EMPLOYMENT TRIBUNALS

Claimant: X

Respondent: Y

Heard at: Ashford

On: 20th & 21st August 2018

Before: Employment Judge Pritchard

Representation
Claimant: Mr J Cook, counsel
Respondent: Mr J Davies, counsel

Interpreter: Mr J Abraham

JUDGMENT

1 The Claimant's claim that he was unfairly dismissed is well-founded and accordingly succeeds.

2 The Respondent is ordered to pay to the Claimant compensation as follows:

a. Basic award in the sum of £2,592.00

b. Compensatory award in the sum of £12,424.50.

The prescribed element is £12,039.50 and the prescribed period is 8 August 2015 to 7 July 2016. The amount by which the monetary award exceeds the prescribed element is £385.00.

The total award is £15,016.50

REASONS

Introduction

1. The Claimant claims unfair dismissal. He claims eleven months loss of wages together with a basic award. The Respondent resists the claim.

2. The Tribunal heard evidence from the Respondent's HR Business Partner, from the Claimant and from the Claimant's wife. The Tribunal was provided with a bundle of documents to which the parties variously referred. At the conclusion of the hearing the parties made oral submissions, Mr Cook amplifying his written submissions.

3. Evidence and submissions was heard on the first day of the listed hearing; the second day was used by the Tribunal in deliberation and in preparation of this judgment.

Issues

4. The issues were discussed at the commencement of the hearing and can now be described as follows:

    4.1. Whether the Respondent can show the reason, or if more than one the principal reason, for the Claimant's dismissal and that it was for a reason relating to the Claimant's conduct. This will require the Respondent to show that they believed the employee was guilty of misconduct;

    4.2. Whether the Respondent had reasonable grounds upon which to sustain that belief; and

    4.3. Whether at the stage at which that belief was formed on those grounds, the Respondent had carried out as much investigation into the matter as was reasonable in the circumstances.

    4.4. Whether the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted

    4.5. The Tribunal will have regard to any provision of the ACAS Code of Practice 1 of 2015 which appeared to be relevant to any question arising in the proceedings and take it into account in determining that question

    4.6. Whether any defects in the original disciplinary hearing or pre-dismissal procedures were remedied on appeal thus curing any such defects.

    4.7. If the Tribunal finds the dismissal was unfair, whether the Respondent might or would have dismissed the Claimant in any event and whether any compensation should be reduced accordingly (Polkey).

5. The Respondent confirmed during the course of the hearing that it would not seek to argue that the Claimant caused or contributed to his dismissal such that any compensation should be reduced thereby.

Findings of fact

6. At material times, the Respondent operated twenty-seven care homes in the South East of England and employed approximately 1,300 employees. At material times the Respondent had a dedicated Human Resources department.

7. The Claimant's native language is Malaylam and he has a limited ability to speak or understand written English.

8. The Claimant was employed by the Respondent as a Care Assistant at one of the Respondent's care homes in St Leonards on Sea from 24 October 2006 until his summary dismissal on 7 August 2015. At material times the Respondent operated two other care homes in St Leonards.

9. The care home in which the Claimant worked was occupied by both residents suffering from dementia and residents with general nursing needs.

10. Apart from an incident which took place in 2013, and for which the Claimant was issued with a twelve month written warning, there was no evidence before the Tribunal to suggest that the Claimant was an unsatisfactory employee.

11. On 26 June 2015, one of the Claimant's colleagues, A, complained to the Respondent in writing that the Claimant had that day approached her from behind and rested his belly on her back. A also complained, in terms, that the Claimant had previously taken photos and touched her backside, a matter which had been sorted out by a previous manager.

12. On the same day, another colleague, B, the sister of A, complained to the Respondent in writing that on 19 June 2015, as she was assisting a resident in a wheelchair, the Claimant had approached her from behind and touched her breasts. She also complained that the Claimant had shown her sex videos on his telephone when they were on duty together, stroked her thigh, and smacked her bottom. She added that the Claimant had touched her breast on more than one occasion, had taken pictures of her and had hugged her.

13. The Respondent suspended the Claimant on 26 June 2015. The Claimant was informed that his suspension followed allegations from two members of staff that the Claimant had been sexually harassing them. However, no further details of the allegations were provided to him.

14. The Claimant attended an investigation meeting with the Respondent's Care Home Manager on 8 July 2015. The notes of the investigation meeting, which on the Respondent's account lasted eighteen minutes, suggest that the allegations made by B – that the Claimant had touched her breasts and legs and taken photos, were denied by the Claimant. He also denied touching the breasts of any female colleague. It is not apparent from the notes that the allegations made by A were specifically discussed. In the absence of any evidence of the Care Home Manager or the note-taker present, the Tribunal accepts the Claimant's evidence that he asked for his wife to be present because of his difficulty understanding the English language but that this was refused. The Respondent did not arrange for an interpreter to be present.

15. At the end of the meeting the Claimant reminded the Care Home Manager that he was going to India for a pre-planned holiday on 12 July 2015. He was due to return to the UK in time to return to work on Monday 27 July 2015. In the event, however, the Claimant was ill with a chest infection while in India and his wife made a telephone call to the Respondent to say that his return to the UK would be delayed. The Claimant's wife was unable to speak direct to the Care Home Manager who was in a meeting and asked for the information to be passed on.

16. On 15 July 2015, a third colleague, C, complained to the Respondent that when she first started employment in 2012 the Claimant had groped her breast, bottom and private areas. She also stated that she had witnessed an incident "a couple of weeks ago" when the Claimant had backed up against "Mo" and that the Claimant had done this several times to both and "Mo" and herself.

17. By letter dated 28 July 2015, the Respondent's HR Business Partner invited the Claimant to attend a disciplinary hearing on 31 July 2015. The disciplinary allegation was said to be "sexual harassment". The written complaints of colleagues A, B and C were enclosed together with a brief note of the investigation meeting which had been held with the Claimant. The letter stated, among other things:

> *It is important that you attend this hearing should you fail to do so without good reason, this failure will be treated as a wilful refusal of a reasonable management instruction and will be added to the matters of concern already under consideration in the rearranged Disciplinary Hearing. Repeated wilful refusal of a reasonable management instruction may be deemed to be Gross Misconduct which could in itself warrant dismissal.*
>
> *Please contact me on* [telephone number] *immediately on receipt of this letter, to confirm your attendance at the above Hearing…*

18. The Claimant did not contact the Respondent and did not attend the disciplinary hearing. This is unsurprising since the letter had been sent to his home address while he remained in India.

19. By letter dated 3 August 2015, because the Claimant had failed to attend the disciplinary hearing, the Respondent's HR Business Partner informed the Claimant that he was required to attend a re-arranged disciplinary hearing on 6 August 2015. The letter set out a further allegation which would be considered:

> *"Wilful refusal of a reasonable management instruction in that you failed to attend the Disciplinary Hearing on 31st July 2015 without a reasonable explanation"*

20. On 6 August 2015 the Respondent's Peripatetic Manager held the disciplinary hearing in the Claimant's absence. After consideration of the documents, the Peripatetic Manager concluded that there was enough evidence to conclude that sexual harassment had taken place and that the Claimant should be dismissed with immediate effect.

21. The Claimant and his wife returned to the UK on 6 August 2015, arriving at their home at 10.00 pm.

22. The Peripatetic Manager wrote the Claimant on 7 August 2015 to inform him that he was dismissed with immediate effect, the reason for dismissal being:

    - *Sexual harassment*

    - *Repeated, wilful refusal of a reasonable management instruction in that you failed to attend two scheduled Disciplinary Hearings without a reasonable explanation*

23. On 7 August 2015, the Claimant was arrested by the police, his former colleague B having alleged that the Claimant had raped her. On 8 August 2015, the Claimant was bailed by the police subject to the following conditions:

    a) Not to go to [the road in which the Respondent's care home was located]

    b) Not to go to [the nursing home where B worked and where the Claimant formerly worked]

    c) Not to contact [B] directly or indirectly by any means, including electronic device

24. By letter dated 12 August 2015 the Claimant appealed against his dismissal. His grounds for appeal were that he had not received notification of the disciplinary hearings because he had been in India as the Respondent had been informed by his wife during the telephone call on 24 July 2014. He denied the allegations made against him. He complained that he had been unfairly treated, that the investigation had been unfair, and that a fair procedure had not been followed.

25. The Respondent's Area Manager held an appeal hearing on 21 August 2015. The Claimant was accompanied by an individual who spoke Malayalam and could interpret for the Claimant. With regard to the appeal hearing, the Tribunal finds the following:

    - The Claimant denied the allegations, claiming that the complainants had been lying;

    - The Claimant's response to being asked why the complainants might have had cause to fabricate their allegations was that they were lazy;

    - The Area Manager told the Claimant that she did not need a copy of the medical certificate from India which he had produced;

    - The Claimant explained the circumstances in which he remained in India and discovered the Respondent's letters when he returned home;

    - The Area Manager reminded the Claimant's companion that she could not answer on the Claimant's behalf;

26. By letter dated 22 September 2015, the Area Manager informed the Claimant that his appeal had been unsuccessful. She reached the following conclusions:

    26.1. The Claimant had not followed company procedure by notifying the Home Manager in person of his sickness and his extended stay in India was treated as absence without leave;

    26.2. That the Claimant's only explanation as to why the complainants might have made the allegations was that they were lazy;

    26.3. That having had regard to the work areas where the alleged incidents took place, and having examined the signing sheets, it was entirely was possible that the Claimant could have been in contact with the complainants;

    26.4. The Claimant had had a fair opportunity to respond the allegations as it was his own failure to notify the Respondent of his absence in accordance with company policy that resulted in him not being aware of the proposed disciplinary hearings.

27. The Claimant was formally charged with rape on 7 June 2016.

28. The Respondent closed the Claimant's former workplace on 24 March 2017. The Respondent had also closed its two other care homes in St Leonards: one in 2016 and the other in 2017.

29. The same bail conditions remained in place until 27 April 2017 when a not guilty verdict was entered upon the prosecution offering no evidence, B having retracted her statement against the Claimant.

30. Following his dismissal, the Claimant claimed Jobseekers allowance. The Tribunal is satisfied that the Claimant made reasonable efforts to seek fresh employment in particular during the remainder of 2016 and the first few months of 2016 as evidenced by the Jobcentreplus documents placed in evidence. The Claimant did not apply for any jobs in the care home sector, he says because of his bad experience working for the Respondent. The Claimant remains unemployed and relies on his wife, a nurse, to provide an income.

31. On 24 May 2016 the Claimant saw his GP because of his low mood and was prescribed anti-depressant medication and after three months the dose was increased. The Claimant remained on anti-depressant medication until he was issued with his last prescription on 4 September 2017.

Applicable law

Liability

32. Under section 98(1) of the Employment Rights Act 1996, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee

holding the position he held. A reason relating to conduct is a potentially fair reason falling within section 98(2).

33. The reason for the dismissal is the set of facts or the beliefs held by the employee which caused the employer to dismiss the employee. In determining the reason for the dismissal, the Tribunal may only take account of those facts or beliefs that were known to the employer at the time of the dismissal; see W Devis and Sons Ltd v Atkins 1977 ICR 662.

34. Under section 98(4) of the Employment Rights Act 1996, where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the determination of the question whether the dismissal was fair or unfair depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and must be determined in accordance with equity and substantial merits of the case.

35. When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in British Home Stores v Burchell 1980 ICR 303, as explained in Sheffield Health & Social Care NHS Foundation Trust v Crabtree [2009] UKEAT 0331, the Tribunal must consider a threefold test:

    a. The employer must show that he believed the employee was guilty of misconduct;
    b. The Tribunal must be satisfied that he had in his mind reasonable grounds upon which to sustain that belief; and
    c. The Tribunal must be satisfied that at the stage at which the employer formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

36. In A v B [2003] IRLR 405, the Employment Appeal Tribunal said that the gravity of the charges and the potential effect on the employee will be relevant when considering what is expected of a reasonable investigation. See also: Crawford v Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402.

37. However, it is not for the Tribunal to substitute its own decision as to the reasonableness of the investigation. In Sainsburys Supermarkets v Hitt [2003] IRLR 23 the Court of Appeal ruled that the relevant question is whether the investigation fell within the range of reasonable responses that a reasonable employer might have adopted.

38. Nor is it for the Tribunal to substitute its own decision as to the reasonableness of the action taken by the employer. The Tribunal's function is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. See: Iceland Frozen Foods v Jones [1982] IRLR 430; Post Office v Foley [2000] IRLR 827.

39. In Taylor v OCS Group Ltd [2006] IRLR 613, the Court of Appeal stressed that the Tribunal's task under section 98(4) of the Employment Rights Act 1996 is not only to assess the fairness of the disciplinary process as a whole but also to consider the employer's reason for the dismissal as the two impact

on each other. It stated that where an employee is dismissed for serious misconduct, a Tribunal might well decide that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as sufficient to dismiss the employee. Conversely, the Court considered that where the misconduct is of a less serious nature, so the decision to dismiss is near the borderline, the Tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee.

40. Indeed, defects in the original disciplinary hearing and pre-dismissal procedures can be remedied on appeal. It is not necessary for the appeal to be by way of a re-hearing rather than a review but the Tribunal must assess the disciplinary process as a whole and where procedural deficiencies occur at an early stage, the Tribunal should examine the subsequent appeal hearing, particularly it procedural fairness and thoroughness, and the open-mindedness of the decision maker; see Taylor v OCS Group Ltd [2006] IRLR 613 CA.

41. The requirement for procedural fairness is an integral part of the fairness test under section 98(4) of the Employment Rights Act 1996. When determining the question of reasonableness, the Tribunal will have regard to the ACAS Code of Practice of 2015 on Disciplinary and Grievance Procedures. That Code sets out the basic requirements of fairness that will be applicable in most cases; it is intended to provide the standard of reasonable behaviour in most cases. Under section 207 of the Trade Union & Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal any Code of Practice issued by ACAS shall be admissible in evidence and any provision of the Code which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

42. Mr Cook reminded the Tribunal of Strouthos v London Underground Ltd 2004 IRLR 636 in which the Court of Appeal stated that disciplinary charges should be precisely framed: it is not only fundamental that employees should know the case against them, but where there is evidence against them they should know what the evidence is.

Compensation

43. Compensation for unfair dismissal comprises a basic award and a compensatory award. The basic award, calculated by reference to a statutory formula, is agreed in this case and no more needs to be said about it.,

44. The compensatory award is limited to proven financial loss – economic loss – flowing from the unfair dismissal. Non-economic loss, such as injury to feelings, is precluded; Dunnachie v Kingston Upon Hull City Council [2004] ICR 1052 HL.

45. Heads of compensation might include:

- Immediate loss of earnings – i.e. from dismissal to date of hearing when the Tribunal decides on compensation. When, during this period the Claimant has received Jobseeker's Allowance, income-related

Employment and Support Allowance, Income Support or Universal Credit, this will be the period to which the prescribed element relates for the purposes of the Employment Protection (Recoupment of Benefits) Regulations 1996.

- Future loss of earnings – i.e. estimated loss after the hearing.

- Expenses incurred as a consequence of the dismissal.

- Loss of pension rights.

- It is commonplace for Tribunals also to award a nominal sum for loss of statutory rights, namely the loss of the right to claim unfair dismissal until employed by a new employer for the statutory qualifying period.

It is the employee's duty to provide evidence of his loss; see, for example, Adda International Ltd v Curcio 1976 IRLR 425 EAT.

- In ascertaining the loss the Tribunal must apply the same rule concerning the duty of a person to mitigate his loss as applies to damages under the common law of England and Wales. The Tribunal is under no duty to consider the question of mitigation unless the employer raises it and adduces some evidence of failure to mitigate.

See: Savage v Saxena 1998 ICR 357

46. In Cooper Contracting Ltd v Lindsey UKEAT/0184/15 Langstaff J reviewed the authorities relating to mitigation and his conclusion can be described as follows:

    46.1. The burden of proof is on the wrongdoer; a Claimant does not have to prove that he has mitigated loss.

    46.2. It is not some broad assessment on which the burden of proof is neutral.

    46.3. Without evidence adduced by the employer upon which the Tribunal can be satisfied that, on the balance of probabilities, the Claimant has acted unreasonably in failing to mitigate, a claim of failure to mitigate will simply not succeed; see: Look Ahead Housing and Care Limited v Chetty and another UKEAT 0037/14.

The Polkey principle

47. The Polkey principle established by the House of Lords is that if a dismissal is found to have been unfair then the fact that the employer would or might have dismissed the employee anyway had the employer acted fairly goes to the question of remedy and compensation reduced to reflect that fact.

48. The burden of proving that the Claimant would have been dismissed in any event is on the Respondent: see: Britool Ltd v Roberts [1993] IRLR 481.

49. Assessing future loss of earnings will almost inevitably involve consideration of uncertainties: Thornett v Scope 2007 ICR 236 CA. In Software 2000 v Andrews 2007 ICR 825 the following principles were enunciated:

    - In assessing compensation for unfair dismissal, the Tribunal must assess the loss flowing from the dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal

    - If the employer contends that the employee would or might have ceased to have been employed in any event had a fair procedure been adopted, the Tribunal must have regard to all the relevant evidence, including any evidence from the employee (for example, that he intended to retire in the near future)

    - There will be circumstances where the nature of the evidence for this purpose is so unreliable that the Tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgment for the Tribunal

    - However, the Tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence

    - A finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can effectively be ignored

Adjustments for breach of the ACAS Code

50. Section 124A of the Employment Rights Act 1996 together with 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 provides that where an employer has unreasonably failed to comply with the Code of Practice, a Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase the compensatory award by up to 25%. Similarly, where an employee has unreasonably failed to comply with the Code, a Tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce the compensatory award by up to 25%.

Conclusion

51. Neither the dismissing officer nor the appeal officer gave evidence in this case and the Tribunal has been required to reach its conclusions on such evidence as was presented.

52. Having had regard to the documents placed in evidence, the Tribunal is satisfied that the Respondent has shown the principal reason for the Claimant's dismissal, that is sexual harassment, and that it related to conduct. The letters sent by the decision makers in the case indicate a genuine belief in this misconduct. As to the reasonableness of this belief, however, see below.

53. Similarly, the Tribunal finds that the Respondent has shown, on the balance of probabilities, what appears to have been a secondary reason for the Claimant's dismissal, namely his wilful refusal to comply with instructions to attend the disciplinary hearings. As to the reasonableness of this belief, however, see below.

54. The Tribunal next considers whether the Respondent carried out as much investigation into the allegations as was reasonable in the circumstances. The Tribunal is satisfied that given the gravity of the charges and the potential effect on the Claimant of a dismissal for sexual harassment, especially in respect of both his reputation and his future employment in the care sector, this is a case to which the principle in A v B should apply.

55. The Tribunal reminds itself that it must not substitute its own decision as to the reasonableness of the investigation. Having done so, the Tribunal finds that the investigation fell outside the range of reasonable responses that a reasonable employer might have adopted. There was no credible evidence to suggest that an adequate investigation had been undertaken given the gravity of the allegations. In particular:

    55.1. The Tribunal has had regard to the size of the employer at relevant times and notes that it had a dedicated HR department;

    55.2. There was no credible evidence to suggest that there were discussions, meetings or interviews with any of the three complainants in order to ascertain further details relating to the substance of their allegations. Their written complaints were brief and in part made unspecified allegations of sexual harassment/assault;

    55.3. There was no investigation as to whether the complainants might have conspired or fabricated their evidence (the Tribunal thus criticises the Respondent in this regard notwithstanding the Claimant's inability to suggest a valid reason why the complaints had been made other than his colleagues' laziness);

    55.4. There appears to have been little attempt to gather additional evidence of a corroborative or exculpatory nature such as that which might be provided by others. For example, the allegation of sexual assault on 19 June 2015 was said to have taken place during a barbeque when other members of staff were present but they were not interviewed;

    55.5. Nor was there any attempt to seek evidence from the resident who was in the wheelchair at the time. Although the HR Business Partner told the Tribunal that residents at the care home suffered from dementia and would not have capacity to give an account of

events, this evidence was undermined in cross examination when the HR Business Partner conceded that the care home also housed residents with general nursing needs;

55.6. The investigation meeting with the Care Home Manager failed to address the specific allegations made by A and appears to have simply addressed the allegations in general terms;

55.7. There was no evidence to suggest that the Respondent investigated the historical allegations made by the complainants which might have supported or undermined the truthfulness of their accounts.

56. With regard to the allegation that the Claimant had wilfully refused a reasonable management instruction to attend the disciplinary hearing on 31 July 2015 without a reasonable explanation, there appears to have been no investigation into the Claimant's explanation that, in light of his sickness, his wife had contacted the Respondent (the HR Business Partner conceded in her evidence that telephone contact had been made but no detail had been provided by the Claimant's wife).

57. In the circumstances, the Tribunal finds that the Respondent's belief in the Claimant's misconduct was not held on reasonable grounds, the investigation into the allegations being woefully inadequate in the circumstances.

58. Assessing as best it can the procedural fairness, thoroughness, and the open-mindedness of the Area Manager, the Tribunal is unable to conclude that defects at the initial stages were rectified on appeal.

59. The Tribunal concludes that no reasonable employer would have dismissed the Claimant based on the minimal evidence gathered.

60. The Tribunal has further concerns about the fairness of the procedure adopted. In particular:

60.1. Given the lack of detail about the allegations which might have been obtained by a reasonable investigation, the allegations were thus imprecisely framed the Claimant was not in a position to respond adequately to them;

60.2. The Respondent appears to have ignored the Claimant's poor grasp of English when carrying out the investigation meeting, not least by failing to allow the Claimant's wife to attend the investigation meeting;

60.3. Having had regard to the notes, the Tribunal if far from satisfied that the Claimant's companion was permitted to interpret at the appeal hearing, notwithstanding that she was asked at the end of the appeal hearing if she wanted to say anything on the Claimant's behalf;

60.4. In circumstances in which the Claimant had not been present in the country, and his wife having informed the Respondent that he was

ill and would have to remain in India, it was fundamentally unfair to proceed in his absence.

61. The Tribunal further finds the Area Manager's conclusion that the Claimant was guilty of a wilful refusal of a reasonable management instruction to attend the Disciplinary Hearing without a reasonable explanation was perverse. Her conclusion was simply unsupported by the evidence available to her, or which would have been available to her had the allegation been reasonably investigated. In particular, there was no evidence before the Area Manager to suggest that the alleged failure was "wilful".

62. In the circumstances, the Tribunal finds that the Claimant was unfairly dismissed.

63. As to Polkey, the Respondent sought to persuade the Tribunal, in terms, that notwithstanding any unfairness, the Respondent would have been obliged to dismiss the Claimant in any event:

    63.1. Because the bail conditions would prevent him from working at the care home;

    63.2. Because of nature of the criminal allegation, and the charge in particular, was such that the Respondent would have a duty of care for its residents and staff and the Respondent could not reasonably be expected to retain the Claimant on paid suspension indefinitely;

    63.3. The care home closed in March 2016 when the Claimant would have been dismissed by reason of redundancy.

64. In respect of the first argument, the Respondent failed to adduce sufficient credible evidence to show that it would have fairly dismissed the Claimant in any event. The terms of the bail conditions would not have prevented the Claimant from working at either of the Respondent's other two care homes in St Leonards, nor at any other care home operated by the Respondent in the South East of England.

65. The second argument is not, in principle, without force. However, although the notion that an employer might determine that, following such a criminal charge, an employee in the Claimant's situation was no longer suitable for a job as a care-worker, the fact is that the Respondent has failed to adduce any evidence to support its argument.

66. In respect of the third argument, this need not be considered further since the Claimant seeks losses limited to eleven months from the date of his dismissal, the end of the period of loss falling before the closure of the care home.

67. Accordingly, the Tribunal makes no Polkey reduction.

Compensation

Basic award

68. The basic award was agreed between the parties in the sum of £2,592.00

Compensatory award

69. It was agreed that the Claimant was paid £995.00 net per month. He claims, and is awarded, loss of eleven months loss of net wages the sum of £10,945.00. There is no award for future losses.

70. In addition, the Tribunal awards £350.00 for loss of statutory rights.

71. The Tribunal has had careful regard to the Claimant's submission that it would be just and equitable to apply an uplift of 25% by reason of the Respondent's unreasonable failure to comply with the ACAS Code of Practice. The Tribunal finds unreasonable failures, in particular, of paragraphs 5, 9, and 11. In the circumstances, the Tribunal concludes that it would be just and equitable to apply an uplift to the compensatory award of 10%.

72. Given that the Claimant received Jobseekers Allowance, the compensatory award relating to loss of wages, including the uplift, will be subject to recoupment.

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Employment Judge Pritchard

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Date: 21 August 2018