EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr E Joseph	**v**	**Grange (Whitefield) Care Services Limited**

Heard at: Watford **On**: 12 & 13 April 2017

Before: Employment Judge Manley

Appearances

For the Claimant: Ms Smeaton, Counsel
For the Respondent: Ms L Millin, Counsel

Interpreter : Mr Fakhar

JUDGMENT

1. I award the claimant the basic award as calculated but I apply a reduction for contributory fault of 15%, making the figure for the basic award **£6,056.25**.

2. It is just and equitable to award a compensatory award calculated to the date the claimant found work, that is to January 2017. I take the view he has mitigated his loss to that date. I also apply a 15% reduction to that and the compensatory award is therefore **£14,195.34**.

3. The total is therefore **£20,251.59** and that is the sum that it is ordered the respondent pays to the claimant.

4. The respondent is also ordered to pay costs of £1200 being the sum paid by the claimant for tribunal fees.

5. The recoupment regulations do not apply.

REASONS

Introduction and issues

1. The claimant brought an unfair dismissal claim on 22 August 2016. No response was presented and a default judgment was entered on 22 November 2016. Part of that default judgment reads: "*The claim for unfair dismissal as set out in the claim form is declared to be well founded*."

2. The matter was listed for a remedy hearing on 25 November 2016 and, on 24 November, the respondent applied for a postponement which was refused. The respondent attended the hearing on 25 November 2016 with a legal representative and made an application for the default judgment to be reconsidered so that it could take part in the proceedings under Rule 70 Employment Tribunal Rules 2013. That application was refused and the remedy part of the hearing was then re-listed for two days, which is this hearing.

3. At paragraph 8 of the judgment at which this was re-listed Employment Judge Lang recorded his reasons for refusing to reconsider the default judgment. He then went on to say as follows:

> "I have given consideration under Rule 21(3) to the extent to which the respondent should be entitled to participate in a remedy hearing and this is a matter that is entirely at my discretion. The respondent intends to argue Polkey, contribution and failure to mitigate at the remedy hearing. Having regard to the overriding objective I think that dealing with this case fairly would involve allowing the respondent to participate. I particularly have regard to the schedule of loss which has been served by the claimant in which he is seeking career long loss subject to the statutory cap. I propose the matter be relisted for a remedy hearing which the respondent will be entitled to participate in and where Polkey contribution and failure to mitigate will be at issue."

4. The issues are therefore as follows. I have to determine the correct level of the basic award and there is a statutory calculation for that. There are some circumstances in which the basic award can be reduced and the respondent argues that this is an appropriate case because of the claimant's contributory conduct.

5. I will also determine the appropriate level of the compensatory award, reminding myself, of course, that the legal provision is that I should award that which is just and equitable in all the circumstances of the case. In this case, I am likely to consider the following matters – i) whether the claimant has mitigated his loss; ii) whether, in line with the case of Polkey v AE Dayton Services Ltd [1987] UKHL 8, the respondent can show that it would have dismissed the claimant after a fair procedure, or there is a percentage chance that he would have been so dismissed and iii) whether there should be a reduction for contributory conduct.

6. As far as contributory conduct is concerned, it is accepted that there has to be a finding of some conduct which was blameworthy. If I find there was such conduct, I need to decide the level of blameworthiness and consider whether to reduce either of the awards with respect to that. That means that I must decide what conduct, if any, occurred which could be said to be blameworthy. I am limited, to some extent at least, by the default judgment which specifically refers to details set out in the claim form.

7. I will also determine how to apply the provisions to increase or reduce any awards for failure to follow the ACAS Code on disciplinary and grievance procedures. The claimant argues that I should consider applying an uplift for failure to follow disciplinary procedures and the respondent argues that I should consider reducing it because of the claimant's failure to appeal the decision to dismiss him.

The hearing

8. At the commencement of the hearing, we discussed the level of participation which the respondent could take in these proceedings. The claimant's representative referred me to the case of Eaton v Spencer and others [UK EAT 177/11]. That judgment reminds me that, once the judgment on liability is made, it cannot be interfered with (except perhaps by reconsideration). I decided to consider what level of participation by the respondent would be appropriate in this case after I had read the witness statements and the relevant documents as well as reading the claimant and the respondent's representatives' submissions.

9. Employment Judge Lang had made it clear when he was looking at this what level of participation would be appropriate. However, this is now clearly a matter for me as I am the employment judge with responsibility for this hearing. I agree that Employment Judge Lang assessed it correctly in relation to what the respondent could raise as set out above. I agreed to hear the respondent's witnesses and the allow cross examination of the claimant and to listen to relevant arguments.

10. As I have indicated, one of the unusual features of this hearing is that there is a default judgment which has not been reconsidered. As I make plain, that default judgment refers directly to the claim form. For the claimant, Ms Smeaton says that I am bound by the case of Eaton v Spencer and that that means I cannot go beyond anything that was contained within the claim form and that must be accepted on its face value. In paragraph 7 of her submissions, she argues that the following are important matters already decided and by which I am bound. They are :

> "In light of the above the tribunal's assessment of compensation must proceed on the basis of inter alia the following:
>
> (a) It was commonplace within the respondent's organisation for employees to give out their mobile phone numbers to patients and vice versa so that they could contact each other more easily (para 6 ET1);
>
> (b) It was not uncommon for employees to buy patients gifts on special occasions such as at Christmas; (para 6 ET1)
>
> (c) MM asked the claimant to buy her a dress, had obtained his mobile number from another patient and would frequently call him or send him messages; (para 7 ET1)

(d) The respondent's Code of Conduct which was the only document in which employees were told they could not give gifts to clients or contact service users on their mobile phones was produced for the first time after the claimant had been suspended and he had received no training in relation to it; (para 19 ET1)

(e) The claimant did not appeal against his dismissal because he did not understand the content of the respondent's letter and he was never advised that he would have the opportunity to appeal; (para 23 ET1)

(f) Prior to the claimant's dismissal he had received no formal or informal warnings in ten and a half years' service with the respondent; (para 24 ET1)"

11. The respondent's representative disagrees that I am so bound. She submits that, particularly with respect to questions of contributory conduct, I am bound to look at blameworthiness. She does, however, accept that I cannot look again at liability for unfair dismissal, a default judgment having been made.

12. This is an unusual case where the respondent did not present a response and was not allowed to present a response when it later applied to do so. However, the respondent sought not only to put some arguments before me but also presented witness evidence. Its representative also asked me to look at documents which were not limited to those contained within the agreed bundle, but were documents that were not previously shown to the claimant's solicitors. In any event, that meant that we dealt with those matters as an when they arose.

13. One extra document which I was asked to look at was accepted by the claimant as being potentially relevant. That was simply a document which indicated the claimant had signed to say he had seen the respondent's procedures in 2014. A further document was handed in right at the end of these proceedings with respect to the calculations for gross pay and net pay and I will come to that later.

14. I heard evidence over the course of the hearing from Mr Rai, who is a manager and from Ms Fernando, who is a senior manager. Neither of them dismissed the claimant. I also heard from the claimant. The bundle of documents runs to over 170 pages but it is true to say that I did not need to look at all of those. I will quote from some of them as I go through my findings of fact.

15. The respondent's representative asked questions of the claimant which related to a document which was in the joint bundle but I understood had not been put to the claimant when the investigation and disciplinary hearings took place. After we discussed it, I allowed those questions to be asked. The claimant denied what was said in that document.

16. I finished hearing the evidence at the end of the first day and we had agreed that there would be short extra submissions the following day and then I would be able to come to my decision.

17. At the commencement of the second day, the respondent's representative said that she had some other documents which had been handed to her by the respondent which she wanted me to look at. It was said that this related to a new issue about the length of the claimant's employment. This could only have been relevant to the calculation of the basic award as even on this new case of the respondent, the claimant still had sufficient service to claim unfair dismissal. I was told that these documents went to the question of whether where the claimant had worked before he was moved to the respondent in 2013 was or was not an associated company of the respondent.

18. I heard the application to admit the documents and the claimant's representative responded, objecting to the application. I am not entirely sure whether it was an application for review or reconsideration under Rule 70 or for me to exercise my powers under Rule 21(3) with respect to the participation of the respondent in this case. In any case, I took the view that it was not in the interests of justice for this point to be raised so late in the hearing. I had had no evidence on it and it seemed unlikely that I was going to be able to hear any evidence on it. It was a substantial and brand new legal point that had never been mentioned before. In any event, the respondent's own witnesses had referred to the two companies as "sister" companies throughout their evidence.

Facts

19. The claimant worked at another care home, which was in another company name but which is in the same group, or was at the time in the same group, as a care worker from 2005. After some sort of complaint or allegation he was moved to the respondent's care home in 2013. The respondent is one of a number of connected companies, listed together at page 41 where a staff handbook is referred to. That appears to be under the name of Scorpion Group.

20. In the bundle before me there were copies of various policies and procedures. It is not entirely clear to me which applied to the claimant at which point in time. The claimant did sign as having received various policies at various times. Ms Fernando says that one of the documents I have in front of me is not a relevant document for these proceedings. What is generally accepted by the parties is that the grievance and disciplinary procedure including that part of it at page 62 which refers to gross misconduct, is the document which applied to the claimant at the time of his dismissal. This reads as follows:

> "Gross Misconduct
>
> The following offences are examples of gross misconduct"

The respondent says this one applies:

> "Any action or omission of duty which endanger the safety of other employees, residents or their relatives.

> These offences are not exclusive or exhaustive and offences of a similar nature will be dealt with under this procedure."

21. What the respondent particularly relies upon in this case is a document which is entitled "*Code of Conduct for Workers*" which appears between pages 91 and 93 of the bundle. It is dated 1 October 2015.

22. Under the heading "*Gifts and Gratuities*" it reads:

> "Workers must not accept gifts, tips or gratuities from residents without prior written approval from the organisation. Workers must not give any gifts to clients under any circumstances without prior written approval from the organisation."

23. It goes on:

> "Workers must not contact clients using their personal mobile phones or contact any clients direct to their mobile phones whether on duty or not."

24. There is no reference there to gross misconduct, save for a further prohibition which reads:

> "Under no circumstances must staff have any personal, sexual or emotional relationships with clients. To do so would constitute gross misconduct and staff will be liable to summary dismissal."

25. This appears to be the document the respondent relies upon for the allegation that the claimant committed an act of misconduct. There is no evidence before me that the claimant's attention was brought to that document before it was sent to him after his suspension. There is no evidence that it was shown to him or discussed with him before the incident in question.

26. In February 2016 there was a complaint from a female service user's mother and Mr Rai visited them and took a note of what was said. He also saw a phone which indicated a message or a call either to or from the claimant from or to the service user which appears to say a misspelling of "call me". I do not accept that Mr Rai saw 15 such messages and there is certainly no other evidence of that.

27. There were also some allegations made then and later which were of a more serious nature. The respondent agrees that these were never put to the claimant. They were passed to the police and to Hertfordshire Social Services who apparently investigated although I understand no charges are pursued against the claimant with respect to those matters. The claimant was suspended. He was given no details except that it arose from a complaint by a service user. He was called to an investigation meeting which he attended on 18 March. That investigation meeting was said to cover the following matters of concern:

- "It is alleged that you have been contacting clients of the supported living project by mobile phone
- The giving of gifts to clients without consent
- Failure to maintain professional boundaries with a client when off duty."

28. The claimant attended that meeting with Ms Fernando. A summary of what happened there is that the claimant accepted that there had been calls between himself and the service user, that he had brought her a gift from Pakistan which she had asked for and, at some point, he had given her a birthday card. He said that this was common practice and that others had done this too. The record there indicates that the claimant also said that he knew it was against policies and procedures. He now denies that he said this but it seems likely to me, even though I accept that the claimant's knowledge of English is fairly limited, that he did accept that there was some wrongdoing in these actions.

29. The claimant was invited on 22 March to a disciplinary meeting to be held on 24 March. This involved the same charges as above. The claimant was told at that point that he could be accompanied by a friend or work colleague. The notes record that the claimant appeared to understand what the disciplinary hearing was about saying that it was about "*calling the client personally and buying gifts for her*". He said he understood the policies and by this time, as I have indicated, copies of those policies had been sent to the claimant and I assume, as I have heard nothing to the contrary, that that included the Code of Conduct quoted above.

30. It is recorded in that note that the claimant said he knew he had breached the policy but it is not clear to me whether he was saying that he knew this having seen the policy after the events in question. He said that others used their mobile phones and he bought the service user a birthday card because others had. There was no discussion about the content of his communication with the service user and no reference whatsoever to the more serious matters the respondent now allege.

31. The claimant was dismissed by a letter of the same date, it being said there that he had committed acts of gross misconduct. That letter informed the claimant of his right to appeal. The claimant did not appeal. He told me that he did not understand or did not notice the reference to the appeal. The claimant's first language is Urdu. He had an interpreter here. I accept his knowledge of English is limited but that he is able to use it sufficiently to deal with some matters.

32. After the claimant's dismissal, he began to look for work but was hampered by the fact that work in the social care field, which he had done for over 10 years, needed CRB (DBS) clearance which he would be unlikely to get while these matters were ongoing. Both the claimant and his wife had periods of ill health. The claimant did not claim any benefits or sign on for work at the job centre.

33. The claimant did find work towards the end of the year with a security company but he had to wait for his security licence. He commenced that work in the new year as a letter before me shows. There were two months earlier this year he earned a little over £700 and he is earning a lower hourly rate for a shorter working week, although that could well increase.

Law and submissions

34. The remedy to award a claimant who has been found to have been unfairly dismissed, falls to be determined under sections 112 to 124 ERA, considering re-instatement and re-engagement first if the claimant wished me to do so.

35. The first financial award to consider is the basic award under s119-122 which has a set formula for the calculation depending on the claimant's age and length of service. S122(2) ERA provides:-

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

36. The compensatory award under s 123 "*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 so far as that loss is attributable to action taken by the employer*".

S123 (6) provides:-

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

37. In assessing what is just and equitable to award, I must consider whether the claimant has mitigated his loss. Generally, that involves consideration of his efforts to find work so that the loss of wages which he has suffered as a result of his dismissal can be mitigated by finding alternative work. This will depend on a number of factors, including the individual circumstances of the claimant and the job market in the industry and more generally.

38. The ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2009) ("The ACAS Code") is a statutory code of practice which provides basic practical guidance and sets out principles for disciplinary matters. By s207A of Trade Union and Labour Relations (Consolidation) Act 1992 the tribunal has power to increase awards to a claimant in circumstances where it is just and equitable to do so where there has been an unreasonable failure by the employer to comply with the ACAS Code. That increase can be no more than 25%. Similarly, there can also be a reduction of up to 25% in awards if a claimant has unreasonably failed to comply with the code.

39. As far as the application of Polkey is concerned, the onus of proving that a dismissal would have occurred if a fair procedure had been followed rests on the respondent.

40. Both representatives presented written submissions and added to them orally. There was no dispute as to the legal tests to be applied as set out above.

Conclusions

41. I deal first with the question of contribution. I do find an element of blameworthy conduct here. This is because the claimant accepted that there was some blame on his part and that is consistent in the notes of the two interviews that he attended. Even with his limited English, I believe that the claimant did know that there was something perhaps wrong with the level of communication that he engaged in with the service user. Assessing the level of blameworthiness is not easy in this case. I entirely accept that I cannot take into account the other more serious matters which were not put to the claimant, nor do I know at what level they were investigated by anybody else. I accept he had no clear instruction before this matter came to light about the use of mobile phones with clients and the giving of gifts, nor did he believe that it could amount to gross misconduct. I do believe, however, that he did appear to accept that it was misconduct on some level. I have therefore decided that an appropriate reduction to both the basic and the compensatory awards is to reduce them both by 15%.

42. I turn then to mitigation. I accept that the claimant did act reasonably in looking for work last year up until the point that he was successful in finding a job. I do not intend to award anything thereafter. Given the claimant's long service with the respondent; the circumstances of his dismissal and the impact that it must have had on himself and his family; the particular difficulty with the area of work he was used to working in and the need for DBS (CRB) checks and the other investigations which were ongoing, I accept that he did find work within a reasonable time. I am confident, however, that he can increase his hours of work there and I do not think it is just and equitable to award anything beyond the date that he found that work.

43. I turn then to the question of a Polkey reduction, namely whether I can find that the respondent would have dismissed the claimant after a fair procedure. I have heard very little evidence which would support such an argument from the respondent. I have had no evidence at all from the decision maker at the time. Those witnesses for the respondent before me were clearly influenced by other information of more serious allegations which they chose, for whatever reason, not to discuss with the claimant. He had no opportunity to deny those more serious allegations and when he was given the opportunity in this hearing, he denied them. The police, as we know, have taken no further steps. The dismissal was for the reasons stated; that is for contacting clients by mobile phone and the giving of gifts. I

cannot go behind that and find that there were any other reasons for dismissal. The investigation did not investigate the claimant's arguments that other employees gave gifts and used mobile phones or, if Ms Fernando did carry out those investigations, she certainly brought no evidence here to that effect. I cannot say on the evidence before me, that the respondent can show it would have dismissed the claimant under what might have been a hypothetical fair procedure. I am therefore not going to make any Polkey reduction.

44. I turn then to the question of the ACAS uplift or reduction. I have decided that I will apply neither an uplift nor a reduction in this case. I do not accept the claimant's argument that the respondent failed to follow the ACAS procedure. The respondent did give notice to the claimant of his right to appeal in the dismissal letter. The only other point that is raised by the claimant with respect to an alleged failure to follow the ACAS Code is with respect to the shortness of time that the claimant had between the investigation meeting and the disciplinary meeting. I accept that that was a very short period of time (of two days) but given what the claimant was asked about and the reason for dismissal, which as I say is limited to those matters which appear in the dismissal letter, I believe that he would have known what the case was about. I cannot find there was a failure to follow the ACAS Code and, if there was one, it was not an unreasonable failure.

45. As for the respondent's argument that I should reduce the award because of the claimant's failure to follow the ACAS Code with respect to not appealing the decision, I find that the claimant failure was not unreasonable given the circumstances of the way in which he was dismissed and the difficulty that he has with English. I am therefore making no increase or reduction for the and ACAS Code failures.

46. I am awarding the sum of £500 for loss of statutory rights. It is very close to one week's pay which is a normal sum awarded for loss for statutory rights and that amount will be added onto the compensatory award.

47. I should add that, very late in the day, it was suggested that I should use different figures for the gross and net pay that had been provided by the claimant's representatives some weeks ago. The figures that were handed to me by the respondent's representative, suggested lower gross and net pay but they were based on a calculation over a much longer period than is usual, over a two year period rather than the twelve weeks that is more commonly used. Given that this point was raised very late in the hearing, I can see nothing to support it and I have used the figures that have been on the schedule of loss of £499.97 gross net weekly pay and £401.00 net weekly pay in my calculations below.

48. The figure for the basic award was agreed to be £7,125. In line with my findings, I reduce that by 15%, which is £1,068.75, which leaves a basic award of £6,056.25.

49. The loss of wages element of the compensatory award is calculated at 40.4 weeks from dismissal to the date of the new job x £ 401and that is £16,200.40. To that should be added loss of statutory rights of £500, making a total of £16,700.40. The deduction for contributory conduct of 15% is £2,505.06. The compensatory award after that adjustment is £14,195.34.

50. The total basic and compensatory awards, as I indicated at the beginning, is £20,251.59.

51. I also order that the respondent pays costs of £1200 with respect to tribunal issue fee paid by the claimant. The recoupment regulations do not apply.

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Employment Judge Manley

Date: 2 May 2017

Sent to the parties on: .....

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For the Tribunal Office