EMPLOYMENT TRIBUNALS

Claimant: Mrs K Jackson

Respondent: Waitings Drainage Limited

HELD AT: Carlisle **ON:** 30 and 31 May 2017

BEFORE: Employment Judge Tom Ryan

REPRESENTATION:

Claimant: In person
Respondent: Mr C Johnson, Consultant

JUDGMENT having been sent to the parties on 6 July 2017 and written reasons having been reserved, the following reasons are provided:

REASONS

1. By a claim presented to the Tribunal on 10 January 2017 Mrs Karen Jackson alleged that she was unfairly dismissed by the respondent by reason of the outcome of a conversation with Mr Adrian Ash, the Director of Operations, which occurred on 3 August 2016.

2. The respondent resisted the claim, disputing that the claimant was dismissed and asserting that she resigned on 3 August 2016. In the alternative it was alleged that if the claimant was dismissed it was for some other substantial reason, namely the loss of trust and confidence in the claimant. A further reason, namely misconduct, was not pursued in final submissions by Mr Johnson on behalf of the respondent.

3. The claim included ancillary complaints of unpaid wages, notice pay and holiday but since in fact the claimant was in fact paid up until the end of August 2016 she acknowledged that that payment satisfied and extinguished the other claims.

Evidence

4. I heard evidence from the claimant herself. On behalf of the respondent I heard evidence from Mr Adrian Ash; Ms Pauline Beckwith, Office Manager; Ms Lesley Phillips, Office Administrator; and Ms Caroline Sullivan, the respondent's HR Manager. All the witnesses provided statements which contained their evidence in chief and I was provided with a bundle of documents. Additions were made to that bundle during the course of the hearing. These comprised: page 93 - interview notes between Ms Sullivan and Mr Ash dated 28 October 2016; and pages 94 and 95 - an annotated version of a letter of 26 October 2016 which was annotated in Mr Ash's writing, and an annotated version of the claimant's solicitor's letter of 23 September 2016, which was annotated by Ms Sullivan.

5. I also received from the claimant a written closing submission which was prepared on her behalf by her solicitor who did not attend the hearing and which, at her request, I read rather than be addressed orally. Mr Johnson made oral submissions.

Amendment

6. Shortly before the hearing solicitors then acting for the claimant applied to amend her claim to include in the alternative an allegation of constructive unfair dismissal. This was initially resisted by the respondent. The question was then discussed at the outset of the hearing. The claimant confirmed the amended claim was simply an alternative way of describing the events that took place in the meeting of 3 August 2016. Mr Johnson accepted there was no prejudice to the respondent in the claimant putting the case in that way so far as the conduct of the defence was concerned. The amendment application, I was satisfied, was necessary in the interests of justice.

7. I expressed the view that since I needed to determine the facts concerning the meeting it was in the interests of justice that I be able to do on a proper application of the law, namely section 95 of the Employment Rights Act 1996. As matters turned out the resolution of the evidential disputes did away with the need for the amendment. Effectively, the same facts upon which the claimant relies for a finding of what might be called "direct dismissal" were the same as those on which she would rely for what one might be called a "forced resignation". In closing submissions Mr Johnson took no issue with that different way of categorising it.

Findings of fact

8. The claimant's employment began on 16 May 2014, when she started cleaning for the respondent on a Friday from 9.00am to 3.30pm and two hours on a Sunday.

9. From 27 April 2015, as it appears from her contract of employment, she started doing office work.

10. The respondent is a small family firm and it had at the material time two directors: Victoria Waitings, who sadly died two days after the claimant's employment ended and had in the months leading up to her death a terminal illness and had

been in a hospice and Mr Ash. Ms Waitings, until she became unwell managed the office, and after she became unwell, Mr Ash took that over.

11. The claimant's hours of work were stated to be 2 days a week in the contract signed 27 April 2015, but it was common ground that they were increased to 3 days a week, Wednesdays, Thursday and Fridays. There was some dispute about the finishing time on a Wednesday but nothing turned on that. The hours of work, whether they were 9.00am to 3.30pm or 9.00am to 5.00pm on a Wednesday were certainly 9.00am to 5.0pm on Thursdays and Fridays, and the claimant's job was inputting and clearing invoices. I note that she was paid for 20 hours a week and that seems to have been by agreement, so there may have been some flexibility around the hours of work of which I have not been told.

12. The background to this case is an unhappy one. The office was small and in effect it consisted of Ms Beckwith, Ms Phillips and the claimant, and in the past they had been friendly and had socialised together. There were some charity events that took place in the early part of 2016 and for whatever reason things then went wrong.

13. When Mrs Waitings was admitted to a hospice Ms Beckwith and the claimant had agreed they would visit her together. Yet after that Ms Beckwith went without the claimant, apparently at the request of Ms Waitings, and this caused a bad atmosphere between them when the claimant found that out.

14. At a later event, about a month before the claimant resigned, at a charity event it had become known to the organisers or the press at least, that Mrs Waitings' daughter, her children, were taking part in support of her and raising funds, I suspect, for the hospice. The press got hold of this. There was an interview. One of the children spoke, and it appears that there was an incorrect recording of the daughter's name by the local press. The claimant said she feared she would be blamed for it. She thought it was Ms Beckwith who had got the name wrong. Ms Beckwith gave evidence that in fact she had got it right and it was the reporter who had got it wrong. But the outcome was another incident which caused the atmosphere in the office to become cold or frosty with minimal communication in what had been a friendly office beforehand. The fact that this was around the time of Mrs Waitings' last illness is itself a further cause for sadness.

15. At all events, what is material, in my judgment, is what occurred on 3 August 2016. I will return in a moment to the background to that, but the chronology is this.

16. On that day Mr Ash asked to speak to the claimant. As a result of that conversation it is common ground that the claimant left his office, went and collected her things, said she had to leave now and left and did not return to work. There is no dispute that the contract of employment ended at that point.

17. The claimant consulted solicitors, having spoken to the Citizens Advice Bureau then her own solicitors, she was than put onto Cumbria Employment Solicitors, who wrote, on 23 September 2016, a letter before action (pages 61-63) asserting the claimant's case.

18. Receiving no reply, on 11 October 2016 they wrote a letter chasing a reply, and the following day on 12 October 2016 Mr Ash responded saying that the matter was being investigated.

19. The evidence of Ms Sullivan, which I accept on this point, is that it was around this time she was shown the letter of 23 September 2016. She had only started employment two days before the claimant's employment ended, not initially as a Human Resources Manager but they needed somebody to discharge that function and she was asked to undertake an investigation so that a response could be sent to the letter of 23 September 2016. She clearly annotated the letter she had received to indicate that she needed to interview or get a statement from Mr Ash. Since it is common ground there was nobody else present at the crucial meeting that was clearly a necessary step.

20. On 25 October 2016 there are notes suggesting that Ms Sullivan spoke to Ms Beckwith and Ms Phillips about the claimant's attitude and about what had gone wrong in the office. The following day she drafted a letter and then two days later she interviewed Mr Ash.

21. At some point after that Mr Ash added to a copy of a letter of 26 October 2016 annotations (page 95, and I will return to those) and it is common ground, or at least it appears to be not disputed, that Ms Sullivan then sent out the letter as she had previously drafted it, unchanged either by the comments that Mr Ash had made in interview or by his annotations which she accepted she had seen before she sent the letter out.

22. One other matter of common ground is that after 3 August 2016 there was no further communication between the respondent and the claimant save that she was paid he wages for the month of August at the end of that month. Although the claimant suspected that that was probably the respondent attempting to buy off claims for notice pay and the like, or perhaps by administrative error, it seems to be the case that Mr Ash had a conversation with Ms Beckwith and agreed that the claimant should be paid for that month.

23. Against that brief history the question for me is whether the claimant was dismissed on 3 August 2016. In order to determine that issue it is necessary to look at the accounts that were given.

24. The first account that is given is in the claimant's solicitor's letter on 23 September 2016 (pages 61-63). I do not for these purposes think it is necessary to recite it all. On page 62 beginning at the fourth paragraph the account of the meeting that the claimant relies upon is set out for the first time.

25. In summary she maintains that:

    25.1. Mr Ash asked to have a word with her.

    25.2. He commented to her that things were not working out.

    25.3. When the claimant said she did not understand what he meant, Mr Ash expressed surprise and suggested that it was the claimant who was causing the atmosphere within the office.

25.4. The claimant was taken aback because she did not believe she had done anything wrong.

25.5. She queried whether he was referring to the "carry on" with Pauline (I assume that is a reference to the press report). Mr Ash did not respond.

25.6. Mr Ash then went on to say to the claimant something like "We could go down the disciplinary route Karen but I don't think you want to do that do you Karen?"

25.7. The claimant was upset and asked if Mr Ash wanted her to go there and then and he confirmed that he did.

25.8. As a result the claimant left the office, cleared her desk and left work.

26. Clearly the latter part of that account is crucial because it was accepted by Mr Johnson in the course of submissions that if the last 3 paragraphs as I have set them out are correct it would be very hard to maintain that there was not a dismissal by the respondent at that point.

27. The respondent's reply of 26 October 2016 (pages 76-77), is the next document in time so far as the dates of preparation are concerned. It is also set out with annotations at pages 94 and 95. From the fourth paragraph it says in terms:

27.1. "Mr Ash did not state 'we could go down the disciplinary route Karen but I don't think you want to do that do you, Karen?"

27.2. "Mr Ash did refer to Ms Jackson's recent performance and attitude and Ms Jackson was confrontational and walked out of Mr Ash's office."

27.3. "Mr Ash fully expected Ms Jackson to return to work on the following Monday 26th September 2016, and had asked her to do so."

27.4. "In your letter you state Ms Jackson was upset. This was not the case… on the contrary she appeared to be very calm."

27.5. "Ms Jackson was not dismissed. [She] cleared out her belongings, walked out and she did not return to the office."

28. The letter also states, in my judgment somewhat disingenuously, "The company could not write to Ms Jackson in relation to any 'dismissal' as Ms Jackson was not dismissed".

29. I can deal with one aspect of these accounts now that is relied upon by the claimant: the statement that Mr Ash expected her to return to work on the following Monday, 26 September 2016. That seems, says the claimant, odd since the Monday following 3 August clearly was not 26 September 2016. I noted during the course of the hearing that 26 September 2016 was the Monday after the letter of 23 September 2016. I am inclined to accept Ms Sullivan's explanation that using that date was just simply an error. However, whether it was that date or not the idea that the claimant should come back on the following

Monday when her normal days were Wednesday to Friday seemed to be a further curiosity that one would have expected Mr Ash to have corrected.

30. The particulars of claim set out in the claimant's ET1, which is the next document in time, are in my judgment, and it was not suggested otherwise by Mr Johnson, consistent with the claimant's account as set out in the letter of 23 September. I do not need to reiterate them.

31. The respondent's ET3, (pages 23 and 24) in paragraphs 5 and 6, contains the respondent's grounds of resistance in answer to the claimant's case. In

    31.1. Mr Ash "commented on the claimant's recent performance and attitude at which point the claimant walked out of Mr Ash's office."

    31.2. "She then collected her belongings and let the building."

    31.3. "It is denied that Mr Ash made any mention of going down a disciplinary route."

    31.4. "It is denied that the claimant asked if he wanted the claimant to leave there and then or that Mr Ash gave any indication that he did."

    31.5. "The respondent assumed that the claimant would return to work the following Monday after she had chance to reflect on the situation. She did not return to work."

32. The claimant's witness statement for these proceedings at paragraphs 22-24 again sets out her account consistently with the previous accounts.

33. In particular, she reiterated that Mr Ash said, "We could go down the disciplinary route, Karen, but I don't think you'd want to do that, do you Karen?" She described it as sounding like a threat, "as though he meant that going down the disciplinary route would end up in me being sacked". She said that she was upset and said "Would you like me to go now?" to which Mr Ash "said he thought that would be for the best". She added, "To me this was a clear statement that he wanted me to leave work there and then which in my mind meant that I had been sacked".

34. Mr Ash's witness statement, regrettably, is not as clear. In paragraphs 9 and following he sets out his account there with more detail than had previously been set out. He said:

    34.1. He asked the claimant to have a chat "because you are obviously not happy". The claimant agreed that he said something to the effect that she was obviously not happy.

    34.2. He said he continued by saying that the people she was working with were "not happy so something is going to have to change." The claimant disputed that was said.

    34.3. and the remainder of the account that he said The claimant disputed that

34.4. Mr Ash said that the claimant became tense and very defensive.

34.5. She asked what was wrong and he said that other members of staff were very upset in relation to how she had acted.

34.6. He mentioned to the claimant that her work performance was clearly suffering and it had been remarked upon by other members of staff.

34.7. H said he commented that he noticed that her attitude had changed for the worse in recent months. The claimant disputed all of that.

34.8. According to Mr Ash, the claimant said, "I don't think I'm handling things very well am I?". The claimant accepted she said the first part of that but not the words "am I" at the end.

34.9. Mr Ash said: "Karen asked me what I wanted to do and I said that something had to change". The claimant did not deny that was said but she did not remember it.

34.10. Mr Ash then stated: "She asked me if I wanted her to go, I said that's not what I'm saying but if she was really not that happy then that might be an option. It was clear to me that she was not happy at work. There was silence for a while. I then said I don't know what the answer is but I've never seen so much upset in this building at such a time when we all need to be pulling together. She said, well I'll just go then. I said,'if that's your decision, that's your decision."

34.11. According to Mr Ash at paragraph 13: "I said that she could spend some time to clear her head then come back in on Monday with a friend if she wanted to and we could through the situation and try and find a resolution. I can't remember the exact words I used but I did say words to the effect of if you want to make this formal or want to leave the business then we can go down that route. I said if things don't change we might have to go down the disciplinary route. She then said words to the effect of, 'I might as well just go then', and left my office."

34.12. Mr Ash said that it was unclear to him whether the claimant would return to work but she was not due in until the following week.

35. In a record of the interview that had taken place on 28 October 2016 Ms Sullivan recorded (page 93) Mr Ash's account thus:

- K stated that 'am not doing very well am I'
- K asked if A wanted her to go - A commented that why didn't Kate go home and have a think about what is happening and K could come back in and A and K could have a discussion on how to work things out.

- K - asked A Are you firing us? - A reinstated [sic] that K to go home and have a think, then reconvene on Monday.

- K - then left A's office - to proceed to go back to her desk collect her things and walk out

36. Finally, in his handwritten annotation on page 95, in reference to the paragraph that I have already quoted at paragraph 25.6 above which mentioned going go "down the disciplinary route", Mr Ash wrote:

> "I did say 'Something needs to change'.
> She responded - Well I should just go then
> I said perhaps for the best' as she very obviously was not happy - visible in attitude.
> I then said come in on Monday and we can put more structure to the meeting
> (Not sure I said disciplinary??"

37. I record here that the words "I said perhaps for the best" were not included in the 26 October letter. They were denied in the response at paragraph 6. They were not stated in the witness statement of Mr Ash. In cross examination he said that he did not remember saying those words.

38. In addition in cross examination, in relation to the paragraph in his witness statement where he describes the exchange, in answer to a question from me, Mr Ash said that he agreed that the exchange was about the claimant giving up her employment and not just about leaving for the day. He also said in evidence that probably the witness statement was his first written account. At that stage of this hearing the additional documents had not been produced. He told me, "We discussed the disciplinary route but I don't recall saying 'you don't want to do that'".

39. Mr Ash agreed that if the words that were attributed to him were used they were an implicit and obvious threat in relation to the claimant's employment.

40. He said, "It was not our intention to resolve it by the employment ending that day".

41. The circumstances in which the additional documents were produced were these. In the course of his evidence Mr Ash mentioned when asked when he had first made an account he said that he had probably made a diary note. I enquired whether this is been disclosed. Ms Sullivan went at my request and undertook some investigations. As a result she produced the attendance note of the interview that she had with Mr Ash (page 93) and then in a further search after the end of the first day of the hearing she found the annotated version of pages 94 and 95.

42. I understand it to be the case that the annotated version of the letter of 23 September 2016 was already in Mr Johnson's possession and had been disclosed but had not been included in the bundle on the ground it was not relevant. I do not understand how it could have been considered on any basis but what Mr Ash had written on the letter was not relevant.

Submissions

43. The claimant's submissions were in writing. They were cogent. I refer to two parts of them below.

44. Mr Johnson's submission, putting his case as high as he could on behalf of his client, was to say that even at the highest the words uttered by Mr Ash do not automatically lead to a conclusion that there was a dismissal by the respondent. He said that even if the Tribunal accepted the key sentence "we could go down the disciplinary route", that of itself would not be enough for dismissal, nor was it a forced resignation. He agreed that the evidence of what occurred on 3 August was crucial and he asked me to accept that the evidence of Mr Ash was more reliable. Mr Johnson submitted that whilst Mr Ash's recollection was not perfect, overall the picture he painted remained consistent. He said that Mr Ash clearly wanted to resolve matters and was open as to how that should be done. He said that pointed to looking for a resolution, and the evidence about coming back on Monday suggests he was looking for resolution and that the events of 3 August were not final.

45. Mr Johnson accepted that there clearly was a discussion of the disciplinary route but argued there was not sufficient certainty to find that Mr Ash added the words "but I don't think you'd want to do that". There was even less evidence, he submitted, to support the claimant's case that she asked if he wanted her to go there and then and he said that he did.

46. Discussion with Mr Johnson in the course of his submission led to this point. He accepted, without I think making a formal concession, that if I were to find that the claimant's account as set out in the letter and in her claim and in her witness statement was an accurate account, then it properly leads to the following conclusion. Either those words, whether this was intended by Mr Ash or not, amounted to words of dismissal, or, in the alternative, that they were what is sometimes described as a "forced resignation," namely the claimant is put in such a position by a threat of potential disciplinary action that she resigns such that the operative reason for leaving her job on that day is not a decision to resign of her own her free will but a pressurised decision made because of the threat of disciplinary action and implicit in that ultimate dismissal.

47. Mr Johnson submitted the alternative argument of constructive unfair dismissal founders because there was no fundamental breach or breach of the implied term of trust and confidence. In my judgment, if the proper construction is the one of "forced resignation" then on the facts of this case that conduct would fall foul of the definition of the implied term of trust and confidence derived from **Malik v BCCI** [1997] UKHL 23 and formulated in earlier cases that: "the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously undermine the confidence and trust that should exist between employer and employee."

48. In either event, if I reach the conclusion that the claimant's account of the conversation on 3 August 2016 is correct, in my judgment she was dismissed..

49. In further submissions Mr Johnson submitted that if I were to find the claimant was dismissed the reason was for some other substantial reason, namely a loss of trust and confidence in the claimant on the part of the employer. He

acknowledged the difficulty inherent in that argument in the light of the fact that Mr Ash did not say that dismissal was in his mind at the time.

50. Mr Johnson also acknowledged there was considerable doubt whether he could secure a finding of fair dismissal relying on the size and administrative resources of his client under section 98(4) of the Employment Rights Act 1996. He accepted this was a thin point.

51. He argued alternatively that there should be some reduction for culpable contributory conduct if it was the claimant who caused the atmosphere in the office which led to the discussion that ultimately led to the ending of employment. He did not attempt to argue for a "**Polkey"** reduction having discussed it with me in submissions.

52. The claimant's written submissions, in particular the section under the heading "claimant's evidence" contains the following powerful points. She notes that Mr Ash gave evidence as to the contents of the letter sent in reply to that of her solicitors and asserted that he was comfortable that it was a full and proper response to what was being alleged. She contrasts that with what he subsequently accepts, namely that the handwritten annotations were not reflected in the letter as sent out and he could not explain why.

53. Ms Sullivan's explanation about the sending the letter in that form was that it was a combination of Mr Ash's decision and her advice was that they would not change the draft letter. Ms Sullivan was unable to give any further explanation as to why that was.

54. In my judgment it is significant that according to the annotations on page 95, when the claimant said "well I should just go then" Mr Ash recollecting "perhaps that's for the best" is a singular and telling omission to give a full and proper response to the allegation, because it bears out the credibility of the claimant's account to her solicitors and indeed to the Tribunal.

55. Secondly, the claimant points out that in the letter Mr Ash says he did not state "We could go down the disciplinary route with Karen, but you don't want to do that". She submits a natural reading of that is that he did not mention disciplinary proceedings at all.

56. She points out that in the response it is denied that Mr Ash made any mention of going down the disciplinary route. I accept that in the annotations Mr Ash puts in his notes that he is "not sure I said this to her". In his witness statement he said for the first time that he did say it. Therefore there was a substantial change between the pleaded case and the evidence given even in chief.

57. The next point is that the letter of 26 October makes no mention of the fact of "whether Mr Ash wanted me to go home". Again, it is denied that the claimant asked if he wanted the claimant to leave there and then or that Mr Ash gave any indication to that (he did in the response), but in particular in paragraph 12 of the witness statement Mr Ash says: "She asked me if I wanted her to go."

58. The claimant submitted on the basis of those points that there were clear contradictions in the content of the letter of 26 October, the response and the

witness evidence. These call into question his credibility as a witness. The claimant's submission was drafted prior to the production very late in the day of the additional documents to which I have referred.

Conclusion

59. I take all these matters into account. I accept the additional submission that Mr Johnson makes that it is possible, if not probable, that the claimant's account is itself not not an entire and complete account. It is shorter than that of Mr Ash and it may be that there was more discussed at the time. Nonetheless I have to decide on the balance of probabilities whether I accept the evidence of the claimant or not.

60. I have regard to the matters raised in the claimant's submissions and the variances at various points in the evidence of Mr Ash evidence. For that reason to the extent that the claimant's evidence conflicts with Mr Ash's evidence I reject Mr Ash's evidence and prefer the account of the claimant.

61. I add that I did not find this an easy decision. Were it not for the later documents I might not have been persuaded to come to that view. But the claimant's submissions in my judgment were cogent, they were well expressed and they are supported by the documents that came to light late in the day.

62. I do not place my judgment on the fact that there was late disclosure. I do not draw an adverse inference from that. It sometimes happens that through oversight documents are disclosed late, but the reality is it was a document that was highly material that is not disclosed earlier and it supports the claimant's case.

63. In those circumstances I am satisfied that Mr Johnson's realistic concession that accepting the claimant's factual account leads to a finding of direct dismissal by the respondent, or at least a forced resignation sufficient to amount to a direct dismissal, is right. In the alternative it would clearly amount to a constructive unfair dismissal for the reasons which have mentioned briefly.

64. As to the reason for dismissal the burden is upon the respondent to prove the reason for dismissal, and given my rejection of Mr Ash's evidence and the fact that Mr Ash himself does not even suggest that the claimant was, according to his evidence, about to be dismissed, the respondent has not made that out.

65. If I am wrong about that and the respondent has discharged that burden then I would still uphold the finding that this dismissal was unfair. Whilst I accept the respondent was small and a family run business and did not have professional HR advice, I was told that they had the benefit of a Citation Consultancy (Mr Johnson's firm) all the way through. Beyond that it is clear that if this was a dismissal as I believe it to be that there was not even the scintilla of an attempt to comply with the ACAS Code of Practice.

66. In those circumstances I do not think that the respondent can get over the hurdle of saying that they have acted within the range of ways that a reasonable employer could reasonably act in these circumstances, and for all those reasons I find that the dismissal was unfair.

67. I am asked to make a finding in relation to culpable or contributory conduct based upon the atmosphere in the office. Again the burden is upon the respondent.

68. It seems to me that I cannot justly take into account the atmosphere in the office. Whether it was the claimant's fault that the atmosphere was frosty. Whether it was Ms Beckwith's or Ms Phillips' fault or that of the claimant or whether it was a combination of one or more of them, it clearly occurred at a time when the claimant's acquaintance/friend who had employed her was extremely unwell and absent from work. In my judgment this would undoubtedly have been likely to lead to personal tensions and potential misunderstandings. It appears to have been accepted by the ladies who worked with her that the claimant was having some personal difficulties at the time as well. It may well have been that is why, as Mr Ash I think sought to say, that he had not spoken to her before. Then to say that that amounted to culpable conduct by the claimant such that when in these circumstances she was dismissed that her compensation should be reduced seems to me to be putting the case too high and I reject that argument.

Remedy

69. In respect of remedy the respondent indicated that the claimant's Schedule of Loss set out at pages 91 and 92 was not disputed as to the figures there set out, but there was an argument in relation to mitigation of damage and in relation to uplift in respect of failure to comply with the ACAS Code of Practice and/or the amount of the uplift, and in relation to the claim for the Tribunal fees.

70. I heard evidence briefly from the claimant. She indicated that she had sought work from about the end of August when her children for whom she cares as a single mother went back to school. They were then aged 8, 13 and 15. She had sought part-time work. She had made a number of applications, she had been to the Job Centre and looked on the internet. She had had five interviews. In respect of four of them she did not have a response. She eventually obtained her current job, which is better paid than the one she lost with the respondent, at about the end of January 2017. It pays £7.50 an hour. It is based near Appleby as a receptionist at a caravan park.

71. No evidence was put before me by the respondent to the effect that there were jobs that the claimant could have performed which she did not apply for, or that there were jobs available of which she knew and did not take. In the circumstances I was not satisfied that the respondent had made out evidentially any basis upon which I could find the claimant had failed to take reasonable steps to mitigate her loss.

72. The next issue concerned the question of whether there should be an uplift in the award for compensation, having regard to the failure by the respondent as was accepted, to comply in any respect with the ACAS Code of Practice.

73. In my judgment this is not such a case where it can be said by the Tribunal that it is just and equitable there should be no uplift; neither is it one in which I think that the Tribunal can award the 25% uplift sought by the claimant through her solicitor. This was a case in which I suspect at the outset of the meeting on 3 August 2015 Mr Ash did not intend to dismiss the claimant, but found himself

having done so. However, it is clear that he was intending to discuss matters of performance and conduct with the claimant, indeed he admitted as much. In my judgment there is no merit to the argument that the ACAS Code of Practice did not apply.

74. Notwithstanding that they did not seem to have an HR function at the time but Ms Sullivan was appointed to do that later perhaps as a result of these events, there is no dispute that the respondent had access to Citation Consultancy advice.

75. In my judgment for those reasons some award by way of uplift is appropriate and in my judgment the appropriate uplift is 10%.

76. The final issue concerns the payment of Tribunal fees. The claimant has obtained partial remission of fees and was due to pay £140 on 1 June 2017. Mr Johnson agreed that I should include that sum in the order that I have made subject to him receiving confirmation that the claimant has paid the fees required of her.

77. Since the judgment was sent to the parties in this case, in the case of **R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51** the Supreme Court decided that it was unlawful for Her Majesty's Courts and Tribunals Service (HMCTS) to charge fees of this nature. HMCTS has undertaken to repay such fees. In these circumstances I shall draw to the attention of HMCTS that this is a case in which fees have been paid and are therefore to be refunded. The details of the repayment scheme are a matter for HMCTS. The attention of the parties is drawn to the President's Case Management Order made in connection with this issue on 9 August 2017 which may be found at: https://www.judiciary.gov.uk/publications/directions-employmenttribunals-england-wales.

78. It was common ground in this case that the basic award is £206 per week. The claimant was not over 41 years of age during the course of her employment. She was employed for two years. Under the heading of "compensatory award" it was not disputed there should be an award for loss of statutory rights in the sum of £300. She had lost her wages at the rate of £198 net per week from 3 September 2016 to 30 January 2017 remembering that she was paid up until the first of those dates. It was agreed that the loss was £4,158.

79. In those circumstances the total compensatory award is £4,458 and awarding 10% on the compensatory element adds £445.80. Accordingly the total award for compensation was £5,315.80, being a total of the sums I have mentioned.

Employment Judge Tom Ryan

Date 16 August 2017

REASONS SENT TO THE PARTIES ON
30 August 2017

FOR THE TRIBUNAL OFFICE