Neutral Citation Number: [2023] EAT 147

Case No: EA-2022-000678-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 6 December 2023

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

SPI SPIRITS (UK) LIMITED **YURI SHEFLER**	**Appellants**
- and –	
VLADISLAV ZABELIN	**Respondent**

- -
- -

Richard Leiper KC (instructed by Osborne Clarke LLP) for the **Appellants**
Sean Jones KC and **Nathan Roberts** (instructed by Mishcon de Reya LLP) for the **Respondent**

Hearing date: 2 November 2023

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JUDGMENT

SUMMARY

WHISTLEBLOWING

The claimant was employed by the first respondent. The second respondent was found by the tribunal to be its agent. In a liability decision the tribunal found that, in a telephone conversation, he subjected the claimant to detriment, and dismissed him, on the ground, or for the sole or principal reason, that the claimant had made protected disclosures. In its subsequent remedy decision the tribunal made joint and several awards of compensation for detriment against both respondents, as well as a further award against the first respondent for unfair dismissal. This appeal related to particular aspects of the remedy decision.

Before the tribunal the respondents relied upon contractual clauses which, they contended, had the effect of limiting the amount of compensation that the claimant might receive upon dismissal to £270,000 net. While it was accepted that such clauses could not impose a legally-effective cap on the tribunal's awards, it was contended that they had been freely negotiated, and were a relevant circumstance to be taken into account when deciding what amount of compensation it was just and equitable to award. The tribunal did not fail to consider this argument. In any event it was not in error in not upholding it. The clauses did not have the meaning for which the respondents contended. Alternatively, if they did, then the outcome the respondents sought to achieve in reliance upon them was in substance an unenforceable contractual cap on the tribunal's awards.

The tribunal uplifted its awards of compensation on the basis of failure by the first respondent to follow the *ACAS Code on Disciplinary and Grievance Procedures* (2015). It was correct that, for the grievance provisions of the Code to be engaged, a grievance needed to be put in writing. **The Cadogan Hotel Partners Ltd v Ozog**, UKEAT/0001/14, 15 May 2014 followed. But the tribunal was not in error in rejecting the contention that the procedure did not apply in this case on the basis that, when the written grievance was first raised, the claimant had yet to raise it in circumstances that gave it the character of a protected disclosure, and only did so subsequently orally. The

tribunal was entitled to conclude that the underlying matter remained the same.

The power to award an uplift in any event arose on the basis that the discipline provisions of the Code applied in respect of the subject matter of the detriment and unfair-dismissal complaints. Where the employer dismisses or takes other action against an employee because, in substance, of what it regards as, or potentially as, culpable conduct, the discipline provisions of the Code will apply. They will not cease to do so by virtue of the tribunal finding that such conduct in fact amounted to a protected disclosure. **Holmes v QinetiQ Ltd** [2016] ICR 1016, **Ikejiaku v British Institute of Technology Limited** UEKAT/0243/19, 7 May 2020 and **Rentplus UK Limited v Coulson** [2022] ICR 1313 considered.

The tribunal also did not err in applying the uplift to the award against the individual agent as well as those against the corporate employer, in circumstances where it had found that the individual concerned was responsible for the employer's failure to comply with the Code. **International Petroleum Limited v Osipov** UKEAT/0058/17, 19 July 2017 followed and applied.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. The claimant in the employment tribunal was employed by the first respondent. Following his dismissal he presented a claim, which led to a liability hearing before Employment Judge Lewis, Mr J Ballard and Mr S Pearlman sitting at London Central. The tribunal found that, during a telephone conversation on 8 June 2020, the conduct of the second respondent, who was the first respondent's agent, towards the claimant, amounted to subjecting him to a detriment because he had made protected disclosures, for which both respondents were co-liable. It also found that, at the end of the conversation, the second respondent dismissed the claimant for the reason or principal reason of having made protected disclosures. That amounted to further detrimental treatment by the second respondent, and to ordinary and automatically unfair dismissal by the first respondent.

2. There followed a remedy hearing before the same tribunal which resulted in an award of £1,626,452.07 against both respondents jointly and severally, in respect of detrimental treatment, and of £3589.09 against the first respondent in respect of automatic unfair dismissal, including a basic award. Both awards were arrived at after increasing them by 20% pursuant to section 207A **Trade Union and Labour Relations (Consolidation) Act 1992** (other than in respect of the basic award) and grossing up to take account of the impact of taxation.

3. I heard the two respondents' appeal against the remedy decision. I will refer to the parties as they were in the employment tribunal. As in the tribunal, Mr Leiper KC appeared for the respondents. Mr Jones KC now appeared for the claimant, leading Mr Roberts, who co-authored the skeleton, and had appeared for the claimant in the tribunal. For completeness I note that there was a third respondent in the tribunal, but no complaints were upheld against her, so she was not further involved.

The Facts – Liability

4. I take the following factual outline from the employment tribunal's liability decision.

5. The first respondent is the UK-based subsidiary of Stoli Group Sarl, which is part of SPI Group Sarl. The group, which is headquartered in Luxembourg, produces, markets, distributes and sells wines and spirits internationally. It has over 2000 employees. The second respondent is the majority shareholder in the group. He made all the decisions about the claimant's employment.

6. The claimant was employed by the first respondent from 1 March 2017, initially with the title Director of Mergers & Acquisitions, later Group Chief Investment Officer. His contract provided for a salary of £180,000 net per annum, and contained a clause relating to discretionary annual bonus.

7. In early March 2020 the claimant was asked by the group Chief Human Resources Officer, Sabina Fatkullina, to agree to a 30% pay cut for three months from April to June, because of the impact on the business of the pandemic. He agreed. An email of 1 April indicated that such a reduction was being implemented for all group employees.

8. On 3 June 2020 Ms Fatkullina emailed the claimant, referring to the 30% reduction and continuing: "As we entered June now, after analysing the current situation, regrettably I have to inform you, that this measure will be continued at least until September 1st." On 4 June 2020 the claimant emailed her a reply. He stated that such measures needed both sides to agree, and that before agreeing to any "further hardships" he sought information. He asked a number of questions. He commented on his own achievements in the previous year. He commented that he had been through crises before in different capacities and that "how the company's response is structured and communicated to me as an employee is unprecedented."

9. Ms Fatkullina arranged a video meeting with the claimant and a colleague, Mr Oliynik, for Friday 5 June 2020. After sending his 4 June email, and prior to that meeting, the claimant had a conversation with a colleague in the New York office, Ms Esposito, who expressed irritation that the group was exploring acquisition targets in the USA, when New York employees were facing

"brutal pay cuts". In May the claimant had also spoken to another colleague, Mr Culyba, who had described an atmosphere of "mess and despair" among Luxembourg staff, on account of the cuts.

10. At the meeting on 5 June 2020 the claimant, Ms Fatkullina and Mr Oliynik all spoke in Russian. The tribunal's salient findings of fact about the conversation can be summarised as follows:

(a) the claimant said that to impose a unilateral pay cut on him would be a breach of his contract;

(b) regarding 2019 bonus Ms Fatkullina said this was discretionary and the second respondent might want to speak to the claimant about it. There were to be changes to bonuses from 2020;

(c) the claimant referred to the previous pay cut having caused a stressful and toxic environment among employees and he said that it could impact on their mental health;

(d) the claimant expressed concern that the group was using the pandemic as an excuse to cut pay without any transparency;

(e) the claimant said something (in Russian) to the effect that the first respondent was pressurising, scaring or intimidating employees, including himself, to agree the pay cut.

11. Following the 5 June meeting both Mr Oliynik and Ms Fatkullina spoke to the second respondent, as a result of which he learned what the claimant had said at the meeting.

12. On the morning of Monday 8 June the second respondent telephoned the claimant. The claimant subsequently sent Mr Oliynik an email, which the tribunal accepted was an accurate account of the conversation. The second respondent began by asking about the claimant's activities in 2019, so that he could consider 2019 bonus. He then spoke of firm plans to "revisit the bonus principles altogether", such that bonus would only be considered where a person "does some extra, outside of such person's scope of work. When I told him that this was not what my employment contract was saying he told me 'then sign a resignation letter if you don't agree'. When I asked him

why I should sign a resignation letter, he told me literally 'forget about everything, I am firing you' and hang up."

The Liability Decision

13. The tribunal found that the claimant was dismissed on 8 June 2020 by the second respondent telling him (in Russian) "forget about everything, I am firing you" and then hanging up. He had actual, alternatively ostensible, authority to dismiss the claimant. The first respondent had not shown a fair reason for dismissal. It had simply denied that there was a dismissal. The dismissal was therefore unfair. Alternatively, it would be unfair for procedural reasons. The tribunal said at [111]: "No procedures were followed whatsoever. In the middle of a conversation to discuss his concerns about pay and bonus cuts, the claimant was told out of the blue that he was fired."

14. The tribunal went on to consider whether the claimant had made protected disclosures.

15. The tribunal found that, at the 5 June 2020 meeting, the claimant had made disclosures, described, using a shorthand advanced by Mr Roberts, as regarding (a) the claimant's pay; (b) the claimant's 2020 bonus; (c) staff welfare; and (d) Covid pretence. It also found that the claimant repeated the disclosure regarding his 2020 bonus in his conversation with the second respondent on 8 June 2020. The tribunal went on to note that it was not suggested that any of the disclosures were not disclosures of information; and to find, in respect of all four of them, that the claimant believed, and reasonably believed, that the information disclosed tended to show a breach of legal obligation.

16. The tribunal then went on to consider whether the claimant believed that the disclosures were made in the public interest. In the course of this section it said, at [128]:

> "**We find that the claimant did believe his disclosures were in the public interest. He thought it was a matter of public interest that a company was making non-transparent and significant pay cuts on the pretext of Covid when it did not need to do so and in order to protect its profits. He thought this applied to all his disclosures. In particular, he believed it was in the public interest to disclose facts showing breach of employees' trust and confidence by scaring them in order to justify cuts and potentially damaging their mental health at a vulnerable time."**

17. The tribunal then considered whether such belief was reasonably held. It said, at [130]

> "**We find that it was reasonable to believe the disclosures were in the public interest for these reasons. It was not a purely private matter. The SPI Group is a fairly large international company with high profile products. The cuts appear to have applied to most or all of 2000 employees. It is reasonable to believe that at a time of Covid, there was public interest in the impact on employees including whether employers were unnecessarily cutting pay of staff, and on how employees might have felt about it. An open-ended 30% pay cut was significant.**"

18. I interpose that the tribunal plainly considered that the qualifying disclosures were also protected, on the basis that they were made to the claimant's employer.

19. The tribunal went on to find, at [133] and [134], that the claimant was subjected to a detriment by both respondents, by the second respondent's conduct on the telephone on 8 June 2020 "including not having a proper conversation with him", and by the second respondent dismissing him.

20. As to whether the detriments were because of the disclosures, the tribunal said, at [136]:

> **"We find that the way the telephone conversation was conducted and the claimant's dismissal were because of the protected disclosures. Mr Schefler had telephoned the claimant at the first opportunity after the claimant's objections had been conveyed to him by Mr Oliynik and Ms Fatkullina. He started by talking about the subject of one of the protected disclosures (the bonus) and lost patience as soon as the claimant referred to his contract of employment. We doubt that Mr Schefler would have lost his patience quite so quickly and to the point of dismissing the claimant if he had not already been annoyed about the claimant's wider position. There is no suggestion of prior conflict between them, so this must have been a response to what he heard about the protected disclosures."**

Remedy Findings and Decision

21. In respect of unfair dismissal, the amounts of the basic award and compensation for loss of statutory rights were both agreed. By the time of the remedy hearing, on 17 March 2022, the claimant had received a firm offer of a new job. The tribunal decided that compensation for loss of earnings, pension and bonus should reflect the remuneration that he would have received had he remained employed from 8 July 2020 to 9 February 2022. It also awarded £9000 for injury to feelings.

22. The tribunal decided to apply an uplift of 20% (other than to the basic award), to the awards as against both respondents, on account of failure to comply with the *ACAS Code of Practice on*

Disciplinary and Grievance Procedures (2015) ("the ACAS Code"). The respondents contended that, having regard to certain provisions in the employment contract, and in a confidentiality and non-competition agreement, the claimant's compensation should be capped at £270,000. The tribunal rejected that contention. These two aspects of the remedy decision are challenged by this appeal. I will consider the relevant parts of the tribunal's reasoning on each of these aspects later on.

23. The final awards appear to have been arrived at on the footing that this was a case of what Underhill LJ has called "dismissal consequent on detriment" (see **Timis v Osipov** [2018] EWCA Civ 2321; [2019] ICR 655 at [49], [79]-[84] and [91(2)]), so that the loss of remuneration was treated as flowing both from the detrimental conduct during the course of the conversation, and, concurrently, from the dismissal at the end. The tribunal's valuation of those losses, and injury to feelings, uplifted and grossed up, was then reflected in the award of compensation for detriment. The award for unfair dismissal reflected the additional value of the basic award and loss of statutory rights. This approach to the allocation of overall loss between the two awards was not, as such, challenged in this appeal.

The Grounds of Appeal

24. The headline grounds of appeal are as follows:

> **"The determination of just and equitable in the context of the compensatory award.**
>
> **1. The Employment Tribunal erred in law in its application of s 123 of the Employment Rights Act 1996 (ERA), and specifically its approach to determining the amount of the compensatory award to be made to the Claimant given his agreement that on termination he should be entitled to the net amount of £270,000 but no more.**
>
> **The application of the ACAS uplift to a grievance.**
>
> **2. The Employment Tribunal erred in law by making any uplift under s 207A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) in circumstances in which the Claimant had not raised a written grievance about the issues which were the subject matter of his protected disclosures. Alternatively, the Tribunal erred in law by failing to take account of the fact that the Claimant had not done so when deciding on the level of the uplift.**
>
> **The application of the ACAS uplift to individual respondents in principle.**

> **3. The Employment Tribunal erred in law in accepting that the uplift under TULRCA s 207A (1) applies so as to allow an increase in the level of an award made against an individual respondent.**
>
> **The application of the ACAS uplift to individual respondents in whistleblowing cases.**
>
> **4. The Employment Tribunal erred in law in failing to address the legal basis for the claim against Mr Schefler (in contrast to that against the Company) and to consider whether there was a failure to comply with the ACAS Code 'in relation to that matter' (as required by s 207A(2)(b)).**"

25. The arguments on both sides were wide-ranging. In what follows I will focus on the points which, in the event, were determinative of the outcome of this appeal.

Ground 1 – the tribunal's decision and the law

26. The relevant passage in the employment tribunal's remedy decision is this.

> **"101. The respondents argue that any award to the claimant must be capped at the net amount of £270,000. This is based on clause 3(c) of the Confidentiality and Non-competition Agreement and clause 7(e) of the Employment Agreement.**
>
> **102. The respondents argue that there is an explicit contractual agreement to this effect and / or that it is not just and equitable under the legislative provisions to award more than £270,000.**
>
> **103. The respondents argued that the tribunal should take into account that at the time of entering the agreements, the claimant was legally trained, had worked as a lawyer, was negotiating a senior position and had lawyers to advise him. He had negotiated a substantial lump sum on termination and the corollary of that was the cap. The respondents say that they would not suggest, for example, that a bus driver who had agreed a cap below the statutory cap should be bound by such an agreement.**
>
> **104. The respondents did not seek to argue in the alternative that we should reduce our intended award – should it exceed £270,000 – by £270,000.**
>
> **105. Clause 7(e) of the claimant's Employment Agreement states:**
>
> > **'In the event that the Company terminates this Agreement after 12 months from the Effective Date other than pursuant to 7(d), the Employee shall be entitled to compensation as described in and subject to clause 3(c) of the Confidentiality and Non-Competition Agreement entered into between the Employee and the Company. For the avoidance of doubt, no other amounts shall be payable to the Employee upon such termination whether pursuant to contract (including, but not limited to, in relation to any notice period), statute or otherwise other than pursuant and subject to such clause 3(c) of the Confidentiality and Non-Competition Agreement.'**
>
> **106. Clause 3(c) of the Confidentiality and Non-competition Agreement says:**
>
> > **'In the event the Company terminates the Employment Agreement after 12 months from the Effective Date other than pursuant to 7(d) of the**

> **Employment Agreement, the Employee shall be entitled to a payment in the net amount of GBP 270,000 (which, for the avoidance of doubt, is inclusive of any amounts payable under English law and, provided that, such amount will be reduced by the amount of any other payments made (except for salary payments for any period worked by the Employee at the written request of the Company post notice of termination) or claimed which arise out of or in connection with such termination if any). This amount shall be payable on the date of termination of the Employment Agreement and this Agreement.'**
>
> **107. We do not apply any cap of £270,000. First of all, we take into account section 203 of the Employment Rights Act 1996 which states that any provision in an agreement (whether a contract of employment or not) is void in so far as it purports (a) to exclude or limit the operation of any provision of this Act' (with exceptions which do not apply in this case). We consider that the clauses referred to by the respondents do seek to limit the operation of the compensation provision because it limits the tribunal's ability to decide what should be awarded and/or what should be considered 'just and equitable'.**
>
> **108. Alternatively, we would say it is in any event just and equitable to cap compensation at £270,000. Parliament has decided that for whistleblowing cases, there should be no cap on compensation. We have calculated the loss arising. The respondents do not ask us to consider setting off any sum of £270,000 which in any event has not yet been paid."**

27. Plainly there is an error in the rendition of the opening words of [108], which should read: "Alternatively, we would say it is in any event not just and equitable …".

28. Section 123(1) **Employment Rights Act 1996** begins:

> **"Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considered 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."**

29. Section 124 imposes a limit, referred to as the statutory cap, on the amount of a compensatory award, but not where, as in this case, the dismissal has been found to be for the reason or principal reason that the claimant made a protected disclosure.

30. Counsel did not, in substance, disagree about the relevant guiding principles relating to section 123(1) which emerge from the authorities. They may be summarised as follows.

31. First, "[t]he object is to compensate, and compensate fully, but not to award a bonus" (**Norton Tool Co Ltd v Tewson** [1973] 1 All ER 183 (NIRC) at 186j). The award is "plainly intended to be compensatory in nature. That is, it should not overcompensate the claimant. To do

so could hardly be just and equitable. Loss is the governing principle …" (**Optimum Group Services Plc v Muir** [2013] IRLR 339 (EAT) at [30]). So the award should not reflect *more* than the underlying loss. I was referred to other authorities which make essentially the same point in their own language.

32. I interpose that the compensatory principle applies to the award prior to any uplift under section 207A of the **1992 Act**. As I observed in **Acetrip v Dogra** UKEAT/0238/18 at [103] there is a punitive element to such an uplift; but it is also subject to a final "sense-check" as to the absolute amount. This tribunal carried that out, and this aspect of its decision has not, as such, been challenged.

33. There may, in a given case, be particular circumstances, such that justice and equity point to the conclusion that the claimant should receive an award of *less* than the valuation of the underlying loss. Examples are rare, but I was referred to two. The first is the famous (to lawyers) case of **W Devis & Sons Limited v Atkins** [1977] AC 931. There it was held that, in determining whether a dismissal was fair or unfair, the tribunal could not take account of evidence of misconduct by the employee which had come to light only after the dismissal. But it could do so when assessing compensation for unfair dismissal. Viscount Dilhorne (with whom the other law Lords gave concurring speeches) said (at 955G) that "it cannot be just and equitable that a sum should be awarded in compensation when in fact the employee has suffered no injustice by being dismissed."

34. The second is **Courage Take Home Trade Limited v Keys** [1986] ICR 874. There the EAT upheld the decision of the tribunal not to award the employee any more than the sum he had already been paid under a settlement reached following a finding that he was unfairly dismissed, but which was held to be unenforceable, even though his loss exceeded that amount. The EAT, at 881A-C, concluded that it would be "unjust and inequitable in all the circumstances if this employee would be allowed to take advantage of the employers".

35. The reasoning in **Courage**, and its ratio, have been considered in a number of other

authorities to which I was referred. For my part, I confess to misgivings about it. However, I do not need to spend more time on it, because, as Mr Leiper KC confirmed, the respondents relied upon it only by way of an example of a case in which it was held to be just and equitable to award the claimant less than the amount of his full underlying loss. They do not contend that the facts of the present case are in any way analogous. Certainly, the harshness of the language used by both the EAT and the tribunal, to describe that claimant's conduct in that case, have no counterpart in the present case.

36. For completeness I note that counsel before me agreed that there is also a strand in the authorities to the effect that the statutory wording means that the tribunal does not necessarily have to calculate the value of a claimant's loss precisely to the last penny – the "just and equitable having regard to" formulation allows for a degree of approximation. But that is not at issue in this case.

Ground 1 – Discussion and Conclusions

37. In the present case the narrative to ground 1 explains that the specific contention is that the tribunal's error lay in its failure to *consider* whether it was just and equitable to limit the award(s) to £270,000, on the basis that "all the circumstances" included the existence of the contractual provisions relied upon, and the evidence that there had been meaningful negotiations in relation to them, that the claimant, who is himself legally trained, had access to legal advice at the time, and that this case was far removed from one in which there is inequality of bargaining power, and terms are simply dictated and imposed by the prospective employer. I was referred by Mr Leiper KC to email trails from the time of the negotiations, which he submitted supported those contentions.

38. Mr Leiper KC submitted that the tribunal had only, at [107] and [108], considered the significance of section 203 of the **1996 Act** and of the fact that the statutory cap on the compensatory award did not apply in this case. But its error was to regard these as the only relevant matters. It had wrongly failed to engage with the respondents' case, which was not that the contractual provisions in question imposed an enforceable cap on the amount which it could award,

but that their existence, and how they were negotiated, were relevant to what amount it was just and equitable to award.

39. I do not agree that the tribunal failed to consider this argument. Paragraphs [101] to [108] must be read as a whole. At [102] the tribunal specifically identified the argument that "it is not just and equitable under the legislative provisions to award more than £270,000" and identified that as being distinct from the contention that the contractual provisions imposed an effective cap. The tribunal went on, at [103], to summarise the features in this particular case relied upon by the respondents in relation to those contractual provisions. Within the context of the overall passage, the opening words of [107] then appear to me to be a reflection of the fact that the respondents' case was that justice and equity pointed to the conclusion that the tribunal should, having regard to these contractual provisions, and the surrounding circumstances, limit the compensation that it awarded to no more than £270,000 net. The tribunal rejected that invitation, and considered that to do so would wrongly limit its ability to consider what was the just and equitable amount to award in this case.

40. Mr Jones KC contended that, in any event, at best for the respondents, these contractual clauses could only have a bearing on the specific unfair dismissal award made against the first respondent, as the second respondent was not a party to the contracts in question. I agree with Mr Leiper KC that this point is not, as such, a knock-out blow, because the tribunal was not being asked to enforce the contractual provisions, as such, but to take account of them in deciding what was just and equitable, when it came to determine its awards against both respondents.

41. However, more fundamentally, Mr Jones KC contended that, in any event, these contractual provisions could not properly have been relied upon by the respondents to achieve the outcome that they sought, as this would have been contrary to section 203 of the **1996 Act**, so that it provided a complete answer to the issue. I turn to that aspect.

42. Section 203(1) provides, in part:

> **"Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports … to exclude or limit the operation of any provision of this**

Act".

43. The reach of this provision plainly extends beyond settlement agreements, potentially to encompass clauses in contracts of employment or relating to employment. There was no dispute that the provisos within section 203 which, if they are fulfilled, may disapply that section in relation to a settlement agreement, were of no application in this case; nor that, in so far as the contractual provisions in question should be construed as purporting to limit the amount of any compensation awarded by a tribunal for unfair dismissal or detriment, they would, in that respect, be void.

44. Counsel however disagreed as to the correct interpretation of these contractual provisions. In summary, the respondents' case was that the overall amount of compensation that the claimant could recover upon termination after twelve months' employment (including by way of any award made by an employment tribunal) was (purportedly, leaving aside the impact of section 203) limited to £270,000 net. On the claimant's case, the contractual amount or amounts payable was so limited, but not the amount of a tribunal award. At worst for the claimant, submitted Mr Jones KC, pursuant to clause 3(c) of the confidentiality and non-competition agreement, the amount of a compensatory award or other tribunal award might reduce the contractual entitlement, pound for pound.

45. I do not think that, correctly construed, these contractual clauses purported to impose a limit on the amount of compensation that might be awarded by an employment tribunal to £270,000 net. The overall sense of them is that, in consideration for the claimant entering post-termination covenants, they provide for a guaranteed *contractual* payment upon termination after 12 months' service. But, as a *quid pro quo* for that guarantee, they also provide for *that* payment to be inclusive of any other contractual (except for certain salary payments as stipulated) or statutory *entitlement* to a payment on termination. So, for example, in a case of redundancy, the £270,000 would be treated as inclusive of any entitlement to a statutory redundancy payment. The reference to "reduced by" indicates that what is contemplated is a set-off or credit for other entitlements, of that sort.

46. As Mr Jones KC effectively acknowledged, the reference to amounts "claimed which arise

out of or in connection with such termination" might be contended to have the effect that credit or set-off of the amount of any award made by the tribunal, in the event of a claim, should *also* be applied, so as to reduce the amount of the £270,000 net payment to which the claimant would otherwise be entitled. But, if so, that would indeed be by way of set off, or reduction of that contractual entitlement, possibly – if the tribunal's award exceeded £270,000 net – to the point of extinction of the *contractual* amount payable, but not by way of cap of the tribunal award itself.

47. That said, I do not think that the outcome of this ground in fact turns on which of the rival interpretations of the contractual provisions is correct. That is because the outcome that the respondents sought from the tribunal in reliance on these clauses, was that the awards that it made should be limited to £270,000 net, on the footing that the clauses had the meaning for which they contended, and that, in light of them having that meaning, it would not be just and equitable to award more than that. See the remedy decision at [4] and [101] – [102].

48. Similarly, Mr Leiper KC submitted at the very opening of his skeleton for this appeal that the respondents' case was and is that this was a "contractual cap on compensation" agreed between parties of equal bargaining power; and, should this ground succeed, the primary relief sought from the EAT was to "substitute a finding that C's compensatory award should be limited to a net sum of £270,000." If the respondents' interpretation of the contractual clauses is (as I think) *not* correct, then ground 1 has no purchase at all, and the tribunal did not err in not capping its awards at £270,000 net.

49. Conversely, if the respondents' interpretation of the contractual clauses were to be correct, I agree with Mr Jones KC that the tribunal did not in any event err, because it would have been contrary to section 203 to permit them to be relied upon in the way that the respondents sought. To repeat, in substance, the respondents sought to rely upon the clauses to support the *outcome* that the awards made by the tribunal would be capped at £270,000 net*, even if (as the tribunal indeed found), the value of the underlying loss suffered by the claimant was higher*. The respondents'

contention was that this outcome would, in all the circumstances, be just and equitable. But the outcome sought was, itself, in substance, the imposition of a fixed cap on the tribunal's awards, *even though* there were no other particular circumstances in this case (alleged or found) that would, on established principles, make it one in which in which it was just and equitable to award less than the underlying loss.

50. That being so, I cannot see how that would, in substance, be any different from the position, had the parties purportedly agreed a contractual clause stating expressly that the amount of any compensatory award, or other compensation awarded, in the event of the claimant being successful in a complaint to the employment tribunal arising from his employment or its termination, would be limited to £270,000 net, regardless of the value of his loss, a provision which would plainly fall foul of section 203. For the tribunal to take into account the actual contractual provisions in this case, and simply on that account to limit its awards to £270,000 net, would achieve precisely the same outcome.

51. It could not be just and equitable to produce an outcome which would have the same effect as disapplying or limiting a statutory provision, in circumstances not among those in which Parliament had itself designated as permitting that, and where there were no other circumstances said to make it just and equitable to award less than the loss incurred. That would be contrary to Parliament's intention, expressed in section 203, that a compensatory award should not be capped by reference to a figure decided upon by agreement between the parties.

52. I should note that Mr Jones KC took issue with Mr Leiper KC's depiction of the nature of the negotiations in this case and the relative bargaining power of the parties. But how such arguments on each side might have fared, had it been open to the tribunal to consider these matters when deciding how much to award, is, in my judgment, irrelevant. Parliament has provided that *any* contractual provision is void in so far as it purports to exclude or limit the operation of any provision of the **1996 Act**. That is not dependent on an assessment of the relative bargaining power

of the parties, or other circumstances in which the provision was negotiated, in the given case. In *every* such case the provision is, in this respect, void, unless one of the exemptions set out in section 203 applies. (Of course, as **Uber BV v Aslam** [2021] UKSC 5; [2021] ICR 657 discusses, relative bargaining power may be relevant to a *prior* issue of whether the contract is an employment or worker contract to which the statutory rights attach. But in the present case there was never any dispute that the claimant was, as such, an employee, and a worker, who was, as such, entitled to bring the claims that he did.)

53. Mr Jones KC contended that, on its face, this ground was in any event confined to a challenge to the automatic unfair dismissal award, and did not extend to the awards in respect of detriment. Mr Leiper KC sought permission to amend, should I judge it to be required, which Mr Jones KC resisted, on the footing that this would place the claimant at a disadvantage, as further research had not been undertaken on the approach under section 49 of the **1996 Act**, which relates to remedies in respect of detriment complaints, including of this sort. I consider, given the literal wording of this ground of appeal, that application to amend is required; but I grant it for the following two reasons.

54. First, although on the literal wording of the ground, permission to amend is required, it has always been clear, I think, that the respondents were seeking to challenge both awards, given that the ground invokes the figure of £270,000, that the automatic unfair dismissal award was only £3589.09, and that that award would have been higher, had the overlapping elements not been loaded on to the detriment award. I note also the submission in the respondents' skeleton, tabled in advance of the hearing of this appeal (albeit in a footnote) that section 49(2) "contains similar language."

55. Secondly, that submission appears to me to be right. The tests under each of these provisions are "materially the same" (*per* Simler P, as she then was, in **International Petroleum Limited v Osipov** UKEAT/0058/17, 19 July 2017 at [165]); or in "substantially the same terms"

(*per* Underhill LJ for the Court, in **Timis v Osipov** (above) at [72]). Section 49(2) provides:

> "**Subject to subsections (5ZA), (5A) and (6) 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."**

56. This language is in substance the same as the relevant phrase in section 123(1). This is also in keeping with the fact that other provisions of section 49 also take the same approach to the assessment of loss as would apply, for example in relation to the duty to mitigate, under section 123(1); and there is a provision relating to contributory conduct, in section 49(5), equivalently worded to its counterpart in section 123(6). True it is that injury to feelings is compensable under section 49, but not section 123, but the shadowing of section 123 in relation to compensation deriving from other heads of loss, is reinforced by the fact that, in cases, in substance, of dismissal of a non-employee, the award should be no more than would have been made for an unfair dismissal: see section 49(6)(c). In the respect challenged by this ground of appeal, the approach of the tribunal could therefore not have properly been any different under section 49, than under section 123. The pertinent authorities cited to me are of equal application to both.

57. For the foregoing reasons, however, ground 1, including as amended, fails.

Grounds 2, 3 and 4 – the statutory framework and the tribunal's decision

58. All of these grounds relate to what may be called the ACAS Code uplift, that was applied to both the detriment and unfair dismissal awards, save for the basic award.

59. The relevant further sections (omitting irrelevant parts) of the **1996 Act** are as follows.

> **"47B Protected disclosures.**
>
> **(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.**
>
> **(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—**

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

… …

(2) . . . This section does not apply where—

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of Part X)

48 Complaints to employment tribunals.

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

49 Remedies.

(1) Where an employment tribunal finds a complaint under section 48(1) … … 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.

94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

103A Protected disclosure.

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

111 Complaints to employment tribunal.

(1) A complaint may be presented to an employment tribunal] against an employer by any person that he was unfairly dismissed by the employer."

60. The relevant sections of the **1992 Act** (omitting irrelevant parts) are as follows.

"**199 Issue of Codes of Practice by ACAS.**

(1) ACAS may issue Codes of Practice containing such practical guidance as it thinks fit for the purpose of promoting the improvement of industrial relations or for purposes connected with trade union learning representatives.

> **207A Effect of failure to comply with Code: adjustment of awards**
>
> **(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.**
>
> **(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—**
>
> **(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,**
>
> **(b) the employer has failed to comply with that Code in relation to that matter, and**
>
> **(c) that failure was unreasonable,**
>
> **the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.**
>
> **… …**
>
> **(4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes.**

61. The jurisdictions listed in schedule A2 of the **1992 Act** include sections 48 and 111 of the **1996 Act**, relating, respectively, to detriment in employment and to unfair dismissal.

62. After referring to the ACAS Code and setting out section 207A(2) of the **1992 Act**, the tribunal continued its self-direction as to the law as follows:

> **"48. The disciplinary part of the ACAS Code '…is intended to apply to any situation in which an employee faces a complaint or allegation that may lead to a disciplinary situation or to disciplinary action. Disciplinary action is or ought only to be invoked where there is some sort of culpable conduct alleged against an employee' (Holmes v Qinetiq Ltd [2016] IRLR 664).**
>
> **49. A protected disclosure can never in itself be a ground for disciplinary action, ie a ground for an allegation involving the culpability of the employee. Depending on the facts, a whistleblowing disclosure can amount to a grievance within the terms of the ACAS Code, ie 'concerns, problems or complaints that employees raise with their employers' (Ikejiaku v British Institute of Technology UKEAT/0243/19). In that case, the protected disclosure was made in an email raising complaints about being told to pass students who had been copying.**
>
> **50. Paragraph 1 of the ACAS Code states that 'Grievances are concerns, problems or complaints that employees raise with their employers'. The Code envisages, amongst other examples, that the grievance may concern a complaint that the employer is not honouring the employee's contract (see paragraph 35).**
>
> **51. Paragraph 32 of the ACAS Code states 'If it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance.' Paragraph 33 onwards sets out the steps which an employer should take on receiving a grievance. The natural reading of the section is that the steps apply only after informal attempts at**

resolving a grievance have failed and after the employee has raised a formal grievance in writing.

52. Paragraph 33 says that 'Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received'. The Code then goes on to set out recommended procedure.

53. One issue which was not discussed during the remedy hearing was whether the Code applies to grievances which have only been raised orally. The parties were asked subsequently to provide written submissions on this matter. The claimant argued that informal grievances are within the Code and that if an employee who raises a grievance orally is summarily dismissed, and is therefore deprived of the opportunity to put that in writing, 'that is a point that counts against the employer rather than the employee'. This appears to fall short of a clear statement that the employer would then be in breach of the grievance procedure in the Code. The claimant argued that in any event, the claimant did put his concerns in writing in his email of 4 January 2020. The respondents argued that the Code makes no provision for how an informal process should be handled and that it does not apply until the grievance is made formal by being put in writing. The respondents say that the 4 June 2020 email is irrelevant because it did not set out relevant concerns. The tribunal claim did not 'relate' to the matters set out in that email. Alternatively, the respondents say, even if the Code does apply to grievances which have not yet been put in writing, given that the claimant did not put his specific whistleblowing concerns in writing, it was not unreasonable for the respondents not to take steps in line with the Code.

54. In a case where the underlying award is of a significant amount, the tribunal needs to take into account the absolute value of a percentage uplift as a relevant consideration (Acetrip Ltd v Dogra UKEAT/0238/18). However, there must still be cases in which the top of the range 25% is applied, otherwise the range set by Parliament is not being respected. The discretion given to the employment tribunal by the statute is very broad, both as to whether there should be an uplift at all, and as to the amount of any uplift, which will be such as the employment tribunal considers 'just and equitable' up to the limit of 'no more than 25%'. While the top of the range should undoubtedly be applied only to the most serious cases, the statute does not state that such cases should necessarily have to be classified, additionally, as exceptional (Sir Benjamin Slade and another v Biggs and others [2022] IRLR 216).

Does the ACAS uplift apply to awards against individual respondents for subjecting workers to a detriment?

55. This matter was not addressed during the remedy hearing and we asked the parties subsequently to provide written submissions. The claimant argues that it does apply and cite the conclusions of Simler P, as she then was, in the EAT in Timis v Osipov [2017] UKEAT/0229/16 at paras 166-167. This conclusion was not disturbed when other aspects of the decision were appealed.

56. Section 207A(1) of TULCRA 1998 applies the uplift to jurisdictions listed in Schedule A2 of TULCRA 1992. That Schedule refers, inter alia, to section 48 of the Employment Rights Act 1996 (detriment in employment). In turn, section 48(1A) covers subjecting a worker to a detriment because he has made a protected disclosure.

57. The respondents argue that section 207A talks about 'where the employer has failed to comply with the Code' (our italics). However, Simler P states 'where an individual respondent is responsible for a failure to follow a relevant procedure it follows that he or she falls within s207A TULCRA and an award of compensation

made against them is liable to the uplift provided for under s207A(2) TULCRA.'"

63. The tribunal's conclusions on this aspect were set out in the following passage.

> **"83. The claimant sought an uplift for not following the Code in relation to the dismissal, which he initially framed as under the disciplinary part of the Code. When we drew the representatives' attention to Ikejiaku v British Institute of Technology Ltd UKEAT/0243/19, Mr Roberts argued that alternatively an uplift should be made on grounds that his grievance had not been appropriately addressed and had led to dismissal. For the respondents, Mr Leiper opposed an uplift on either ground.**
>
> **84. We do not believe that the disciplinary part of the Code applies. We address the reason for dismissal at paragraph 110 – 112 of our liability judgment. The respondents denied that the claimant was ever dismissed. Therefore they did not put forward a reason for dismissal. They did not seek to invoke a disciplinary procedure against the claimant. Even if the respondents had argued that the reason for dismissal was that the claimant would not accept cuts to his pay and changes to his bonus, this could not have been a ground for disciplinary action. It would not have entailed culpable conduct. Therefore the disciplinary part of the ACAS Code did not apply.**
>
> **85. We find that the grievance procedure in the Code did apply. In his email dated 4 June 2020, the claimant raised 'concerns, problems and complaints'. He was complaining specifically about the proposed cut to his own pay. He said such measures were 'a two-way street that require both parties to agree'. He said it was 'extremely disturbing' that an open-ended extension was required. He talked about no one having given him any concession in relation to his request to take up a non-executive position on a third party board just a month previously.**
>
> **86. In response to that written grievance, the respondents held an initial meeting on 5 June 2020. Using the shorthand from Mr Roberts' submissions on liability and adopted at paragraph 113 of our liability decision, the claimant made the following disclosures to Mr Oliynik and Ms Fatkullina at the meeting on 5 June 2020: disclosures regarding the claimant's pay; regarding his 2020 bonus; regarding staff welfare; and regarding Covid pretence. These disclosures were the subject of the tribunal claim.**
>
> **87. It is true that only the disclosures relating to the claimant's own pay and bonus had been put in writing, but that is sufficient. In any event, it is not uncommon for an employee's grievances to expand once a grievance meeting is held. It cannot sensibly be suggested that an employee should have to put each new complaint raised at a grievance meeting in writing in order to have the grievance dealt with properly.**
>
> **88. Indeed, even if the 4 June 2020 email had not contained anything which met the definition of a protected disclosure, it did raise grievances. The grievances led to a grievance meeting. At the grievance meeting, the claimant raised closely related concerns. The closely related concerns were the subject of his claim. This would be of sufficient proximity to fall within s207A in any event.**
>
> **89. We therefore find that the ACAS grievance procedure should have been followed. It was not. We consider it just and equitable to make an uplift in our award of compensation. Putting it most bluntly, the direct result of the claimant raising his grievances was that he was dismissed. Although a meeting was held on 5 June 2020, this was not with anyone who had the power to make a decision.**

> **90. The Code says that following the formal meeting, the decision should be communicated to the employee without unreasonable delay, and the employee should be informed that they can appeal. None of this happened. Instead, Mr Schefler's telephoned the claimant on 8 June 2020 and rather than any proper discussion or any decision, Mr Schefler cut off the claimant and dismissed him.**
>
> **91. The respondents were therefore in significant breach of their duty to investigate grievances properly under the ACAS Code. The consequence of their failure to do so was serious – the claimant was abruptly sacked. We do take into account that there was the initial 5 June 2020 meeting with the claimant, but there was no decision communicated, and as soon as the real decision-maker became involved, the claimant was peremptorily dismissed. Our starting point would therefore be an uplift of 20%.**
>
> **92. We then considered whether the uplift overlaps with our award for injury to feelings. It does not. That award focused on different matters including the hurt caused by Mr Schefler's disregard for their previous working relationship.**
>
> **93. Once we have calculated the overall value of the compensatory award, we will consider whether the 20% uplift is still just and equitable and proportionate.**
>
> **94. Finally, we considered whether the uplift should be awarded against the 2nd respondent as an individual, as well as against the 1st respondent as the employer. We refer to the parties' submissions on this in the section on law above. In our view, the 2nd respondent was the person responsible for failing to follow the procedure in the Code. Indeed the 2nd respondent is barely distinguishable from the 1st respondent which he owns. Therefore, following the EAT in Timis, we are able to apply an uplift to the award we made against him and we do so.**
>
> **95. In the alternative to the above, we considered what uplift we would have awarded had we thought that the disciplinary part of the ACAS Code applied. We would have made the same level of uplift for essentially the same reasons. The claimant raised concerns. He was dismissed as a result with no proper process. The reason the uplift would again have been 20% rather than 25% was because there was some very limited effort at discussion."**

Grounds 2 and 4 – discussion and conclusions

64. These grounds overlap and I will consider them together. Mr Jones KC in fact questioned whether ground 4 added anything to ground 2. In his written skeleton Mr Leiper KC submitted that the further failure by the tribunal was to consider separately the application of the ground 2 points in relation to the detriment complaint on the one hand, and the unfair dismissal complaint on the other, although in oral argument he seemed to accept that the two grounds stood or fell together.

65. The starting point for the overall challenge is that the respondents do not dispute that the tribunal correctly held that the part of the ACAS Code that is concerned with "Grievance" applied in this case. But they contend that, under the grievance provisions, the mandatory first step is for

the employee to put the grievance in writing, and unless or until they do, no obligation falls on the employer to take any action. They rely specifically on paragraph 32 of the Code, which states:

> **"If it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance."**

66. The respondents rely also on **The Cadogan Hotel Partners Ltd v Ozog**, UKEAT/0001/14, 15 May 2014, in which the EAT held that the effect of the identically-worded predecessor of paragraph 32, was that it required a grievance to be put in writing in order to engage the Code.

67. In the present case, the respondents contend, the protected disclosures found by the tribunal were only made orally, all of them at the meeting on 5 June, and one of them being repeated in the telephone conversation on 8 June 2020. The tribunal therefore erred by finding that there was a failure to comply with the Code in relation to the complaints that had succeeded, because the Code was never engaged in relation to the subject matter of those complaints, which was those protected disclosures.

68. Specifically, they contend, the tribunal erred by holding at [87] that it was "sufficient" that only the disclosures relating to the claimant's own pay and bonus had been put in writing (in the email of 4 June). The claims to which the proceedings related did not concern the grievance advanced in writing on 4 June, but the protected disclosures made orally on 5 and 8 June. The tribunal's observation that it is "not uncommon" for a grievance, once raised, to be expanded upon, did not engage with this difference. The claimant raised significantly different and wider issues on 5 and 8 June, and the respondent was entitled to expect that, if he wanted them considered under the grievance procedure, he should put them in writing. The tribunal's procedural criticisms, at [90], were that the first respondent had failed to give him a written answer to his written grievance, and a right of appeal. That was not related to the wider matters raised by him in his later protected disclosures.

69. The claimant's position is, in summary, that (a) a grievance does not have to be in writing

for the ACAS Code to be engaged – the decision in **Ozog** was manifestly wrong (so that, applying the guidance in **British Gas Trading Ltd v Lock** [2016] ICR 503 I was not obliged to follow it); (b) alternatively, it was not necessary for the 4 June written grievance itself to have been a protected disclosure, as its subject matter was substantially the same as that of the tribunal claims; (c) alternatively, the tribunal had, in the remedy decision, found that the 4 June grievance was also a protected disclosure. Mr Jones KC relied upon the words at [88]: "… even if the 4 June 2020 email had not contained anything which met the definition of a protected disclosure", from which, he said, it could be inferred that the tribunal considered that its contents *did* meet that definition; (d) further or alternatively, the discipline section of the ACAS Code was (contrary to the tribunal's primary position) applicable in this case. So the tribunal's conclusion was correctly reached in any event, given its finding that, if the discipline section *had* applied, it would have made the same uplift.

70. In relation to that last point, Mr Leiper KC's position in his skeleton was that it required permission to cross-appeal; but in oral submissions he indicated that he did not object to such permission being granted. Mr Jones KC's position was that this was not a cross-appeal, but merely an alternative basis for upholding the tribunal's decision. But, given Mr Leiper KC's concession, that point is moot; and I will consider the issue of substance, on which they both made submissions.

71. As to the substance, Mr Leiper KC relied on **Ikejiaku v British Institute of Technology Limited** UEKAT/0243/19, 7 May 2020, as authority for the proposition that the discipline provisions do not apply in respect of protected disclosure complaints of detriment or unfair dismissal. Mr Jones KC's position was that **Ikejiaku** was also manifestly wrong; alternatively, that it, and an earlier authority to which it referred, **Holmes v QinetiQ Ltd** [2016] ICR 1016, were distinguishable.

72. I start my analysis by observing that the ACAS Code is concerned with dispute resolution. It is intended to be applied and followed as and when disputes or concerns arise in the workplace, on either side, with a view to assisting their resolution by fair internal process. While employment

tribunals inevitably only get involved after the event, the ACAS Code exists in order to help and guide the parties, as it were, in real time.

73. Secondly, in the very broadest of terms, the distinction between grievance and disciplinary situations reflects the difference between a situation where the employee has a concern about something the employer has done, is doing, or may do, and one in which the employer is concerned about something the employee has done, is doing, or may do. In some cases, concerns on both sides may be in play, and a sequential or combined process or processes may need to be followed, which meet the standards of both the grievance and discipline provisions.

74. Thirdly, a recurring theme in the authorities is that the employer ought to follow a fair disciplinary procedure, conforming to the Code, where it is alleged that the employee has behaved unsatisfactorily in some respect for which (so it is alleged) the employee is, or may be, culpable. In line with that approach, the Code itself states that it does not apply to redundancy dismissals, or non-renewal of limited-term contracts. But it does apply where the allegation relates to the employee's conduct, or to what is alleged to be poor performance by the employee.

75. Further, the line drawn by this distinction does not always align with the sub-categories of fair reasons for dismissing under sections 98(1) and (2) of the **1996 Act**. This is a recurring theme in cases where the employer seeks to rely upon what is said to be a breakdown in the relationship, and to argue that the Code did not apply, but the employee contends that in substance the underlying concern arose from what was alleged to be their culpable conduct, so that the Code did apply. See: for example, **Lund v St Edmunds School**, UKEAT/0514/12, 8 May 2013.

76. Similarly, while the statute has a single category of capability, that embraces both cases where it said that the employee was responsible for performing poorly, to which the discipline provisions of the Code would apply, and those where their capability is said to have been affected by ill health beyond their control, so that they would not apply. That is the specific point that arose in **Holmes**, which contains perhaps the clearest discussion of the general distinction between cases

in which the employee is alleged to have done something culpable, and those where that is not the concern.

77. However, for present purposes, two further aspects of the discussion in **Holmes** need to be noted. The first is the observation, at [8], [12] and [15], that the Code states that disciplinary situations "include" those relating to misconduct and/or poor performance. That is not exhaustive, and the provisions relating to discipline may apply where there is an allegation of culpable conduct because of misconduct, poor performance or "something else" which requires "correction or punishment".

78. The second aspect is the focus, in the discussion, on what the employer *alleged*, not on what the outcome of the process turned out to be, or whether the allegation was, in fact, well founded. That, I would observe, is in keeping with the fact that the Code is intended to guide parties as to how a matter should be handled going forward, the purpose being to ensure that employees are fairly treated at the time. As the EAT observed in **Rentplus UK Limited v Coulson** [2022] ICR 131, at [30], if, for example, the employer believed at the time that the employee had stolen money, but in fact, as matters turned out, that was wrong, it would be very surprising if the ACAS Code then did not apply. The protection of the ACAS Code is "particularly important for innocent employees."

79. In my judgment, the same general principles should guide the tribunal in deciding, in a case which includes a claim that the claimant made protected disclosures, whether the grievance provisions of the Code, or the discipline provisions, or possibly both, should have been followed. This is to be judged not by reference to the hindsight of the outcomes that the tribunal has determined, such as whether the claimant did, in fact and law, make a protected disclosure, or whether, if so, that was the sole or principal reason for their dismissal, but by reference to what happened at the time.

80. If an employee raises a (written) concern, for example, that they are not being paid the

correct wages, or that a pay cut has been wrongly imposed on them, that will trigger an obligation on the employer to follow the Code provisions relating to grievances, regardless of whether the employee raising that concern is later determined also to have amounted to the making of a protected disclosure.

81. Next, where the provisions of the ACAS Code, whether relating to grievance, discipline or both, were triggered by the events as they unfolded, which of them are relevant to the issues before the tribunal may depend on what the legal complaints are and/or which complaints have succeeded. If an employee complained that their pay had been wrongly cut, engaging the grievance provisions, and they later succeed in a wages claim, then the tribunal may need to consider under section 207A whether the grievance provisions were complied with. The same may apply if they also bring, and succeed in, a constructive unfair dismissal claim arising from the same matter. That should and would be so, whether or not the original complaint has been found also to amount to a protected disclosure.

82. But if the employee complains, or also complains, to the tribunal, that, following their complaint to the employer, the employer actually dismissed them, and did so unfairly, then, in respect of *that* complaint, the tribunal may need to consider whether the discipline provisions of the ACAS Code applied and were observed at the time. That may be relevant at the liability stage in respect of ordinary unfair dismissal. If the complaint succeeds, it may also be relevant when considering section 207A at the remedy stage. Once again that will be so, regardless of whether the complaint succeeded only as one of ordinary unfair dismissal, and/or one under section 103A. The employee should be able to enjoy the procedural safeguards of the Code whether their case is simply that they are not guilty of culpable behaviour, or that, more than that, the conduct in question amounted to the making of a protected disclosure. The employer, by following a fair process, would indeed enable them to advance that case, and enable itself then to give that consideration when deciding what to do.

83. Where the successful complaint before the tribunal is for detrimental treatment because of having made a protected disclosure, potentially, depending on the facts of the case, the grievance and/or discipline provisions of the Code may be found to have been engaged, or both, and a failure to follow either or both, to support an uplift under section 207A. The discipline provisions might apply (or also apply) if, for example, in a given case, the tribunal found that the issuing of a written warning was materially influenced by a protected disclosure, and no fair process had been followed.

84. I turn to **Ikejiaku**. In that case, the claimant, who worked as a lecturer, made a protected disclosure that he had been told to give a pass mark to students who he had found had been copying each other's test scripts. The respondent's case was that the reason for dismissal was a reduced requirement for lecturers, triggered by a decision by a partner university. But the tribunal found that the sole reason was the protected disclosure. The EAT (Soole J) went on to describe at [16] how the tribunal had concluded that the discipline provisions of the ACAS Code did not apply, as the protected disclosure "could never be ground for disciplinary action" though the tribunal also considered it to be unjust that the Code was "drafted in a way which appears not to apply to an automatically unfair dismissal such as this." However, had it been able to, it would have applied an uplift of 25%, given the respondent's "total failure to follow any procedure and disregard of basic fairness."

85. Before the EAT in that case the claimant, who was in person, ultimately relied upon the proposition that the grievance provisions of the Code applied. The respondent's counsel accepted that, as such, and that it would be "no bar" to that, that the claim was for automatic unfair dismissal under section 103A: [38] and [40]. Further, on, at [44], the EAT noted that the respondent's counsel also submitted that the tribunal had been right to conclude that the discipline section "could have no application to a claim under s103A." His more particular submission was that "the critical question was whether the employee had faced an allegation that involved liability" citing **Holmes** and **Lund**.

86. The EAT concluded:

> **"46. For the purposes of this appeal as it relates to the Discipline section of the Code, it is sufficient to cite the statement of Simler P in Holmes that the relevant paragraphs:**
>
> > **"…demonstrate that it is intended to apply to any situation in which an employee faces a complaint or allegation that may lead to a disciplinary situation or to disciplinary action. Disciplinary action is or ought only to be invoked where there is some sort of culpable conduct alleged against an employee." [12]**
>
> **47. In the circumstances of this case the Tribunal was clearly right to hold that the Discipline section of the Code had no application. First, as it held, because a protected disclosure could never be a ground for disciplinary action, i.e. for an allegation involving the culpability of the employee. Secondly, because culpability formed no part of the Respondent's unsuccessful case on the true reason for the dismissal.**
>
> **48. However, Grievance procedures are a different matter. As Mr Kohanzad rightly accepts, the protected disclosure of 12 July 2017, which founds the successful claim of automatic unfair dismissal, constituted a Grievance within the Code's definition of "concerns, problems or complaints that employees raise with their employers"; and so as potentially to engage s.207A. In consequence, the essential question is whether the Claimant confined his s.207A claim to the Discipline section of the Code."**

87. After dismissing an argument that it was not open to the claimant to seek to rely in the EAT on the contention that the grievance provisions of the Code applied, on the footing that it had not been advanced below, the EAT concluded at [53] that the matter should be remitted for reconsideration of the uplift application, having regard to the grievance provisions of the ACAS Code.

88. I observe that it was conceded by the respondent in that case that, in principle, the grievance provisions of the Code applied to the claim of unfair dismissal. As to the non-application of the disciplinary procedure, the respondent sought to rely upon **Holmes** and **Lund**. However, the claimant, a litigant in person, appears not to have argued the point; and, as I have noted, those authorities indicate that the focus should be on whether the employer was *alleging* culpable behaviour. It is unclear to me whether it was being said here by the EAT that, as a protected disclosure could never be a ground for disciplinary action, *therefore* the Code could never apply in a case where a section 103A claim had succeeded. I note that the further stated basis for the

outcome on that point was that, in that case, culpability formed no part of the respondent's case on the reason for dismissal.

89. If, therefore, the EAT meant to imply that the discipline provisions could never be regarded as applying in a case of dismissal found to be contrary to section 103A, that was not essential to its decision, and was a point that was not fully argued. I observe also that, if the discipline provisions could never apply in respect of a successful claim of actual unfair dismissal under section 103A, that could mean (if the grievance provisions did not also apply in the given case) that a claimant who succeeded in a claim of ordinary unfair dismissal for conduct might be eligible for uplift of their compensation, but not if the conduct was also found to amount to a protected disclosure.

90. I conclude that I am not bound by **Ikejiaku** to hold that the disciplinary provisions could never apply (whether or not in addition to the grievance provisions) in a case whether the claimant has been unfairly dismissed contrary to section 103A. So to hold would also appear to me to be out of line with the guidance and approach in authorities such as **Lund**, **Holmes** and, more recently, **Coulson**.

91. I turn then to the specific issues raised by grounds 2 and 4 in the present case.

92. First, I consider that, as a matter of law, there does have to be a written grievance in order for the grievance provisions of the ACAS Code to be engaged. That is the natural meaning of paragraph 32 of the Code. That is also consistent with the introductory paragraphs of the Code, which include the statement that "… where an issue cannot be resolved informally, then it may be pursued formally. This Code sets out the basic requirements of fairness that will be applicable in most cases …". Accordingly, **Ozog**, is, respectfully, not manifestly wrong. It is manifestly right.

93. Next, does it matter that the communications which the tribunal had found amounted to protected disclosures were not in writing? Mr Jones KC says not, first, because the tribunal effectively decided in the remedy decision that the claimant also made a protected disclosure or

disclosures in the 4 June email. However, I do not think the opening words of [88] will bear the weight that Mr Jones KC sought to place on them, in the context of the two decisions read together. As the tribunal correctly understood, whilst a claimant does not have to be *motivated* to further the public interest, they must nevertheless make their disclosure "in the reasonable belief" that it is made in the public interest. That means that they must in fact hold such a belief *at the time when they make it*. (See: **Chesterton Global Ltd v Nurmohamed** [2017] EWCA Civ 979 at [27] – [29] and **Ibrahim v HCA International Ltd** [2019] EWCA Civ 2007; [2020] IRLR 224 at [15] – [17] and [25].)

94. In this case, while the claimant had spoken to his Luxembourg colleague in May 2020, the tribunal in its liability decision at [129] found that it was the conversation he had with his New York colleague, in point of time after he wrote his email of 4 June, that "put freshly in his mind the wider picture", echoing what he recalled that the Luxembourg colleague had said previously in May. The sense here is not that the claimant had the May conversation in mind, when he sent his 4 June email. It was the New York conversation that called the May conversation to mind, as further evidenced by him then making on 5 June the wider points that he had not made in the 4 June email.

95. That being so, I agree with Mr Leiper KC that the opening sentence of [88] of the remedy decision cannot be read as a further finding that all the necessary factual ingredients of a qualifying and protected disclosure were present when the claimant sent his email of 4 June. That would be at odds with the natural sense of the liability decision, that there was a missing ingredient at that point, but which had become present by the time of the 5 June meeting. Further, the opening sentence of [88] of the remedy decision is, at best, grammatically ambiguous; and I agree with Mr Leiper KC, that, given all of that, if the tribunal had meant to make such a further finding, one would have expected the reasons for it to be clearly and explicitly spelled out.

96. However, it seems to me that the tribunal was right to conclude that the content of the claimant's email of 4 June 2020 triggered an obligation on the first respondent to follow the

grievance provisions of the ACAS Code, and the tribunal did not err in concluding that that was "sufficient" in this case, and that at the 5 June grievance meeting the claimant raised "closely related concerns", such that he did not need to raise a further written grievance, or separately to reduce them to writing.

97. It is plainly right, as a general industrial observation, that a complainant's case in support of a grievance is liable to be filled out as the process unfolds, for example, in the course of a meeting held to discuss it, or by the provision of particulars. What is important is whether there has been a material change of *kind* in the nature or scope of the complaint, for example by reference to the underlying subject matter, or redress sought, such that fairness requires a new or additional process, or written grievance, in relation to it. That will be a matter for the industrial judgment of the tribunal in each case, in relation to which the EAT should allow it a generous margin of appreciation.

98. In this case the tribunal found that the additional belief which the claimant formed, after the 4 June email (and gave voice to at the 5 June meeting) meant that, when he raised his complaints at that meeting, he did so in the belief (reasonably, it also found) that his disclosures were in the public interest. But it was not suggested, or found, that the claimant was, at the 5 June meeting, seeking also to raise complaints about, or on behalf of, other colleagues who he said had been treated similarly, seeking some remedy or redress on their behalf, as well as his own. The arguments were broader; but the underlying character of his *grievance* had not changed: it was still about his own pay and his own bonus; and the redress he sought from the first respondent was still essentially the same.

99. Pausing there, the tribunal did not err in concluding, as such, that the events, as they unfolded, engaged the grievance provisions of the ACAS Code, which ought to have been followed by the respondent, through and beyond the meeting on 5 June 2020, and that no further written grievance was required from the claimant, to take account of the wider points that he had in mind,

and voiced, at the meeting on 5 June, that meant that he had now made protected disclosures.

100. I note that, subject to the particular point raised by grounds 2 and 4 (and the point raised by ground 3) the respondents did *not* contend that the tribunal erred by considering that the grievance provisions could have any application *at all* in respect of the successful claims in this case. But in any event the tribunal's decision to award uplifts under section 207A in respect of both the detriment and unfair dismissal awards was supported by the facts found in this case. That is on the basis that, if not the grievance provisions, then the discipline provisions of the Code were engaged, but not fully followed, in respect of both aspects; and given the tribunal's express finding that, had it considered that the discipline provisions applied, it would have awarded the same uplift pursuant to them.

101. In this case the reality is that the tribunal found that the conduct by way of detriment and dismissal was all of a piece. It arose from the conduct of the same individual – the second respondent on behalf of the first respondent – in the same discussion; and, as I have noted, the detriment was found to have concurrently caused the same loss as the dismissal.

102. While the respondents had disputed that the claimant had in fact been dismissed in the 8 June 2020 conversation, and had not argued in the alternative that, if so, dismissal was for a fair reason, the tribunal found in the liability decision at [136] that the second respondent lost his patience during the call on 8 June 2020 to the point of dismissing the claimant, because he was "already annoyed about the claimant's wider position", being "a response to what he heard about the protected disclosures". It was therefore found that it was the second respondent's reaction to the claimant's conduct in taking the stance that he did at the meeting on 5 June, and then during the course of that call, which was the reason for the detrimental treatment and dismissal. Further, as the tribunal found at [111] of the liability decision, the dismissal was in any event unfair for procedural reasons as "[n]o procedures were followed whatsoever. In the middle of a conversation to discuss his concerns about pay and bonus cuts, the claimant was told out of the blue that he was fired."

103. Accordingly, I conclude that the tribunal did not err in the overall outcome, and decision, that the awards it was making (save for the basic award) should both be uplifted by 20%.

104. Grounds 2 and 4 therefore fail.

Ground 3 – Discussion and Conclusions

105. This ground contends that it was an error to award an uplift under section 207A in respect of the award against an individual, as opposed to the employer. The decision of the EAT in **Osipov** (above) is to the contrary, but Mr Leiper KC contended that it was manifestly wrong. It ignored, he submitted, the fact that section 207A refers to the conduct of "the employer". In that context, the reference to "any award" is just to the quantum of the award. It could not be read as enabling an enhanced award to be made against someone other than the employer. While section 47B(1B) of the **1996 Act** makes an employer co-liable for a detriment inflicted by a co-worker or other agent, and, in such a case, section 48(5)(b) deems references in section 48 and 49 to "employer" to include such an individual, section 207A, he noted, contains no equivalent to section (48)(5)(b).

106. In **Osipov**, in summary, at [166], Simler P reasoned that the jurisdictions within the scope of section 207A include section 48 of the **1996 Act**, which embraces claims of detriment under section 47B(1B), which in turn includes claims of detriment inflicted by such individuals. The reference in section 207A to "any award" therefore includes any award made in respect of a claim against such a person. I respectfully agree. I also disagree with Mr Leiper KC's arguments. My reasons follow.

107. First, the expression "any award" is used, it seems to me, in order to cover the possibility that the tribunal may, in a given case, not necessarily make a financial award at all, as well as the possibility that it may make more than one such award, any of which might be enhanced (save that the legislation specifically excludes a basic award for unfair dismissal). As Simler P held, the expression "any award", in and of itself, is naturally apt to cover *any* award under section 48, including any in respect of a successful complaint under 47B(1B). For the phrase "any award" to

embrace an award against an individual does not require a strained reading. To the contrary, it would require some express qualification, or words of limitation, in order for it to be read as *not* applying to such an award, as such claims of detriment plainly *are* proceedings under section 48.

108. Secondly, I do not agree that the reference in section 207A to "employer", coupled with the absence of a deeming provision equivalent to section 48(5)(b) of the **1996 Act**, should be read as implying such a limitation. The reference to the "employer" in section 207A(2)(b) is to the failure of the employer to comply with the Code, that is, to the conduct which triggers the potential enhancement of "any award". The Code itself, in its nature, of course refers only to the "employer", as it is the employer which must follow the relevant procedure when it applies. But that casts no light on which award or awards may, on account of such failure, be uplifted.

109. Thirdly, as Simler P discussed in **Osipov**, and in line with the approach in respect of discrimination claims taken in **Catanzano v Studio London Limited** [2012] UKEAT/0487/11, 7 March 2012, this does not mean that the individual whose conduct renders the employer liable will automatically, in every case where the award against the employer is uplifted, also suffer the same uplift. But they will do so in cases where the tribunal properly finds that they were responsible for the relevant failure by the employer to comply with the Code. That was certainly what the present tribunal found. It was the conduct of the second respondent, as agent of the first respondent, which resulted not only in the detriment and dismissal, but in the failure to follow any kind of fair procedure. The tribunal was therefore entitled to uplift the award against him.

110. Ground 3 therefore fails.

Outcome

111. The appeal is dismissed.