EMPLOYMENT TRIBUNALS

Claimant: **Ms C Cattell**

Respondent: **Dr Rachael Sullivan t/a St Peter's Avenue Dental Practice**

Heard at: **Nottingham** **On:** **19 February 2018**

Before: **Employment Judge R Clark**
Mr P Jackson
Mr R Loynes

Representation

Claimant: **Written submissions from the Claimant**
Respondent: **Written submissions from Mr C Bourne of Counsel**

REMEDY JUDGMENT

The unanimous judgment of the Employment Tribunal is :-

1. The claim for unfair dismissal having succeeded, and subject to the application of the recoupment provisions below, the respondent shall pay to the claimant the sum of £2,343.03 made up of.

    a. A basic award of: £1,461.24
    b. A compensatory award of £ 881.79

2. The Employment Protection (Recoupment of Job Seeker's Allowance and Income Support) Regulations 1996 apply to the award as follows :-

    a. Monetary Award: £2,343.03
    b. Prescribed Element: £476.64
    c. Period to which (b) relates: 21/07/2016 – 06/09/2016
    d. Excess of (a) over (b): £1,866.39

REASONS

1 Introduction

2 On 25 October 2017, the Tribunal gave judgment dismissing the claimant's claims of discrimination, but upholding the claim of unfair dismissal. Today's matter was listed as an attended remedy hearing to be heard at Lincoln. On 8 February 2018, the claimant wrote to the Tribunal indicating that she would not be attending the remedy hearing and instead set out her submissions in writing. She provided a revised schedule of loss. The Tribunal indicated it was minded to proceed with the hearing in the claimant's absence, taking her written submissions into consideration in accordance with rules 41, 42 and 47. In the interests of saving costs and proportionality, the time for the respondent to similarly file written submissions under rule 42 was abridged, should she so wish. The Respondent took up that opportunity and, consequently, the remedy decision was determined on the parties' respective written submissions.

3 The Basis of the Unfair dismissal

3.1 Reference should be made to our earlier decision. In summary, we found a breach of the implied term of trust and confidence arising out of the handling of the disciplinary process adopted by the respondent but, in respect of which, the claimant subsequently affirmed the contract. There was then a further breach of the implied term in the circumstances of the proposals for the claimant's return to work which was not waived by the claimant and in response to which, she resigned from her employment. The proposals included the imposition of various adjustments or safety requirements as a condition of the claimant's return to the workplace and an informal warning of the consequences of a repeat of similar misconduct. We found there to have been reasonable and proper cause in respect of imposition of adjustments and also in respect of the informal warning so far as it related to the matters that the respondent had first hand experience of. In respect of the other disciplinary allegations, that reasonable and proper cause was not made out. It is in that limited respect that the actions of the employer breached the implied term and the resignation that flowed in response amounted in law to a dismissal.

3.2 We rejected the respondent's contention that any dismissal was nonetheless a fair dismissal.

4 The Issues

4.1 The claimant seeks financial compensation only. Her revised schedule of loss is limited and the underlying arithmetic is not in dispute, save in respect of loss of benefits. The issues today are principally how we apply and adjust those figures to arrive a final figure of compensation.

4.2 We have before us the original schedule and counter schedule of loss, the claimant's revised schedule of loss, the parties' respective written submissions for this hearing and the original evidence and bundle filed. At the conclusion of our liability judgment, we made a number of observations identifying what then

appeared to us to be the likely remedy issues. From all those sources, we have identified the following five issues to be determined today:-

a) The period for which the respondent should be liable for any losses.
b) Whether there should be any adjustment in respect of *Polkey.*
c) Whether the claimant is entitled to, and if so the extent of, any compensation for the loss of discretionary benefits.
d) Whether there should be any adjustment under s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992.
e) Whether there should be any adjustment in respect of contributory conduct.

5 Discussion and Conclusion on the Issues

The Period for Which the Respondent Should be Liable.

5.1 The respondent is liable to compensate the claimant so far as is just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. All claimants are under a duty to mitigate any loss. That duty is generally understood to be to act as one might reasonably act if one had no expectation of a respondent making up the losses. The period of loss ends when a claimant recovers the financial position they enjoyed before dismissal, or at such time as the Tribunal determines they ought to have.

5.2 In this case, the claimant did quickly obtain new employment within around 6 weeks of the date of termination, commencing on 6 September 2016. It is in a different sector and is remunerated at a slightly lower hourly rate but over more hours per week. Her total income is greater than it was in her employment with the respondent. So far as the hourly rate is less than that paid by the respondent and the claimant has had to work more hours to achieve the same level of income, that is potentially relevant to the question of whether the claimant has a continuing loss or has mitigated her loss. However, the claimant is not continuing to seek alternative employment at a higher hourly rate. She has not claimed any ongoing losses after the new employment commenced and we are now some 17 months on and as far as we can tell from what is before us, that employment continues. She is working in a positive environment and it seems to suit her circumstances. We therefore regard the new employment as fully mitigating her loss.

5.3 We conclude that the period for which the respondent should be liable to compensate the claimant ends with the claimant's new employment with effect from 6 September 2016.

Whether there should be any adjustment in respect of "Polkey".

5.4 The considerations of *Polkey* are part and parcel of the just and equitable nature of the exercise before us. In this case, it is not engaged in respect of whether or not a fair procedure would have made any difference to the outcome, but to the wider consideration of whether the employment relationship would have fairly come to an end at future date in any event.

5.5 The claimant argues that it would not and, had the events of 2016 not happened as they did, she would still be employed by the respondent today and that would have lasted to her retirement. The respondent argues at the other extreme. Mr Bourne points to the deterioration in their relationship, the claimant's view of the respondent's qualities as an employer and her settled intention to resign at an earlier stage of the chronology although she later affirmed that breach. The relationship is characterised as being on a knife-edge and there remained matters of concern about the claimant's conduct and her changing position on whether she required adjustments in the workplace or not. The respondent argues that, whatever the actual findings going to the unfair dismissal, in considering how the relationship might have continued but for that dismissal, we should conclude that the underlying attitude of the claimant was unlikely to change.

5.6 We do take the view that the relationship was destined to continue, as Mr Bourne puts it, "on a knife edge" and we are satisfied that there was a real likelihood that the employment relationship would have come to an end some point not too long after the actual date of termination. The crux of this issue is when, on the balance of probabilities, that would have happened. We are not of the view that the facts and findings allow us to conclude that, had there not been the accusations of misconduct that led to the breach and unfair dismissal, there would have been a resignation in any event at the same time. However, we do take the view that the wider recent background had set the parties on a particular course. The other matters need to be seen in their context. Although any earlier breaches had been waived, they do no disappear from the factual background to the resignation that did in fact happen. The parties' respective views of each other remained soured. Stripping out the implication of a finding of guilt from some of the misconduct matters still leaves the rest of the picture in place and that is enough to keep that continuing relationship on the metaphorical knife edge. We take the view that the key factor in the difference between the timing of the resignation that did happen, and the future resignation in our reconstruction of what is likely to have unfolded, is likely to have been whether there was alternative employment immediately available to the claimant. In other words, we find the claimant's employment would have come to an end in a more controlled way, linked to her obtaining a new position. We know that in fact happened as soon as 6 September 2016. The more controlled situation that would then have existed may have meant that employment started slightly later as the resignation was likely to have been with notice. We have therefore come to the conclusion that, even if there had not been an unfair dismissal when there was, on the balance of probabilities, the employment would have ended by the end of September 2016.

5.7 Consequently, we make no percentage deduction to the award but we do apply the alternative principle of Polkey. The result is that, even if we had not already determined that the claimant had mitigated her loss by 6 September, in any event we would not have awarded losses beyond the end of that month.

Whether the claimant is entitled to, and if so the extent of, any compensation for the loss of discretionary benefits.

5.8 In her schedules of loss, the claimant has sought compensation to reflect the loss of free or discounted dental care whilst an employee of the Respondent. In her revised schedule of loss, she particularises this loss as being the cost of a

replacement dental insurance plan and certain items of treatment undertaken. They total £240.20. She says how there was a verbal agreement with the predecessor employer, Mr Hind, which continued with the respondent to the effect that employees would pay only for costs to the practice of materials or other services bought in from third parties.

5.9 The respondent argues that the treatment undertaken was not a contractual benefit but accepts the claimant will have had some treatment at no cost. She argues the nature and frequency of the free treatment did not amount to a contractual promise. She points to the fact that Mr Hind gave no evidence on this point in his witness statement.

5.10 We have also seen recent disclosure of the claimant's dental records made by the respondent practice which confirm the treatment and, in some cases, payments made. These cover the period before and after the transfer of the employment to the Respondent and appear to be consistent with the basis on which the claimant says treatment was provided to staff. We accept that the employer had over the years established a mutually accepted practice with its staff whereby the claimant could expect, and the employer would provide, reasonable levels of dental treatment at no cost save the costs incurred by the practice to others. That is a loss to the claimant on the termination of her employment which can be measured in the cost to her of obtaining replacement dental care.

5.11 We have determined that the respondent is liable for financial loss only to 6 September 2016. There is little further information before us concerning the amounts claimed. Some of the items claimed are explicitly dated within that period and we note the claimant has not sought other losses beyond that period. Considering the claim in the round, we accept these are costs incurred by the claimant during that short period and which, but for the circumstances of her employment ending, would have been free to her. We therefore conclude it is just and equitable to award compensation in the sum of £240.20

Whether there should be any adjustment under s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

5.12 The claimant initially sought an uplift to any award under s.207A alleging breaches of the ACAS code. That is not restated in the revised schedule of loss although in her written submissions, the claimant does assert the respondent's procedural failings generally and, specifically, in respect of the handling of her initial grievance.

5.13 The respondent's counter schedule seeks a reduction to any award on the basis of the claimant's failure to lodge an appeal. In her written submissions, the respondent further argues that the grievance was concluded, albeit with delay and that the appeal intimated by the claimant did not in fact arise. In respect of the dismissal itself, it is argued that this occurs after the disciplinary decision had concluded no disciplinary sanction should be imposed and that matters had moved on to agreeing a return to work plan. The respondent relies on *Lund v St Edmunds School UKEAT/0541/12/KN* and *Phoenix House v Stockman and another UKEAT/0264/15/DM* as to the extent of the application of the ACAS code.

5.14 We are not satisfied this is a case in which any adjustment is appropriate. Whilst the grievance and the disciplinary process form part of the factual background to the case, they had concluded by the time the circumstances of the dismissal arose. In any event, to the extent that the claimant's challenge to procedure is particularised, it appears to focus principally on the delay in resolving the grievance and the absence of formality in dealing with it at meetings and initially in writing.

5.15 We accept Mr Bourne's submission that the ACAS code is not engaged in the circumstances of this dismissal. However, even if it is, as far as the disciplinary process was concerned we are not persuaded to make an adjustment. Firstly, whilst it is not difficult to point to deficiencies in the employer's handling of her concerns about the claimant generally, ultimately, the essential elements of a disciplinary procedure were present in what in fact unfolded. By the time the matters occur which breached the contract of employment, the employer had stepped back from its disciplinary process. Over all, the power given to us by s.207A is no more than a power to make an adjustment where it is just and equitable to do so. We are not satisfied it is in respect of either the claimant's failure to appeal the grievance decision or the employer's disciplinary process. Consequently, for those reasons we decline to make any adjustment either way.

Whether there should be any adjustment in respect of contributory conduct.

5.16 The respondent seeks a substantial reduction in compensation on grounds of the claimant's contributory conduct either extinguishing, or at least substantially reducing, any awards under both s.122 and 123 of the 1996 Act. She points to our finding that the way the claimant conducted herself when working alongside the respondent was out of choice and a conscious manifestation of what was by then her sense of dissatisfaction with her employment. She also relies on the manner in which the claimant behaved during the various hearings held which was at odds with the claimant's claim of intimidation by the employer. She points to the claimant's inconsistent accounts, in particular as to whether the disability was the cause of any difficulties in the workplace.

5.17 In her written submission the claimant accepts, at least as far as acknowledging, why the tribunal may reduce compensation due to contributory behaviour but asks that it is put in the surrounding context of what had been happening to her both before and at the material time in terms of her health and her relationship with her employer.

5.18 Contributory conduct for the purpose of s.123 and other relevant conduct to be taken into account for the purpose of s.122 are to be considered within the overarching concept of an award that is just and equitable. Justice and equity applies to both parties. In respect of contributory conduct under s.123, *Nelson v BBC (No2) [1979] IRLR 346* makes clear there are three constituent elements to any reduction. They are findings of culpable or blameworthy conduct, a causal link to the ultimate dismissal and that it remains just and equitable to make the reduction. The distinction between an adjustment under s.123 and s.122 is essentially the causal link to the dismissal and whilst that might therefore mean in some cases a different approach is justified between the two awards, in most cases any reduction will apply equally to both awards.

5.19 Against those principles we have carefully reviewed the submissions received together with our findings made in the liability judgment. As we indicated previously, and as the claimant understands, there was conduct found that we do categorise as culpable or blameworthy in what we have described as the conscious manifestation of her sense of dissatisfaction with her employment. There are also other points in the history of this matter where the claimant's conduct may be criticised. In particular, her fluctuating position on whether she required adjustments or not and her stance during the hearings with the respondent. However, those latter matters can be contrasted with the former which arises before her suspension. Firstly, they are not matters which have a clear causal connection with the basis of what would become the breach of contract and, therefore, dismissal. Secondly, they occur during a time where there is equal, if not greater criticism, of the respondent's conduct of the matter which in our judgment goes to the justice and equity of making any adjustment. The former conduct is slightly different in that, even though it may itself be separated from the breach of contract, it is that which started the ball rolling towards what became the dismissal. Whilst the factual matrix by the time of the dismissal was considerably broader, we are satisfied there was culpable conduct which was causative or contributory and that the justice and equity of the situation does require some reduction to be made. The complexity of the entire factual matrix leads us to keep the size of the reduction in proportion. We reduce both basic and compensatory award by 25%.

6 The Calculation.

6.1 Against those conclusions on the issues, we arrive at the following calculation of compensation payable.

6.2 The basic award is a matter of arithmetic and is agreed subject to any reductions. The claimant is entitled to £1948.32 less 25% which equals **£1461.24**.

6.3 As to the compensatory award, we are compensating only for immediate, or past, financial loss as the period of loss had ended before this hearing. That is made up of lost wages agreed in the sum of £865.92, less the mitigation income received from temporary work of £230.40 amounting to a total loss of £635.52. To that must be added the loss of benefits enjoyed in employment which we award in the sum of £240.20 together with a notional award of compensation for the loss of statutory rights. That has been claimed in the sum of £300. The respondent does not explicitly address this in her written submissions but acknowledged the sum of £300 in her counter schedule of loss. We are satisfied that £300 is an appropriate figure to award.

6.4 All of those figures must be reduced by 25%. The result is that loss of wages reduced to **£476.64**, loss of benefits to **£180.15** and the award for loss of statutory rights to **£225**. We do not account for the £446.42 said to have been paid in job seeker's allowance. This is a recoupable benefit to be charged against the prescribed element of the compensatory award insofar as it relates to loss of wages between the dismissal and 6 September 2016. Consequently, we make no adjustment in our calculations but will, instead, express our judgment in compliance with the 1996 Regulations.

Employment Judge Clark

Date 19 February 2018

REASONS SENT TO THE PARTIES ON

26 February 2018

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FOR THE TRIBUNAL OFFICE