THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Ms L Pinkerton	**AND**	**Secretary of State for Justice**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On: 1 August 2017**

Before: **Employment Judge A M Buchanan**

Appearances
For the Claimant: **Mr Mugliston of Counsel**
For the Respondent: **Mr Royle of Counsel**

JUDGMENT ON REMEDY

It is the judgment of the Tribunal that:-

1 The respondent do pay to the claimant the sum of £4029.97p compensation for wrongful dismissal.

2 The respondent do pay to the claimant the sum of £22885.80p compensation for unfair dismissal.

3 The Employment Protection (Recoupment of Benefits) Regulations 1996 ("the 1996 Regulations") do not apply to this award.

4 The total sum due from the respondent to the claimant is £26915.77p

REASONS

Preliminary matters

1.1This matter came before me to deal with a remedy arising out of a finding that the claimant was both wrongfully and unfairly dismissed by the respondent.

1.2 The decision on liability was communicated to the parties in January 2017 and the respondent subsequently indicated an intention to appeal that decision.

1.3 The question of remedy was stayed pending the sift taking place at the Employment Appeal Tribunal ("EAT"). At the hearing it was confirmed that the only ground of appeal against the finding of wrongful dismissal was one rejected by the EAT on preliminary review. That matter was to be the subject of an oral hearing in late August 2017. If that application to the EAT fails then the appeal against the finding of wrongful dismissal will fall away. In those circumstances I was advised by Mr Royle that any award for wrongful dismissal which I might make would be discharged by the respondent without delay. Clearly payment of any award in respect of unfair dismissal will have to await the outcome of the appeal to the EAT. Both parties accepted that this was the position.

1.4 I remind myself that in the Judgment on Liability there is a finding of contributory conduct to the extent of 35%. Any question of a reduction in relation to the decision in **A E Dayton Services –v- Polkey [1988] ICR 142** remained an issue to be determined at the remedy hearing.

The Hearing

2. I heard evidence from the claimant who was cross examined. I had a bundle of documents before me extending to 80 pages. Any reference in this Judgment to a page number is a reference to the corresponding page in the bundle prepared for the remedy hearing.

Submissions

Claimant

3. On behalf of the claimant Mr Mugliston made oral submissions which I summarise briefly:-

3.1 The annual gross salary of the claimant was £20,977.80p. If there is added to this sum 20.9% gross contribution to pension by the respondent pursuant to the decision in **University of Sunderland –v- Drossou UKEAT/0341/16/RN** the gross annual salary becomes £25,362.15p. Tis would be the cap on any compensatory award pursuant to section 124(1ZA) of the Employment Rights Act 1996 ("the 1996 Act").

3.2 It is accepted that the basic award and compensatory award for unfair dismissal will be reduced by 35%.

3.3 In relation to **Polkey** it is the claimant's position that there should be no deduction at all because the unfairness in this case is so substantial that it would be impossible to assess any percentage chance of a fair dismissal. Effectively this would be creating a past which never happened. Whilst this may be appropriate in a redundancy type case, it is not appropriate in a case of this nature. If the matters which render a dismissal unfair are not mere procedural points then it is very difficult to apply the doctrine in **Polkey**.

3.4 The respondent could not have dismissed the claimant fairly for assaulting the prisoner because there was a finding by the Tribunal that there was no assault. The claimant genuinely saw a threat to herself and responded proportionately to it. It is inconceivable that the prisoner could have explained away all the inconsistencies in his account of the events if he had been properly interviewed with the benefit of the cctv recording. If the matter had been looked at fairly, the respondent would have reached the same conclusion as reached by the Tribunal – namely that there was no assault of the prisoner by the claimant as the claimant responded proportionately to the situation she faced.

3.5 If the prisoner had been interviewed what would he have said and would he have been believed? It is inconceivable that the prisoner would have explained away the inconsistencies in his statement and therefore dismissal would not have occurred.

3.6 Even if the respondent had reached a conclusion that there had been an assault of the prisoner by the claimant, then the respondent could not have fairly dismissed in those circumstances given the great amount of mitigation available.

3.7 None of the other matters found by the Tribunal as representing contributory conduct would have led to the dismissal of the claimant. Whilst the claimant is culpable for not completing the appropriate paperwork it is not sufficient to lead to her dismissal. The allegation of unprofessional conduct was not deemed so serious as to have amount to a matter justifying dismissal and this was confirmed at the liability hearing. Accordingly it was submitted that there should be no deduction under the doctrine in **Polkey**. Alternatively it was submitted that if there was to be a deduction under the doctrine in **Polkey** the total deduction including any deduction for contributory fault should not exceed 40%. Any deduction greater than that would not be just and equitable compensation as required by section 123 of the 1996 Act.

3.8 In relation to mitigation it was submitted that the claimant had mitigated her losses. Whilst a Prison Officer she had taken pride in her job and it is inconceivable that she would have sat around letting the losses mount up around her. She took reasonable steps to mitigate her loss bearing in mind her childcare responsibilities. The claimant now has a new job at Durham County Council and she will also have the benefit of the pension scheme. No details of the pension scheme are available but when the claimant was interviewed she did not press for those details. She would have continued until age 68 working for the respondent. Given the claimant's educational background and few qualifications she would surely have remained working for the respondent in employment which was well paid.

3.9 In respect of pension loss, it was submitted that the two calculations submitted in the bundle at pages 4/5 and 6/7 should be considered. It was submitted that the calculation of substantial loss was the appropriate schedule to follow given that the claimant would clearly have remained in the employment of the respondent until her retirement age of 68. The contract of the claimant with Durham, County Council is a temporary contract and any pension attributable to that role should not in any event be considered. It was noted that the respondent's counter schedule at page 9 placed the pension loss after 70% combined deduction for contributory fault and Polkey at £4852.72 and thus the full loss before any deduction was £15043.00p. The respondent is now saying that the claimant has suffered no loss at all in respect of pension. That is

not what the counter schedule of loss indicates. The extent of the dispute between the parties should be determined by the schedule and counter schedule of loss and it is not now open to the respondent to argue that there is in fact no pension loss at all.

3.10 The loss of statutory rights claim is clearly well-founded. It is clearly now not appropriate to make any award for Tribunal fees in light of the decision of the Supreme Court in **R (on the application of Unison) -v- Lord Chancellor 2017 UKSC 51.**

Respondent

On behalf of the respondent Mr Royle submitted:-

3.11 Procedural matters found by the Tribunal related to the fact that the prisoner was not re-interviewed and shown the CCTV recording. Neither of those matters would have made any difference. The prisoner would have had to say something to inculpate himself and exculpate the claimant and clearly that was not going to happen. The other matter raised by the Tribunal was the failure by the dismissing officer to consider mitigation once he had reached the view that gross misconduct had been made out. It was submitted that that made no difference to the outcome.

3.12 It was submitted that an appropriate level of deduction in total would be 70%. It was suggested that the Tribunal should consider alternative **Polkey** scenarios and express any view it felt appropriate in order to enable the parties to resolve matters depending on the outcome in the EAT.

3.13 In relation to the compensatory award it was submitted that the question to be asked is what has the claimant lost and that was a more difficult question that at first appears. If the claimant received payment from the respondent for working unsocial hour shifts this should be taken account of when calculating the compensatory award otherwise there was a risk of a windfall. It was suggested that the income of the claimant from the respondent should be reduced by some 30% to reflect this element.

3.14 A ten year old daughter is not a reason to avoid full time work. Many parents work full time and there has been a very obvious failure to mitigate in this case. It is submitted had proper efforts been made, the claimant would have found work on a similar salary to that being paid to her by the respondent especially when reduced by the unsocial hours premium. The claimant had evinced a closed mind to working full time or considering work other than that which could be reached by a short commute. The period of loss should be 6 months from dismissal or 12 months at most.

3.15 It was submitted that the net income received weekly by the claimant from her role at Lambton House was £173 rather than the £157 stated on the schedule of loss.

3.16 In relation to pension loss, it was for the claimant to prove her loss and that it was inappropriate to award either compensation based on this simplified or substantial loss approach because the guidance was withdrawn in 2016 at the time a consultation paper on pension loss was issued.

3.17 The calculation of any loss should reflect that fact that the claimant was a member of a career average scheme rather than a final salary scheme. The substantial loss

approach should not be followed as there was a considerable risk that the claimant would withdraw from the pension fund or resign from her employment. It was clear the claimant would have realised that the prison service was not the right place for her and she would have resigned her employment. It is clear that in light of the difficulties the claimant was encountering in the workplace and given her interest in working elsewhere, the claimant would have left the employ of the respondent within 3 to 5 years at most. The information provided in respect of the pension scheme of which the claimant was a member is inadequate.

3.18 It was submitted that it was clear from the evidence of the claimant that in reality she had a permanent job with Durham County Council which she was due to start and that carried with it a pension scheme. No information about that scheme had been produced.

3.19 It was submitted that there must be some loss to the claimant in respect of pension but it was submitted that the loss should be calculated on a simplified basis. It would not be right to work on an assumed contribution rate by the respondent of 20.9% because that was the rate across all employees and it cannot necessarily be the rate for the claimant. If 20.9% is taken for a period of one year then that comes to £4,200 which should be reduced by 35% and any further **Polkey** contribution. That simple approach would do justice in this case.

Claimant

3.20 In response Mr Mugliston stated that it was inappropriate to make any deduction for the unsocial hours payment being received by the claimant.

3.21 It was submitted that the claimant had fully mitigated her loss and it would not be right to cut off the claimant's pension loss after 6 or 12 months even on a simplified basis.

3.22 It is accepted that there should be an award of 13 weeks net pay for wrongful dismissal.

Findings of fact

4. Having considered both the written and oral evidence from the claimant and having taken account of the matters put to the claimant in cross examination and having considered the documents to which I was referred, I make the following findings of fact in relation to remedy on the balance of probabilities:

4.1 The claimant began work for the respondent on 3 November 2003 and was dismissed effectively from 5 November 2015. She was aged 47 at that time and had completed 12 years' service. The claimant is a single parent and lives with her daughter who is aged 12 years. Whilst in the employment of the respondent, the claimant worked for 28 hours each week which commitment enabled her also to take care of her daughter. The claimant worked so called family friendly shifts which enabled her to be at home some of the time when her daughter was not at school. When the claimant could not be at home, she used child minders to look after her daughter and also had help from her father.

4.2 Prior to working for the respondent, the claimant worked for 12 years in an office. The claimant left school with few qualifications. She has a qualification in English language but not in mathematics. On leaving school the claimant obtained typing qualifications at RSA Level 1 and Level 2. She worked first in the Post Office on a Youth Training Scheme placement and then at the Department of National Savings in Durham for 12 years. She then took a job working with children with learning disabilities and behavioural problems but when the centre at which she worked closed, she took work in call centres. She then took employment with Group 4 which involved escorting prisoners to and from prison and that led her to seek work with the respondent which she took up in 2003.

4.3 The claimant's gross monthly wage from the respondent was £1,748.15 and monthly net was £1,446.01 and this equates to £403.42 per week gross and £333.69 per week net. The claimant had the benefit of a pension scheme when working for the respondent. When she began work for the respondent the scheme was a final salary scheme but this had been amended to an average salary scheme. The first scheme was known as the Premium Pension Scheme and the second scheme as the Alpha Pension Scheme. If the claimant had worked until her normal state retirement age which in her case is age 68, she would have worked for a further 21 years. At the time of her dismissal, the contribution of the respondent to the claimant's pension scheme was 20.9% of her gross salary namely £4384.36 per annum which if added to the actual gross annual salary of £20977.80 produces an annual figure of £25362.16p. The claimant's contract of employment with the respondent gave her an entitlement to 13 weeks' notice pay.

4.4 The claimant sought alternative employment immediately after her dismissal. She made applications on line but could not produce details of applications made.

4.5 The claimant commenced alternative employment with Kelly Park Care Home on 16 February 2016 working 24 hours a week at £7.00 per hour. Tis employment involved caring for people in their own homes and involved the claimant in considerable travel for which she was not remunerated. This employment ended on 23 April 2017 when the claimant found other better paid and more convenient employment with Lambton Grange Care Home. At Lambton Grange Care Home the claimant earned £7.20 per hour for 22 hours per week. Her average weekly pay was £157.98. This work involved working with people with learning disabilities. Lambton House is very close to where the claimant lives. The claimant worked her hours at Lambton House by working two shifts per week including one in three weekends. The claimant was refused a reference by the respondent after her dismissal.

4.6 The claimant received Jobseekers Allowance ("JSA") for a very short time after her dismissal and before taking up employment with Kelly Park Care.

4.7 Whilst in employment the claimant continued to seek alternative employment. On 10 July 2017 the claimant was interviewed for a role with Durham County Council working in a Day Centre offering care for people with disabilities visiting that centre. She was successful in securing that role which she was due to take up on 7 August 2017 on at the rate of £8.25 per hour. The role is to work 30 hours each week. The role has the benefit of a local government pension scheme. The role offered to the claimant by

Durham is on a temporary contract until March 2018 but the claimant has been told that there is every likelihood that the post will be a permanent one. The claimant will work 5 days per week from 9.15 am until 3.15pm or 10am until 4pm. Whilst working at Lambton House the claimant worked for an NVQ in Health and Social Care at Level 2 and will continue with this course of learning at Durham County Council where she hopes to achieve NVQ Level 3.

The law

5.1 I reminded myself of the provisions of sections 118-126 inclusive of the Employment Rights Act 1996.

5.2 I have reminded myself of the direction I set out at paragraphs 14.13 and 14.14 in respect of **Polkey –v- A E Dayton Services Limited 1988 ICR 142** and **Software 2000 Limited –v- Andrews 2007 ICR** 825 and **Hill –v- Governing Body of Great Tey Primary School 2013 IRLR 274** which I set out in the Judgment on Liability in this matter which was sent to the parties on 12 January 2017.

5.3 It is a fundamental principle that any claimant will be expected to mitigate the losses they suffer as a result of an unlawful act and the Tribunal will not make an award to cover losses that could reasonably have been avoided. An employee is expected to search for other work, and will not recover losses beyond a date by which the Tribunal concludes she ought **reasonably** to have been able to find new employment at a similar rate of pay. The burden of proving a failure to mitigate is on the respondent (Fyfe v Scientific Furnishing Ltd [1989] IRLR 331).

5.4 I have reminded myself of the decision in **Wilding v British Telecommunications plc [2002] ICR 1079** in the Court of Appeal and paragraph 37 in the judgment of Potter LJ:

"37. … (i) It was the duty of [the Claimant] to act in mitigation of his loss as a reasonable man unaffected by the hope of compensation from … his former employer; (ii) the onus was on [his former employer] as the wrongdoer to show that [the Claimant] had failed in his duty to mitigate his loss by unreasonably refusing the offer of re-employment; (iii) the test of unreasonableness is an objective one based on the totality of the evidence; (iv) in applying that test, the circumstances in which the offer was made and refused, the attitude of [the former employer], the way in which [the Claimant] had been treated and all the surrounding circumstances should be taken into account; and (v) the court or tribunal deciding the issue must not be too stringent in its expectations of the injured party. I would add under (iv) that the circumstances to be taken into account included the state of mind of [the Claimant]."

and Sedley LJ, who explained the difference between a test of acting reasonably on the one hand and not acting unreasonably on the other, which are different.

"54. Take a not uncommon case: an employee who has been subjected to harassment at work is offered his job back with the same colleagues but with promised safeguards against repetition. He refuses it in circumstances in which the employment tribunal consider that it would have been reasonable to accept it; but they accept, too, that his decision to refuse was in all the circumstances not an unreasonable one. …"

"55. … it is not enough for the wrongdoer to show that it would have been reasonable to take the steps he has proposed: he must show that it was unreasonable of the innocent party not to take them. This is a real distinction. It reflects the fact that if there is more than one reasonable response open to the wronged party, the wrongdoer has no right to determine his choice. It is where, and only where, the wrongdoer can show affirmatively that the other party has acted unreasonably in relation to his duty to mitigate that the defence will succeed."

5.5 I have reminded myself of the decision of Langstaff P in **Cooper Contracting Limited –v- Lindsay EAT 0184/2015** where he set out a summary of the law on mitigation of loss thus:

(1) The burden of proof is on the wrongdoer; a Claimant does not have to prove that he has mitigated loss.
(2) It is not some broad assessment on which the burden of proof is neutral…If evidence as to mitigation is not put before the Employment Tribunal by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works: providing the information is the task of the employer.
(3) What has to be proved is that the Claimant acted unreasonably; he does not have to show that what he did was reasonable (see Waterlow, Wilding and Mutton).
(4) There is a difference between acting reasonably and not acting unreasonably (see Wilding).
(5) What is reasonable or unreasonable is a matter of fact.
(6) It is to be determined, taking into account the views and wishes of the Claimant as one of the circumstances, though it is the Tribunal's assessment of reasonableness and not the Claimant's that counts.
(7) The Tribunal is not to apply too demanding a standard to the victim; after all, he is the victim of a wrong. He is not to be put on trial as if the losses were his fault when the central cause is the act of the wrongdoer (see Waterlow, Fyfe and Potter LJ's observations in Wilding).
(8) The test may be summarised by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.
(9) In a case in which it may be perfectly reasonable for a Claimant to have taken on a better paid job that fact does not necessarily satisfy the test. It will be important evidence that may assist the Tribunal to conclude that the employee has acted unreasonably, but it is not in itself sufficient.

5.6 I have reminded myself of the decision of Slade J in **University of Sunderland –v- Drossou UKEAT/0341/16.** I have had regard to sections 220-229 of the 1996 Act. I have noted the decision is to the effect that the cap on the compensatory award for unfair dismissal referred to in section 124(1ZA) of the 1996 Act is to be calculated to include any pension contribution paid by the respondent in respect of the claimant. The same statutory provisions which define a "week's pay" are applicable also in calculating the basic award for unfair dismissal and so the pension contribution of the respondent will apply also for the purposes of calculation of the basic award.

Conclusions

6.1 I make a preliminary comment that the parties did not appear to have fully prepared for the remedy hearing. The claimant could not provide any details of the pension

scheme with Durham County Council of which she will have the benefit in the employment she began on 6 August 2017. The bundle had all the hallmarks of having been hastily prepared. In respect of pension loss I am left to make the best I can with such information as was provided.

6.2 There are several matters of general application to deal with before I move to my calculation of loss in this matter.

6.3 I drew the attention of counsel to **Drossou** and it was the agreed position that the pension contribution paid by the respondent to the claimant should be added to her annual gross salary for the purposes of calculating the limit on the compensatory award referred to in section 124(1ZA)(b) of the 1996 Act which in turn brings into play the provisions of sections 220-229 of the 1996 Act. In dealing with the limit in section 124(1ZA)(b) the limit on the amount of a weeks' pay which applies for the purposes of the calculation of the basic award (and other purposes) and as set out in section 227 of the 1996 Act has no application.

6.4 Counsel did not refer to recoupable state benefits received by the claimant. On the claimant's schedule of loss (page 2) the claimant records that she received 2 payments of £154 by way of JSA. This was not the subject of cross examination and it was not challenged. In particular I do not know the dates when that benefit was paid. I have decided to award damages for breach of contract to the claimant in respect of wrongful dismissal and that is for a period of 13 weeks from dismissal on 5 November 2015 until 5 February 2016. The claimant began work at Kelly Park on 16 February 2016 and so even if the claimant received any JSA at all between 5 and 16 February 2016, it was minimal. I choose to infer that the JSA received was wholly within the period of 13 weeks after dismissal and thus the amount received is wholly deductible from the award of damages for wrongful dismissal. In those circumstances, I conclude that the 1996 Regulations do not apply to the award of compensation for unfair dismissal and a declaration to that effect is set out at the head of this Judgment.

6.5 For the respondent, Mr Royle sought to advance an argument that the claimant received in her net pay from the respondent an unsocial hours premium and that I should reduce her net pay from the respondent and therefore her loss to reflect that matter. I do not agree. I consider it right to take the claimant's actual net earnings from the respondent and use the resulting figure as the basis of the calculation of her loss arising from the unfair and wrongful dismissal. I will make no such deductions in my calculations which follow. I am required by section 123 of the 1996 Act to calculate compensation which is just and equitable: it would be neither just not equitable to make any such deduction in my judgment.

6.6 I was asked to conclude that the claimant had failed to mitigate her loss and to calculate her losses accordingly. It is for the respondent to establish on the balance of probabilities that the claimant has failed to mitigate her losses. Mr Royle sought to do so by taking the claimant to various job vacancies included in the bundle (pages 26-74). I was not persuaded that the claimant's failure to apply for any of those roles amounted to a failure to mitigate. The claimant is not highly qualified. She lives in the Durham area. She is a single parent to a young child. For those reasons she finds travelling excessive distances to work difficult and she did not do so when she was employed by the respondent as she worked at Durham prison. The applications to which the claimant

was taken required her to have qualifications which she did not possess and required her to travel a very considerable distance from her home. Traveling as far afield as Blyth and Morpeth in Northumberland was not a reasonable request in my judgment. I am satisfied that by obtaining employment when the claimant did and where she did is evidence that the claimant has mitigated her loss arising from her unfair and wrongful dismissal. In particular in acquiring the position with Durham County Council the claimant has obtained work which is close to her home and fits in with her child care responsibilities and in my judgment will see within 12 months an end to the losses arising from the dismissal. Whilst the claimant did not evidence any other applications for work, I am satisfied that she has mitigated her loss and that there should be no reduction from the award of compensation based on any alleged failure to mitigate her loss.

6.7 I find the question of how to approach the question of pension loss difficult. For the respondent, Mr Royle submitted that it was inappropriate to approach the matter as set out in the Guidelines prepared for use in Employment Tribunals (third edition 2003) as these were withdrawn when a consultation paper on pension loss was produced in March 2016 to which I was taken and which I have considered. Since the hearing took place and whilst I was considering this judgment, there has been issued Presidential Guidance on the Principles for Compensating Pension Loss. This guidance was not issued at the time of the hearing before me and for that reason I have not felt it appropriate to have reference to it in the circumstances of this case. If I was to do so, it seems to me that I would have to give the parties the opportunity to make submissions on that Guidance either in writing or at a hearing. Given the appeal which is ongoing and given that the claimant has found new pensionable employment with Durham County Council, I considered that that was not a proportionate step. However, if the parties consider that it would make a difference to the outcome in this case, then application can be made for reconsideration and I will consider any such application if it is made in accordance with Rules 70-73 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

6.8 I am satisfied that the pension loss to the claimant is not as great as it appears in the calculations produced by the claimant (pages 4-7) because neither calculation includes reference to the pension scheme of which the claimant is now a member with the Durham County Council. I was not given details of that scheme and so I am left to deal with the calculation of pension loss without full information. I conclude that it is appropriate to consider the loss on the basis of the contribution (albeit a notional one) made by the respondent to the schemes of which she was a member and which I take as 20.9% of gross salary pursuant to the information set out at page 80. I set out my calculation below which effectively adopts the approach urged on me by Mr Royle although for a longer period than was submitted should be the case. I set out my conclusions and calculations below.

6.9 I turn to the question of any deduction from remedy pursuant to the doctrine in **Polkey**. I have concluded that no such deduction is appropriate. In reaching this conclusion I prefer the submissions of Mr Mugliston on this point. The reasons I struck down the claimant's dismissal as unfair are substantial and numerous. The failure properly to investigate was substantial and I can only guess what prisoner A may have said if he had been interviewed with the benefit of the Recording as I conclude he should have been. There needs to be a rational basis for the speculation required of a

Tribunal in carrying out a so called **Polkey** exercise and in this case there is no such basis for speculation.

6.10 I concluded that the consideration given to the substantial mitigation in this matter was not reasonable and that the decision to dismiss was preordained. To speculate what might have happened if the mitigation of the claimant had been properly considered is difficult. I was asked to set out my conclusion on this point on the basis that the EAT might strike down the other grounds on which the dismissal was declared unfair but leave the conclusion in respect of mitigation in place. I am prepared to undertake that exercise. It seems to me that the mitigation in this case was very substantial for the reasons I set out at paragraph 15.10 of the Judgment on Liability. I conclude that if that mitigation had been considered with an open mind and reasonably as it should have been, then the chance of a fair dismissal occurring was very low and I would place that chance at no greater than 10%. However, for the reasons given in the Judgment on Liability and above I conclude that there should be no further deduction from remedy by reason of the doctrine in **Polkey** and I confirm the deduction of 35% from both the basic and compensatory awards at 35% by reason of contributory conduct.

Wrongful Dismissal

6.11 I deal first with the claim for wrongful dismissal. I consider it appropriate to award damages to the claimant for wrongful dismissal. It was accepted that her contractual right to notice pay was for 13 weeks' pay and I award that sum. The net weekly wage of the claimant whilst employed by the respondent was £333.69 which produces a figure of £4337.97p. In that period of 13 weeks I was told that the claimant received £308 in Jobseekers' Allowance and that figure was not challenged. I consider it is right to deduct that sum resulting in an award for wrongful dismissal of £4029.97p.

6.12 For the reasons set out above I accept that the claimant has not failed to mitigate her loss. The period of loss covered by the award of damages for wrongful dismissal is 5 November 2015 until 5 February 2016. There is no deduction for contributory fault from this award given that the award is for breach of contract and is not awarded pursuant to the provisions of the 1996 Act.

Unfair Dismissal

6.13 The claimant indicated that she wished to receive the remedy of compensation. No other potential remedy was considered.

Basic Award

6.14 I calculate that the amount of a weeks' pay of the claimant including the pension contribution of the claimant was £487.73 per week. This is in excess of the limit on the amount of a weeks' pay for the purposes of section 227 of the 1996 Act at the point of dismissal which was £475. The claimant was aged 47 at dismissal and had 12 years' service and thus the appropriate multiplier applying the formula in section 119(2) of the 1996 Act is 15. That produces an award of £7125.00p.

Compensatory Award

6.15 I turn to the compensatory award. I accept that the claimant worked for Kelly Park Care Home from 3 February 2016 until 23 April 2016. She earned £166.44 per week for 9 weeks which totals £1497.96p. After that the claimant worked at Lambton Grange and earned on average the accepted figure of £173 net per week. The period of time from 23 April 2016 until 6 August 2017 when the claimant began work for Durham County Council is 67 weeks which produces a figure of £11591.00p. The period from 3 February 2016 until 6 August 2017 is 78 weeks. In that period the claimant would have earned 78 x £333.69 which totals £26027.82p. From this is to be deducted £1497.96 and £11591.00 which totals £13088.96. That produces a loss of £12938.86p.

6.16 Turning to the position with Durham County Council, I accept that the claimant will work 30 hours per week and will earn £8.25 per hour and that will produce a weekly gross income of £247.50p. Understandably the claimant could not produce any pay slips to evidence her net income. I note the gross annual salary will be £12870. The personal allowance is £11000 per annum leaving tax to be paid at 20% on £1870 namely £374. National Insurance is payable by the claimant on earnings over £155 per week at 12%. This equates to £11 per week which is £572 per annum. Annual deductions will total £946 which produces a net income each year of £11924 which is £229.30p and I will adopt that figure for the purposes of my calculation of future loss. The claimant earned £333.69 per week from the respondent and so the weekly loss after the Durham County Council income is taken into account is £104.38p. This represents an annual figure of £5427.88.

6.17 The claimant has secured employment with Durham County Council and I accept that there will be opportunities for the claimant to seek higher paid posts in that same employment in particular once she has completed further qualifications. I conclude that by August 2018 the claimant should be able to secure a role which will pay her the same level of remuneration as she had from the respondent. Accordingly I will award 12 months for future loss of earnings. Without taking account of pension loss at this stage, I calculate that the loss to the claimant of income until 6 August 2018 will be £104.38 x 52 namely £5427.76p.

6.18 In relation to pension loss, I find myself with insufficient information to apply what was previously known as the simplified loss approach or the substantial loss approach. The position is made easier by the fact that the claimant has secured public sector employment which has the benefit of a pension scheme. In the absence of information about the scheme with Durham County Council I conclude that once the claimant has reached the level of income with Durham which she enjoyed with the respondent, there will be no ongoing pension loss. Thus the pension loss covers the period 5 November 2015 until 6 August 2018 which is 143 weeks.

6.19 I accept the figure of contribution to the claimant's pension scheme by the respondent was 20.9% as set out in the letter from SSCL at page 80. Given the way I have decided to approach the question of pension loss I consider this to be the correct figure to adopt. 20.9% of the claimant's gross income from the respondent at dismissal was £4384.36 namely £84.31 per week. That figured multiplied by 143 is £12057.01p. From 6 August 2017 the claimant will have the benefit of the Durham scheme and I will assume a contribution rate to that scheme by Durham at the same level. 20.9% of

£12870 is £2689.83 or £51.72 per week. The claimant will receive that benefit in the period from August 2017 until August 2018 and it is right to deduct that sum from £12057.01 giving an awardable pension loss of £9367.18p.

Table of Compensation awarded

7 I calculate that the compensation due to the claimant as follows:

Wrongful dismissal

13 weeks x £333.69	£ 4,337.97
Less JSA	£ 308.00
Award	**£ 4029.97** (A)

Unfair dismissal

Basic award

15 x £475	£7125.00
Less 35% contributory fault	£2493.73
Award	**£4631.25** (B)

Compensatory award

Earnings

3.2.16-6.8.17			
78 weeks x £333.69		£26027.82	
Less:			
Kelly Park	£1497.96		
Lambton Grange	£11591.00	£13088.96	£12938.86

Add: **Earnings – Future Loss**

6.8.17.- 5.8.18			
52 X £333.69	£17351.88		
Less:			
Durham CC	£11924.00		£ 5427.88
			£18366.74
Less 35% Contribution			£ 6428.35
Award			**£ 11938.38** (C)

Pension Loss

Figure from above	£9367.18
Less 35% Contribution	£3278.51
Award	**£6088.67** (D)

Loss of statutory rights

Gross award	£ 350.00
Less 35% Contribution	£ 122.50
Award	**£ 227.50** (E)

SUMMARY

Wrongful Dismissal	£4029.97 (A)
Basic Award	£4631.25 (B)
Compensatory Award	£18254.55 (C D E)
Grand Total	**£26915.77**

Final Matters

8.1 In light of the amount of compensation awarded, it is not necessary to gross up the award as I conclude that the first £30000 compensation will be exempt from income tax by reason of the provisions of Section 401 of the Income Tax (Earnings and Pensions) Act 2003.

8.2 The amount of the compensatory award does not exceed the statutory cap set out in section 124(1ZA)(b) of the 1996 Act.

8.3 For the avoidance of any doubt, Tribunal records indicate that the claimant was granted remission of all fees payable in respect of these claims.

EMPLOYMENT JUDGE A M BUCHANAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 27 September 2017

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JUDGMENT SENT TO THE PARTIES ON

28 September 2017

AND ENTERED IN THE REGISTER

G Palmer

FOR THE TRIBUNAL