Case No: 3400331/2016

EMPLOYMENT TRIBUNALS

Claimant: Mrs C Lofty

Respondent: Mr S Hamis

CERTIFICATE OF CORRECTION

Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69, the Remedy Judgment sent to the parties on 16th May 2017, is corrected as set out in block type at paragraphs 2, 5 and 12

Employment Judge Postle

Date 07 June 2017

SENT TO THE PARTIES ON

07 June 2017

FOR THE TRIBUNAL OFFICE

Important note to parties:
Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.

Case Number: 3400331/2016

EMPLOYMENT TRIBUNALS

Claimant Mrs C Lofty

Respondent Mr S Hamis

HEARD AT: NORWICH **ON**: 23rd March 2017

BEFORE: Employment Judge Postle

MEMBERS: Mrs B Handley Howarth

REPRESENTATION

For the Claimant: Ms R Snoken (Counsel)

For the Respondent: Mr S Hamis (In person)

REMEDY JUDGMENT

1. The Respondent is ordered to pay to the Claimant a basic award of £4026.

2. The Respondent is ordered to pay to the Claimant a compensatory award in the sum of **£965.50**

3. The Respondents are ordered to pay to the Claimant the issue and setting down fee total £1200.

4. The award is subject to Recoupment.

5. Total award payable to the Claimant is **£6191.50.**

REASONS

1. This is a Remedy Judgment pursuant to the liability hearing before the Tribunal between the 24th and 27th October 2016. A Reserved Judgment being promulgated on the 9th December in which the Tribunal found the Claimant did not satisfy the definition of disability under Section 6 of the

Equality Act 2010. The Tribunal did find that the Claimants dismissal under the Employment Rights Act 1996 was procedurally unfair.

2. In this Remedy Hearing it was agreed with the parties consent that the Tribunal could be comprised of one member in the absence of Mr Briggs who sat on the Liability Hearing. Mr Briggs has now retired and was unable to attend today's hearing due to a medical appointment.

3. In this Tribunal we heard evidence from the Claimant through a prepared witness statement. The Tribunal also heard evidence from the proprietor of the respondents Mr Hamis again through a prepared witness statement. The Tribunal also had the benefit of a bundle of documents consisting of 140 pages.

4. The first port of call is the basic award and under Section 120 of the Employment Rights Act 1996 the Claimant is entitled to a basic award and that sum given the Claimants age, the date of dismissal and the number of complete years of service equates to £4026 – that amount the Tribunal understand there is no dispute about.

5. As to the compensatory award that is dealt with under Section 123 the Employment Rights Act and 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. Claims for damages at common law are subject to rule that the Claimant must take all reasonable steps to mitigate their losses. The mitigation rule is given statutory force in it's application to compensatory awards in unfair dismissal cases under Section 123, sub-section 4 again of the Employment Rights Act provides that in ascertaining the loss sustained by the Claimant the Tribunal shall apply the same rule concerning the duty of a person to mitigate his or her loss as applies to damages recoverable under the common law of England and Wales or as the case may be Scotland.

6. Therefore, an employee who has been unfairly dismissed should take all reasonable steps to find alternative employment and thus mitigate their loss. Now as to mitigation the Tribunal have seen little evidence of the Claimant actually looking for employment roles following her dismissal, or even part-time ones immediately after her dismissal. Indeed as early as the Claimant was making her claim for Employment Support Allowance [and that seems to be certainly from the documentation in the bundle around about the 4th December] she was being advised that she was fit for work and should apply for part-time roles. On the 23rd February the Claimant is converted to Job Seekers Allowance presumably on the basis at that stage she was now deemed fit for work equivalent to that which she had formerly performed in hours for the Respondents (approximately 30 hours). Again the Tribunal have seen little or no evidence of the Claimant applying for roles equivalent in hours to that which she previously worked namely 30 hours per week. In fact the Tribunal has seen only one form from the Job Seekers showing that the Claimant applied for two jobs both through Norse in which she was certainly successful in obtaining one position from the 11th April 2016 for 12.5 hours per week term time only. There is no evidence to support the fact

the Claimant was applying for further jobs thereafter to make up her hours until a further part-time position was obtained in December 2016.

7. Therefore, subject to any deductions the Tribunal would make further on we are satisfied that the Claimant has not fully applied her common law duty to mitigate her loss and therefore we would stop any damages at the date of 11th April. The Tribunal drawing on their experience and knowledge of the job market in the area are satisfied there were an abundance of jobs working in a similar field of catering, with similar hours the Claimant could and should have applied for and could have obtained by April 2016.

8. The Claimant having been paid twelve weeks notice pay brings it to the 29th February 2016 that means the amount payable for the compensatory award is six weeks from 29th February to 12th April. It is agreed that the net pay is £188.50 per week, six weeks amounts to £1,131.

9. The next area to look at under Section 123 of the Employment Rights Act is Polkey whether the unfairly dismissed employee could have been dismissed fairly at a later stage or if a proper procedure had been followed. In that respect a Polkey deduction has particular features, first the assessment is a predictive matter – could the employer fairly have dismissed and if so what were the chances that the employer would have done so, the chances may have been at the extreme certainly that it would have dismissed or certainly that it would not have dismissed though more usually will fall somewhere on a spectrum between those two extremes. That is to recognize the uncertainties in dealing with a Polkey deduction. 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. The Tribunal repeat it is predictive as to what this employer would have done. In our view had the Claimant attended a meeting with Mr Hamis before dismissal and explained a prognosis and gave a possible planned return or a hopeful return in the next month there was a 100% chance the Claimant would not have been dismissed, therefore there is no Polkey deduction.

10. On the issue of contribution under Section 123 sub-section 6 of the Employment Rights Act; where the Tribunal finds that the dismissal was to any extent caused or contributed to or by any action of the employee the Tribunal shall reduce the compensation payable by such proportion as it considers is just and equitable. What constitutes contributory conduct; the relevant action must be culpable or blame worthy, it must have actually caused or contributed to the dismissal and it must be just and equitable to reduce the compensation.

11. The Tribunal reminds itself again the decision at the Liability Hearing and the reason for dismissal was the failure of the Claimant to engage or attend meetings with her employer Mr Hamis and discuss her health position, possible return to work and, planned phased return or otherwise. There was a failure to engage by the Claimant. Had she have done so we might not have been here today. An employer is entitled to have information when he reasonably requests it about the likely return to work. The Claimant had been off since around the 17th August with minor surgery, the biopsy

fortunately for the Claimant proved non-malignant, a skin graft was necessary and by December the Claimant was still not engaging and not able to provide her employer with any meaningful return date to work. The operation or the last operation for the skin graft concluded at the latest in September and thereafter the Claimant was recovering and despite one meeting in October the Claimant was unwilling to attend or engage with her employer or give any indication of a likely return to work despite at least four requests from her employer to come in and talk about it, and a request for consent to approach her GP. That failure to engage with Mr Hamis the Tribunal believe is culpable and blame worthy conduct. In those circumstances the Tribunal concluded it is appropriate to reduce compensation, it actually caused the Claimants dismissal had she engaged reasonably and properly with Mr Hamis, the Tribunal repeat we would not be here today.

12. Therefore the compensation referred to above of £1,131 will be reduced by 50% giving a sum of £565.50. To that sum add to basic award of £4026; loss of Statutory Rights we assess at £400, we make no award for the bus pass. The Claimant is clearly entitled to her issue fee of £250 and setting down fee of £950 which makes a total award payable by Mr Hamis of **£6191.50**.

13. This award is subject to recoupment for the period 29th February 2016 to 11th April 2016.

Employment Judge Postle, Norwich

JUDGMENT SENT TO THE PARTIES ON
07. June 2017
FOR THE SECRETARY TO THE TRIBUNALS