if the employer did not know of that misconduct.

67. Section 123(1) is also the provision which underlies the doctrine in **Polkey**. This doctrine applies where an employer who has been found to have dismissed an employee unfairly seeks to argue that the employee would still have been dismissed if he had acted fairly. The doctrine requires the ET to make an assessment as to whether there was a chance that the employee would have been dismissed if the employer had acted fairly and if so to what extent. That chance will then be reflected in an appropriate reduction of the compensatory award.

68. In **Hill v Governing Body of Great Tey Primary School** [2013] UKEAT/0237/12 Langstaff P summarised the doctrine in the following way.

> **"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 it would not) though more usually 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 it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand."

69. There are, accordingly, both subjective and objective elements to the application of the doctrine. The ET is concerned to assess what *this* employer would have done in respect of *this* employee; it is not concerned with a hypothetical employer or hypothetical employee. On the other hand, the ET is concerned to assess what the employer would have done if it had acted fairly; and the ET here applies its own assessment of what is fair, not that of the employer.

70. Although the **Polkey** doctrine will usually be concerned with facts and matters known to the employer at the time of dismissal, it is not necessarily limited to such facts. The ET may have to take into account facts which the employer would have found out if it had acted fairly, or developments which would have occurred if the employer had acted fairly.

71. In our judgment, just as there is a subjective and an objective element to a **Polkey** assessment, so there must be a subjective and an objective element to the ET's approach to section 122(2) and section 123(1) where the issue is whether and to what extent it is just and equitable to make an award in the light of conduct which the employer subsequently learns. The question is whether and to what extent it is just and equitable to reduce an award given the actual employer and employee, not a hypothetical employee. But the ET must then make its own assessment of what justice and equity requires.

72. A moment's thought will indicate why this must be the case. Although there are common standards of expected behaviour applicable to many employers, experience tells us that there are also variations. Some employers may attach particular importance to a standard of conduct and inform their employees accordingly, where other employers may attach much less importance to the same conduct and condone it or treat it leniently. The ET could not treat the two cases the same and impose its own values if an issue arose where the employer subsequently learned of such conduct. Part of its assessment of what was just and equitable would involve considering the importance (or lack of importance) of the behaviour in question to the employer in question. But, having considered the importance of the matter to the employer in question, the ET would then make its own assessment of what justice and equity requires.

73. For these reasons, to the extent that Mr Milsom's argument would not allow a subjective element to the ET's consideration, we reject it. There is, in our judgment, a close linkage between the exercise under section 122(2), the exercise under section 123(1) and the **Polkey** exercise. What this employer would have done if it knew of the misconduct, while not the only factor, is a highly relevant consideration. This, we think, is the point which the ET was making in paragraph 43 of its reasons.

74. We do, however, accept that there was an objective element to the assessment: the question for the ET was whether, having regard to what it knew of this employer and having regard to its assessment of the employee's conduct, it was just and equitable to reduce the awards and if so to what extent. If the ET lost sight of that objective element it will have erred in law. But in our Judgment, it did not lose sight of this element. It asked itself what the chance was of the Claimant being dismissed fairly; and it weighed all the circumstances as well as assessing

whether or not the Respondent would have dismissed the Claimant if it had known of the recordings. It applied the just and equitable test both to section 122(2) and to section 123(1).

75. This brings us to Mr Milsom's submission that the Claimant's conduct, in covertly recording the meeting at 3.30 on the afternoon of 23 May, necessarily committed a breach of the implied term of trust and confidence.

76. The implied term of trust and confidence is concerned with conduct which so undermines the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in employment: see Lord Jauncey in **Neary v Dean of Westminster** [1999] IRLR 288.

77. There was a time when an employee – or for that matter an employer – had to go to a great deal of trouble to record a meeting covertly. At that time it would be straightforward to draw the conclusion that the recording had been undertaken to entrap or otherwise gain an unfair advantage. But in our judgment times have changed. Most people carry with them a mobile telephone which is capable of making a recording; and it is the work of a moment to switch it on. In our collective experience it is now not uncommon to find that an employee has recorded a meeting without saying so. In our experience such a recording is not necessarily undertaken to entrap or gain a dishonest advantage. It may have been done to keep a record; or protect the employee from any risk of being misrepresented when faced with an accusation or an investigation; or to enable the employee to obtain advice from a union or elsewhere.

78. We do not think that an ET is bound to conclude that the covert recording of a meeting necessarily undermines the trust and confidence between employer and employee to the extent

that an employer should no longer be required to keep the employee. An ET is entitled to make an assessment of the circumstances. The purpose of the recording will be relevant: and in our experience the purpose may vary widely from the highly manipulative employee seeking to entrap the employer to the confused and vulnerable employee seeking to keep a record or guard against misrepresentation. There may, as Mr Milsom recognised, be rare cases where pressing circumstances completely justified the recording. The extent of the employee's blameworthiness may also be relevant; it may vary from an employee who has specifically been told that a recording must not be kept, or has lied about making a recording, to the inexperienced or distressed employee who has scarcely thought about the blameworthiness of making such a recording. What is recorded may also be relevant: it may vary between a meeting concerned with the employee of which a record would normally be kept and shared in any event, and a meeting where highly confidential business or personal information relating to the employer or another employee is discussed (in which case the recording may involve a serious breach of the rights of one or more others). Any evidence of the attitude of the employer to such conduct may also be relevant. It is in our experience still relatively rare for covert recording to appear on a list of instances of gross misconduct in a disciplinary procedure; but this may soon change.

79. That said, we consider that it is good employment practice for an employee or an employer to say if there is any intention to record a meeting save in the most pressing of circumstances; and it will generally amount to misconduct not to do so. We think this is generally recognised throughout employment except perhaps by some inexperienced employees. This practice allows both sides to consider whether it is desirable to record a meeting and if so how. It is not always desirable to record a meeting: sometimes it will inhibit a frank exchange of views between experienced representatives and members of management. It may be better to agree the outcome

A at the end. Sometimes if a meeting is long a summary or note will be of far more value than a recording which may have to be transcribed.

B 80. It follows from what we have said that the ET was not bound to approach its task on the basis that there was a breach of the implied term of trust and confidence. It was entitled, as it did, to make an assessment of the circumstances. It found that the Claimant had not recorded the meeting with the intention of entrapment. The Claimant recorded a single meeting concerned with her own position rather than the confidential information of the business or other individuals. We do not think that **Brandeis** or **Lopez Ribalda** require a different approach to that which the ET took. While some ETs might have awarded a greater reduction than the ET in this case, the matter was one for the ET's assessment. We do not think it erred in law or reached a perverse or unreasoned result.

E 81. It follows that the appeal and cross appeal will be dismissed.

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