# EMPLOYMENT TRIBUNALS

**Claimant** Denise Nunes

**Respondent** Acorn Training and Education Limited

**HEARD AT**: WATFORD **ON**: 31st October 2018, 2 November 2018

**BEFORE**: Employment Judge Lewis (sitting alone)

**Representation**

**For the Claimant:** In Person

**For the Respondent:** Mr G Isherwood (Legal Consultant)

# JUDGMENT

1. The claim of breach of contract succeeds in part. The Respondent is ordered to pay the Claimant the sum of £1,441.53 in relation to the breach of contract claim, comprising the following elements:
   1.1 £1,196.25 in respect of damages for breach of contract in relation to removal from the lead worker role for the Fun Zone.
   1.2 £120 in respect of 1 week's pay in the week of 13 to 17 March 2018
   1.3 £125.28 in respect of the shortfall of 1 week in the notice pay to which the Claimant was entitled.

2. The claim of unlawful deduction of wages also succeeds in part but there is no further award to be made in respect of this claim beyond the award in respect of breach of contract.

3. The Respondent shall pay the following sums to the Claimant, totalling £3,675, in respect of the Claimant's claim of unfair dismissal:

| | | |
|---|---|---|
| **A. Basic award** | | £384 |
| **B. Compensatory award** | | |
| **Prescribed element** (loss of wages from dismissal to date of assessment, excluding the period from 30 March 2018 to 6 April 2018 which is subject to the breach of contract award): | £864.42 | |

| | | |
|---|---|---|
| **Non-prescribed element:** | £2,426.58 | |
| | | |
| **Total compensatory award** | | £3,291 |
| **Grand total** | | £3,675 |

**Recoupment**

| | | |
|---|---|---|
| (a) Grand total | £3,675 | |
| (b) Prescribed element | £864.32 | |
| (c) Period of prescribed element from 30 March 2018 to 9 November 2018 | 32 weeks | |
| (d) Excess of grand total over prescribed element | £2,810.68 | |

# REASONS

1. The Claimant's claim is for unfair dismissal and breach of contract and/or unlawful deduction of wages. Liability in relation to unfair dismissal was admitted at the outset of the hearing. The Claimant confirmed she seeks compensation only. I heard evidence from the Claimant and, on behalf of the Respondent, from Mr Henderson (a Director of the Respondent, who described himself as its owner).

**THE ISSUES**

2. The issues were clarified with the parties at the outset of the hearing. In relation to the claim of unfair dismissal, the following issues were identified in relation to remedy (the Claimant having confirmed that she is not seeking re-engagement or reinstatement):

    2.1 Whether if a fair procedure had been followed the Claimant would or might have been dismissed or his employment terminated in any event and if so what is the chance that this would have occurred and/or by when would it have occurred.

    2.2 What if any reduction should be made to any award on the grounds that it is just and equitable to do so or on the grounds of contributory fault (in respect of any conduct prior to dismissal which was blameworthy and causatively relevant)?

    2.3 Was there a failure to comply with the ACAS code on disciplinary and grievance procedures and, if so, what if any adjustment is to be made to any compensatory award under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 and section 124A of the Employment Rights Act 1996 ("**ERA**")?

3. In relation to contributory fault and the chance of dismissal in any event, the Respondent contended that although there was a failure to follow a fair procedure, there was a potentially fair reason for dismissal and that the Respondent would have been fairly dismissed if a fair procedure had been followed, or alternatively there should be a reduction for the chance that this would have occurred or the Claimant's employment would in any event have terminated fairly. In relation to this, the Respondent contended that the dismissal was for a potentially fair reason, being a reason related to conduct in relation to alleged unreasonable behaviour of the Claimant and her attitude towards work in relation to:
   3.1 refusal to follow management instructions in relation to refusal to do marketing/ standard media work for and on behalf of the Respondent and refusal to work on a holiday programme (Fun Zone); the Respondent claims this amounted to insubordination.
   3.2 poor attitude including failure to follow procedures in relation to sickness absence in January 2018 and not attending a meeting in July 2017 when it is alleged suspension could have been resolved.

4. In relation to deduction of wages/ breach of contract, there are the following issues:
   4.1 Whether there was a shortfall of pay when the Claimant claims she should have been paid at £15 per hour in relation to:
      (a) three weeks' work on the Summer Fun Zone 2017: £1,244.31; as to this the Respondent asserts that there is no sum due as the Claimant was suspended and she was paid her hourly rate and pay during suspension (£7.50 for 16 hours per week), that the Respondent was entitled to suspend her due to not carrying out normal project and marketing work and could not work on the Fun Zone due to lacking DBS, and the period of suspension was prolonged by the Claimant not attending the first fact-finding meeting.
      (b) 1 week in October 2017: £109.77; and
      (c) 1 week in February 2018: £589.77.

      In relation to (b) and (c), the Claimant states that in effect she continued to be suspended from working on the Fun Zone as she was not assigned to this after returning to work and that this was in breach of contract. The Respondent asserts that the Claimant did not complete her "DBS" and refused to work on the Fun Zone as it was not to be paid at £15 per hour as she was not leading the project and that it was in any event entitled to assign her to office duties. The Claimant asserts that she could not obtain the necessary enhanced DBS because this needed to be done through the Respondent who she contended had in effect declined to do this.

   4.2 Whether the Claimant suffered loss or is entitled to pay in respect of being sent home from work from 13 to 17 March 2018: £120 at £7.50 per hour.

   4.3 Whether there was a shortfall of 4 days' notice pay: £96 at £7.50 per hour. As to this in the course of the first day of the hearing it was

accepted by the Respondent that the Claimant was indeed entitled to an additional week's notice pay on the basis that there was a statutory entitlement to a minimum notice period of 5 weeks (s.86 ERA) and notice of dismissal was not received until 3 March 2018.

5. In her Claim, the Claimant also claimed loss of pay in relation to 3 weeks in Easter 2018 (£1,768.31). However she accepted in the course of clarifying the issues that this could not be claimed by way of deduction of wage or breach of contract as the programme was delivered from 3 to 13 April 2018 and therefore post-dated the termination of the employment.

6. The notice pay claim can only be brought by way of breach of contract. There may have been time limit issues in relation to some of the deduction of wages claim, but these do not apply to the breach of contract claim which can be brought within three months of termination of the employment in relation to claims arising or outstanding upon termination of employment.

7. As noted above, unfair dismissal was only admitted at the outset of the hearing. The Respondent explained this on the basis of only having recently instructed Mr Isherwood, but that did not wholly explain why there could not have been any prior notice to the Claimant. Delay was caused in the hearing as a result of neither party had complied with directions. No schedule of loss had been served by the Claimant despite the direction to do so. It was finally provided (at my direction) at the start of the second morning of the hearing. The Claimant's witness evidence did not deal with mitigation. Nor had there been adequate disclosure. Both parties gave further disclosure during the course at the hearing (in part as required by me at the end of the first day of the hearing). No disclosure had been given relating to mitigation prior the hearing, and was only given during the first day of the hearing and at the start of the second day of the hearing, as a result of which it was necessary for the Claimant to be recalled at the start of the second day of the hearing.

8. The Claimant contractual claim for notice pay in the first week of April 2018, and her claimed weekly loss of £480 per month set out in her schedule of loss, were both calculated on the basis of an hourly rate of £7.50 per hour. In the course of drawing up these Reasons, I noted that from 1 April 2018 the minimum hourly rate for employees aged over 25 (and therefore applicable to the Claimant) increased from £7.50 an hour to £7.83 an hour (s.1(3) of the National Minimum Wage Act 1998 and regulation 4 of the National Minimum Wage Regulations 1998 as amended by the National Minimum Wage (Amendment) Regulations 2018 regulation 2(1)). I proceed on the basis of the latter rate for claims relating to the period from 1 April 2018. Whilst the Respondent has not had a prior opportunity to make submissions as to this, I take into account (a) that this is a statutory minimum rate of pay, and (b) if the Respondent considers that there are relevant submissions it wishes to make on this point it is open to it to apply for reconsideration under rules 70 and 71 of the Employment Tribunal Rules within 14 days of this Judgment and Reasons being sent to the parties.

## MATERIAL FACTS
## The Claimant's employment

9. The Claimant was employed by the Respondent, latterly as Programme Development Officer ("**PDO**"), from 22 October 2012 to 30 March 2018. Initially she was a full time support worker paid at £7 per hour. She was subsequently promoted to the role of PDO with an increase in the rate of pay to £7.50. In that role her duties were to research, plan, create, deliver and facilitate programmes which supported children, young people and their families (although I was not shown any written job description). There had been various such programmes delivered in the course of the Claimant's employment. By the final months of her employment the only programme was then being delivered was known as "the Fun Zone", which was the programme which generated the most revenue. Work continued to be done in relation to planning and researching other programmes in preparation for when they might be delivered in future.

10. In 2015 the Claimant hours changed to part time hours to accommodate her studies. Subsequently, in 2016, she enrolled with Goldsmith University in New Cross, South London on the second year of an Applied Social Science Youth and Community Work Degree, with Mr Henderson as her work supervisor and mentor. Completion of the course would mean that she would be a qualified Youth and Community worker.

11. The written contract provided that the Claimant's normal working hours were 16 hours per week and her rate of pay was £7.50 per hour and she would work on Monday to Fridays. In fact she ordinarily worked Wednesdays, Fridays and some Thursdays, whilst attending lectures on Mondays, Tuesdays and two Thursdays a month. She had the opportunity to work additional days or hours during holidays or when classes were cancelled.

12. It was said on behalf of the Respondent that the effect was to guarantee the Claimant 16 hours paid work notwithstanding that on some weeks she only worked 2 days and in some weeks 3 days. That is not wholly accurate. The Claimant was entitled to 16 hours pay if she was ready and willing to work those hours. The contract did not provide for her to be paid for 16 hours irrespective of whether she worked those hours. That is consistent with the variable hours that are shown as paid in the Claimant's payslips.

13. The Claimant was also entitled to pay for additional hours if she worked those hours. She did not have a contractual right or obligation to work additional hours, though there was an expectation that she would do so during holidays, and an obligation to work the hours required for delivery of an external project when she had been allocated that responsibility.

14. Prior to July 2017, with one exception, in all cases where the Claimant had been involved in delivering external programmes, she had done so as lead worker (or the worker with lead responsibilities). That had been the case in relation to the Fun Zone and also in relation to two other projects; a motherhood project (later renamed "Star Mums") and a Sexual Health Awareness programme. The role of lead worker was not limited to what was

done whilst engaged in delivering the programme, but also the preparatory element. This included planning for what would go on for the period when the course was delivered, overseeing the whole project including identifying the equipment needed, creating timetables, deciding the activities and on the equipment needed, getting flyers designed, project plans, session plans and staff packs and choosing which other staff were on the timetable.

15. The one exception where the Claimant attended on delivery of a programme without having lead responsibility for it was the Deva programme. The Claimant had been asked to substitute as the dance tutor, and another worker had lead responsibility for the programme as a whole.

16. The contract did not deal with the position when the Claimant worked on an external project. On each occasion when she did so she was paid at £15 per hour. The Claimant's case was that there was an express agreement from the outset with Mr Henderson that this would be the case and it was not qualified by reference to the particular role she would have, whether by reference to being a lead worker or otherwise. The Respondent's case was that the amount that was paid depended on the budget for the particular project. In most cases that depended on what the external provider paid. In the case of the Fun Zone there was not an external provider and it depended on the internal budget. Generally the lead worker would be paid £15 per hour. Whether other workers could be paid at that rate would depend on the budget, and it was said that this explained the higher rate paid when the Claimant worked as dance tutor on the Deva course. Mr Henderson contended that when he allocated responsibility for a project to be delivered outside normal working hours he would tell staff their role and rate of pay, so that he would have said to the Claimant (except on the Deva course) that she would be lead worker for which she would be paid at £15 per hour. He further contended that staff would also know where the money was coming from, whether paid for by the company or paid for externally.

17. I accept Mr Henderson's evidence that his genuine understanding and intention was that the rate of pay was determined in each case by reference to the budget or funding available, and that whether the £15 rate was paid other than to the lead worker would be dependent on this. There was commercial logic in the point that the amount that could be paid for all staff must be dependent on the funding available, and by extension for the Fun Zone the budget. I also accept that the Claimant genuinely understood that there had been agreement to a rate of £15 as being applicable generally. Indeed that was understandable given that she had always been paid at £15 when working on the delivering the programmes. She was not aware of what others were paid for working on the programmes and indeed had been asked not to disclose what she was paid to other employees other than the Senior Admin and Finance Officer, Leanne Senior

18. However the relevant issue is as to what was objectively communicated and agreed. On balance I am not satisfied that there was an obligation to pay the £15 rate irrespective of the role that would be carried out on delivery of the programme. The absence of any reference to the rate in the written contract is more consistent with it not being a set rate irrespective of the role or the

circumstances of the programme, and being an ad hoc agreement depending on the role and the programme. Given the variety of roles that there might be on a programme, and potential differences in budget and funding, on balance I consider it more likely that Mr Henderson would not have given, or objectively communicated an unconditional right to be paid at £15 irrespective of the circumstances of the external programme or the budget. Whilst the Claimant believed that she had been told unconditionally at the outset of her employment that there would be an hourly rate of £15, in the absence of any written note of what was said, realistically it must be difficult for her to be certain as to the specific language used and I consider a real risk of her recollection being influenced by the fact of having invariably been paid at the £15 rate. I consider that what the Claimant was subsequently told as to the rate she would be paid has to be seen in the context of the specific roles she was allocated.

19. That said, I note that the uncertainty which arose as to the rate of pay was in large part the fault of the Respondent. As employer, it ought to have documented the rate of pay. It failed to do so, only noting the basic rate of pay in the written contract and failing to make reference to or document the rate or basis of payment for work on delivering external projects. Had that been done it would have avoided the confusion as to the circumstances in which the higher rate would be paid.

20. The Claimant worked on the Fun Zone for North London on each half term and holiday except Christmas, whereas another employee (Paulette Simon) was the lead worker for South London. The Claimant's leadership role in relation to this was also an important part of the assignment for her University course. Mr Henderson's contention was that he regarded the Claimant's appointment as lead worker as temporary and that he had always intended to rotate staff so as to give others the opportunity to develop their skills and develop a major project. Whether or not that was his subjective intention, it is not something of which the Claimant had been made aware, and indeed a contrary impression was given by Mr Henderson regularly referring to the North London Fun Zone as the Claimant's "baby".

21. It does not follow that the Claimant had a right in all circumstances to retain her responsibility as lead worker for the North London Fun Zone. The Respondent had a discretion as to what lead responsibilities were given to its relevant staff. However the discretion as to this, and in particular as to whether to remove the responsibility for the North London Fun Zone, was to be exercised rationally and fairly taking into account all the circumstances including the legitimate expectations engendered by the description of it as the Claimant's "baby" and in accordance with the implied obligation of trust and confidence (or more fully in the implied obligation not without reasonable cause or excuse to act so as to destroy or seriously damage the relationship of trust and confidence between the parties).

**DBS issue**

22. In order to work on delivery of the external programmes involving dealing with young people it was necessary to have had "DBS clearance". For the

Claimant's role in delivering the "Fun Zone" it was necessary to have "enhanced DBS". Although the Claimant had previously had a DBS certificate it had been lost during her home move. It also emerged that the Respondent did not have a record of DBS certificates. The Claimant's recollection was that the issue in relation to this had emerged during the Easter Fun Zone (which was from 3 to 13 April 2017) when she reported back to Mr Henderson a conversation with a parent who had asked about DBSs. She discovered that the Respondent did not have a copy of her DBS and when she telephoned the external company who had arranged them she was told that as it was more than 30 days since the DBS check, rather than being provided with a copy of her DBS certificate, there would need to be a fresh check. She relayed that back to Mr Henderson and Ms Senior who arranged appointments for all ground staff to attend with an external company to have DBS checks done. Her case was that she had not been able to attend for the appointment during the Easter Fun Zone due to her commitments in leading its delivery, nor immediately afterwards due to University commitments.

23. In fact, as is apparent from an email chain produced by the Respondent on the second morning of the hearing, the Respondent had sought to arrange appointments with an external company in March 2017, prior to the Easter Fun Zone, for staff to complete DBS applications. Mr Henderson emailed a representative of the company on 17 March 2017 seeking to arrange appointments for staff between 20 and 22 March 2017. It does not appear that staff did attend on those dates, because Ms Senior subsequently sent a further email, on 28 March 2017, asking if staff could come down to the company between 30 and 31 March 2017 to complete their DBS. The Claimant was at work on those days. Her recollection was that she was not asked to attend on those dates.

24. Whilst it is not certain on the material before me whether the appointments did go ahead on those days or slipped into the following week, when there was the Easter Fun Zone, I accept that the Claimant was incorrect in her recollection that it was a query at the Easter Fun Zone that prompted arranging the appointments. She did however seek to attend the external company's offices within about a couple of weeks after the Fun Zone. At that stage she discovered the that external company concerned had moved or closed. She reported this back to the Respondent, through Ms Senior who liaised with Mr Henderson. From her enquiries she also understood that in order to obtain an enhanced DBS she would need an application to be made via her employer and she also relayed this to the Respondent. Mr Henderson's evidence was that the Respondent had another external company who the Claimant could have approached and that it was not in any event necessary for the application to be via the Respondent. However, whether or not that was the case, neither of these matters were relayed to Claimant.

25. The issue was raised by the Claimant in a meeting to which I refer further below on 2 August 2017. By that stage there was a wider dispute arising principally from the Respondent's decision that the Claimant should no longer be lead worker for Fun Zone, and would only be paid at £7.50 per

hour, and the Claimant's objection to this and suspension from work. In that context the Claimant raised the fact that she could not work on the impending Fun Zone as she did not have her DBS. She also stated that she would not work on the Fun Zone unless paid £15 per hour, being what she believed to be the agreed rate. Mr Henderson's position on the DBS was that she would not need it as she would not therefore be working on the Fun Zone and it was made clear that the DBS would not be done by the Respondent.

26. When the Claimant came back to work after her annual leave in September 2017 she continued to ask about DBS and what would be done regarding that and was again informed that she would not be needing it as she would not be working at the Fun Zone.

27. Although neither party was able to pinpoint the date for this accurately, at some point the Respondent adopted the position that, since the Claimant had not taken the opportunities to attend for the DBS application to be dealt with, she would have to pay for this to be done herself. I accept that it was implicit in this, taken together with the failure to address the issue which the Claimant had raised as to the need for the application to be made via her employer, that the Respondent was indicating not only that the Claimant would have to pay for the application (which involved a fee of less than £60) but also that she would have to arrange it herself rather than via the company. In any event the Respondent failed to address the concern raised by the Claimant as to the need to deal with the matter via the employer to obtain an enhanced DBS.

28. Whilst both parties attached blame to the other in relation to the DBS issue, the overwhelming likelihood is that but for the stand-off to which I refer below in relation the removal of the Claimant from her lead responsibilities for the Fun Zone and the disagreement as to the rate of pay, the issue would have been resolved. It was a straightforward and inexpensive matter for the DBS issue to be dealt with via the employer, and I infer that if this was all that was standing in the way of the Claimant working on the Fun Zone it would have been resolved. Mr Henderson accepted in his evidence that the DBS issue was not a reason for the suspension or ultimately the dismissal of the Claimant. On his own evidence it was something that had occurred to him to add later, after the Claimant's dismissal and presentation of her claim, to seek to bolster his defence on the basis that with hindsight he contended it was something he could have relied upon.

**Removal of lead responsibility for the Fun Zone**

29. Relatively shortly before the Summer Fun Zone, the Claimant was informed by Mr Henderson or Ms Senior that she would only be paid at the rate of £7.50. There was some dispute on the evidence as to how close to the event this was communicated. Having indicated in his witness statement that he took the decision in April 2017, in his oral evidence Mr Henderson's recollection was that the Claimant was informed about a month before. The Claimant put this, or at least the conversation when the Claimant was informed that she would no longer be lead worker, at just two days before. I

accept in any event that by the time that the decision that she was no longer lead worker was communicated to her, the Claimant had already completed her preparatory work as lead worker for the event.

30. By this stage there was already a degree of tension building between the Claimant and Mr Henderson. He had previously held a supporting and mentoring role for her in relation to her University course, but he had removed himself from that role. The Claimant had also been expressing some concern as to lack of support in relation to the Fun Zone programme from other members of the team and as to the need for Mr Henderson to make sure they pulled their weight. The Claimant's perception was that the decision to reduce her rate of pay was taken to teach her a lesson. It was only when she challenged Mr Henderson as to the reason for the reduction in pay that it emerged that he was removing her from her lead worker position. The responsibility was instead given to Ms Senior. Mr Henderson explained that he felt it was time to give someone else an opportunity and that he wanted to give her time to work on her dissertation. She was not in the middle of her dissertation work at that time and, as set out above, by the time the decision was communicated to her she had already done the lead worker preparatory work.

31. An issue also arose in relation to responsibility for marketing, in the sense of going out distributing flyers. In around the 2nd or 3rd week of July 2017, prior to the Claimant having been informed of the lead worker decision and whilst the Claimant was still engaged in developing the Fun Zone's timetables, she received a call from Mr Henderson asking her if she would do marketing for the Fun Zone week. Having already expressed the view that it was unfair that most of the jobs fell on her when she was involved managing and facilitating the programme, the Claimant said that she felt that it was unfair that Mr Henderson was asking her to do this. Her understanding at the time was that Mr Henderson had taken her point in relation to this, but that was not Mr Henderson's understanding. A week later, on 20 July 2017, the Claimant received a call instructing her that she had to support the programme by going out to hand out flyers and that there would be consequences if she did not do so. There was some confusion in her evidence in relation to this. In her claim form, she stated that the call was from Ms Senior whereas in her witness statement, as explained in her oral evidence, the call was said to be from Mr Henderson on Ms Senior's phone. In her oral evidence however she confirmed that the statement in the claim form was the more accurate document having been compiled from her recollection closer to the events. I accept that the gist of the Claimant's response was to complain about what she saw as a change of stance on behalf of Mr Henderson and to object to having to do leafletting. Whilst she may not have regarded this as a refusal to do the leafletting, there was at best a very fine line between objecting to doing so (without any offer to do it under protest) and an outright refusal, and it was understood by the Respondent as being a refusal.

32. Shortly after the call, the Claimant received a letter of 20 July 2017 from Ms Senior (on behalf of Mr Henderson) stating that she was suspended with immediate effect for refusal to follow management instructions. This was

superseded by a letter of 21 July 2017 inviting her to a formal meeting and noting that there was no need to bring representation as it was a fact-finding meeting only. The meeting was initially arranged for 25 July 2017 but the Claimant was unable to attend on that date due to a university commitment. It was ultimately held on 2 August 2017 and was held in Mr Henderson's car with Ms Senior present.

33. In the meeting the Claimant took issue with having been demoted after having completed all the preparatory work and with the Respondent's position that she should be paid at £7.50 an hour. The Claimant's position, in addition to raising the need to deal with her DBS, was that she would work on the Fun Zone if paid at £15 an hour which she believed to be the agreed rate (irrespective of whether she was lead worker). Mr Henderson's response was that she would not be working on the Fun Zone, which reflected his position that she would not be paid at the £15 rate because she was no longer lead worker. No agreement was reached.

34. Mr Henderson's position at the meeting was also that the Claimant had no right to be paid during her suspension. There was no right under the Claimant's contract to suspend her without pay. It was only after ACAS had intervened at the Claimant's request that the Respondent relented and agreed that she would be paid (at her basic rate for normal hours).

35. By a letter dated 10 August 2018 the Claimant was informed that her suspension had been lifted with effect from 14 August 2018. She was informed that there would be a back to work meeting on her return but this did not take place. There was no outcome relayed in relation to the investigation save that no further action was taken and the parties maintained their position in relation to the Fun Zone. She was not reinstated on her lead worker position in relation to the Fun Zone. Given her position that she maintained she was willing to work on the Fun Zone only if paid £15 per hour she was not allocated to work on the Fun Zone. Nor was she asked to do so or given any warning that if she maintained her position in relation to the Fun Zone that there would be further disciplinary action.

36. In his evidence Mr Henderson was unsure as to whether the Claimant had also been asked to carry out marketing after her return from suspension and refused, although he thought she had been. I am not satisfied that was the case. She was not assigned to work on the Fun Zone after her return – she instead was left to work on her other projects. Her own evidence was that she had not refused to do marketing, and there were no questions put to her in relation to this other than in relation to the alleged refusal prior to her suspension. Nor was there any evidence given of any specific conversation asking her to do marketing after her return nor any documentation referring to this prior to the allegation raised in the dismissal letter.

**Sick pay**

37. The Claimant had a period of sickness absence from the first week of January 2018. She informed Ms Senior who said she was required to provide a sick note to be paid. The Claimant disagreed, and indeed her

contract provided that self-certification was permitted for a maximum of ten days after which a doctor's certificate would be needed. Ultimately, having been off work for longer than she expected, the Claimant provided a doctor's certificate dated 29 January 2018. In the light of a continuing dispute over payment relating to the period of absence, the Claimant contacted ACAS for advice and referred to this in her email to Ms Senior and Mr Henderson on 14 February 2018. Initially the Respondent agreed only to pay for 10 days but ultimately agreed to pay for the full period of absence.

38. It was part of the Respondent's case that the Claimant's conduct in relation to her sickness absence contributed to her dismissal. I do not accept that there was any significant blameworthy conduct on the part of the Claimant in relation to this. She was contractually entitled to self-certify for the first 10 days without a doctor's note and I do not consider that any delay in providing a sick note was a matter which could reasonably be regarded as conduct contributing to dismissal. The Respondent also referred to the fact the Claimant had come into work during her absence. She did so on one day as a result of concern as to whether she would get paid in the light of the Respondent having disputed her right to self-certify in the period where she was permitted to do so under her contract. Whilst the Respondent may well have been irritated by her having involved ACAS, the Claimant was entitled to do so in the light of the dispute over payment, as had also been the case over her previous suspension.

**Clash in relation to zero hours contracts**

39. A further point of conflict between the Claimant and Mr Henderson arose in the course of a telephone call following the Claimant's return from sickness absence in February 2018. The Claimant challenged Mr Henderson in relation to a comment he had made about putting staff on zero hours contracts. Whilst Mr Henderson disputed this, his recollection of events was vague in places, and I accept the Claimant's evidence on this issue is the more reliable.

**Dismissal**

40. By a letter from Mr Henderson dated 1 March 2018, received by the Claimant on 3 March 2018, she was notified of her dismissal on the grounds of:

> "Refusal to follow management instruction, refusal to do marketing for and on behalf of the company also refusal to work on holiday programme (Fun Zone)."

41. The letter stated that the Claimant was given one month's notice which was stated to expire on 30 March 2018. The letter was not received until 3 March 2018. Although the contract provided for a months' notice, the Claimant was entitled to a minimum of 5 weeks under s.86 ERA, expiring on 6 April 2018.

42. The letter of dismissal came out of the blue. There was no prior warning or any hearing offered and no appeal was offered. The disciplinary procedure set out in the Claimant's employment contract was wholly ignored.

43. The reason given for dismissal was a refusal to follow management instructions in relation to doing marketing and working on the Full Zone programme. I do not accept that this would have provided reasonable grounds for dismissal even if a fair procedure had been followed. There was a genuine disagreement over whether the Claimant was entitled to be paid at £15 an hour, and whilst I have found against the Claimant on that issue, her position was understandable and the Respondent had allowed the ambiguity by the failure properly to document the position. In any event there had been no warning of disciplinary action if the Claimant maintained her position and there had been no further request for her to undertake work on the Full Zone since her return from suspension. Similarly in relation to marketing I am not satisfied that there were continued requests and refusals after returning from suspension and no warning given.

44. Whilst the Claimant did not appeal the decision I do not consider that is to be regarded as culpable conduct, in circumstances where no right of appeal was offered and the dismissal letter indicated that the Respondent was wholly disregarding the disciplinary procedure. Further, there was a breakdown in the relationship with Mr Henderson that I accept is properly be viewed against what I consider to have been unreasonable conduct by the Respondent in informing the Claimant of removal of her lead worker responsibilities only very shortly before the Summer Fun Zone after the lead worker preparatory work had been done and then suspending her in part due to her objection to this and only belatedly withdrawing from the position that the suspension would be unpaid.

45. In oral evidence Mr Henderson indicated that there were other reasons for dismissal. He alleged that it was about the Claimant's attitude after her return from suspension, allegedly being confrontational with other members of staff and creating a toxic environment in the office, engaging in arguments with other members of staff and bringing the atmosphere down. He claimed that he had not raised this previously as he had been told by ACAS that to do so would involve other people. I do not accept this evidence. Not only was this not the way the allegations were framed in the dismissal letter, but nor was it put this way in the letter of 22 August 2018 from Mr Henderson summarising the reasons for dismissal. Whilst there was brief mention in the Grounds of Resistance of the Claimant becoming snappy and falling out with staff, none of this was put to the Claimant when she gave evidence and no details were provided by Mr Henderson. Whilst Mr Henderson may have regarded the Claimant as being confrontational in involving ACAS in relation to the dispute over sick pay and having done so previously in July 2017, and in relation to challenging the comments about zero hours, that provided no legitimate basis for dismissal or disciplinary action.

**Claimant sent home**

46. On 12 March 2018 the Claimant was sent home from work by Mr Henderson and told that she had worked too many hours having worked the whole of the previous week. He made reference to the provision in her contract to the effect that she was expected to work for 16 hours. The Claimant sought to argue that it was a new week, but Mr Henderson insisted that that she go

home, stating that there was not enough money in the budget to pay for her. She was not paid at all for the week of 12 March 2018. The case put to the Claimant was that she had wanted not to work that week due to the need to work on her dissertation. I do not accept that was the case. Indeed Mr Henderson's own evidence was that whilst he could not recall this, if he did send the Claimant home it would have been because she had worked her full complement of hours and that in the light of her alleged behaviour previously there was no agreement for her to work further hours.

47. I am satisfied that the Respondent was not entitled to send the Claimant home. She was ready and willing to work and entitled to work 16 hours a week irrespective of time worked in the previous week.

**Post-dismissal**

48. Following her dismissal the Claimant was unable to find alternative work apart from two months temporary work for which she was paid £3,079.02. She produced extensive evidence of applications for alternative work, albeit the documentation was only produced belatedly in part on the first and in part on the second day of the hearing. I address in the discussion section below my conclusions in relation to mitigation of loss.

**APPLICABLE LEGAL PRINCIPLES**

*(a) Chance of fair dismissal in any event*

49. There is an issue as to whether, if a fair procedure had been followed, the Claimant would or might have been fairly dismissed in any event and if so what is the chance that this would have occurred and/or by when would it have occurred. I should assess on the basis of all the evidence the chance if any that the Claimant would have been dismissed in any event and if so when. The focus is on what the employer would have done, rather than what a hypothetical reasonable employer would have done.

*(b) Contributory fault*

50. Contributory fault is relevant both to the basic award (s.122(2) ERA) and the compensatory award (s.123 ERA). Conduct will not entail a reduction in the award unless it (a) is culpable or blameworthy and (b) caused or contributed to the dismissal. It is necessary to take a broad commonsense view of the situation, deciding what if any part the employee's conduct played in causing or contributing to the dismissal and then, in the light of that finding, assessing the reduction to be made.

51. In relation to the compensatory award, pursuant to s.123(6) ERA if I find that the dismissal was to any extent caused or contributed to by any blameworthy conduct of the Claimant, I must (not may) reduce the amount of the compensatory award by such proportion as I consider just and equitable having regard to that finding. In relation to the basic award I am not obliged to reduce the award if I find there was blameworthy conduct which caused or contributed to the dismissal, but I must do so if I consider that any conduct of

the Claimant before dismissal was such that it would be just and equitable to reduce the basic award to any extent.

*(c) ACAS code*

52. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, when read together with s.124A of the Employment Rights Act 1996, provides for an adjustment in the level of the compensatory award. So far as material the effect of the provisions is that:
    52.1 If I find that the Claimant was unfairly dismissed and (a) the Respondent failed to comply with the ACAS Code in relation to Disciplinary and Grievance Proceedings ("the ACAS Code") and (b) that failure was unreasonable, I may if I consider it just and equitable in all the circumstances to do so, increase the compensatory award by no more than 25%. (There is an equivalent provision for a reduction in the award in the event of a failure to comply by the Claimant but there was no argument advanced by the Respondent that there should be such a reduction in relation to any of her claims).
    52.2 The adjustment is to be applied immediately before any reduction for contributory fault (s.124A ERA). It would however be applied after taking into account any reduction for the chance that the Claimant would be dismissed in any event.
    52.3 It is relevant to consider:
        (a) whether the procedures were applied to some extent or ignored altogether;
        (b) whether the failure to comply with the procedures was deliberate or inadvertent;
        (c) whether there were circumstances which mitigated the blameworthiness of the failure to comply.

*(d) Week's pay*

53. The calculation of a week's pay is relevant both to the calculation of the basic award and the ceiling of the compensatory award (which is 52 weeks' pay). The amount is to be determined in accordance with the regime in Part XIV, Chapter 2 of the ERA. This calculation depends firstly on whether there are normal working hours under the contract of employment in force on "the calculation date": s.221-223 ERA. The "calculation date" for these purposes is the date on which statutory notice would have been given to terminate the employment on the effective date of termination ("EDT") ie five weeks before 31 March 2018, being 24 February 2018: s.226(3),(6) ERA).

54. Section 234 ERA provides for overtime to be included within normal hours only where the contract fixes the number or minimum number of hours of employment in the week or other period and this exceeds the number of hours without overtime.

*(e) Minimum wage*

55. As noted above, the notice pay for the first week of April 2018, and the claim for compensation after dismissal (which in the Claimant's schedule of loss

was calculated on the basis of the £7.50 an hour hourly rate) falls to be adjusted by reference to the prevailing national minimum wage rate from 1 April 2018 of £7.83. If the Claimant had remained in employment should could not have been paid less than that hourly rate. This does not affect the basic award or the ceiling on the compensatory award, which as noted above is addressed by reference to the calculation date which precedes dismissal.

*(f) Relevant principles in relation to contractual claims*

56. There is an implied term of the employment contact that the employer will not without reasonable cause or excuse act so as to destroy or seriously damage the relationship of trust and confidence. It is also an implied term that where the employer has a contractual discretion it will be exercised rationally and in good faith, taking into account all and only relevant considerations.

**DISCUSSION**

**A. BREACH OF CONTRACT**
**Breach of contract in relation to removal from Fun Zone**

57. I turn first to the breach of contract claims in relation to removal of the Claimant from her lead worker role in relation to Fun Zone. I am satisfied that it was not a permissible exercise of discretion, and was in breach of contract, to remove the Claimant from her lead worker role for the Summer Fun Zone without any prior consultation at such a late stage and after the lead worker preparation had been completed. This was an irrational exercise of discretion and indeed I am satisfied it was a breach of the implied term of trust and confidence.

58. The position is more difficult in relation to the October 2017 and February 2018 Fun Zones. The Claimant did not have a specific entitlement to continue as lead worker on the Fun Zone or to be paid at £15 an hour in a lesser role. It was relevant to take into account whether continuing responsibilities were consistent with the Claimant's PDO role which included amongst other things the duties of delivering a project. The Respondent did not do so. Further, I accept that the Claimant had a legitimate expectation at least that the responsibilities would not be removed without reasonable notice and consultation. In the event she was presented with a fait accompli, and the meeting which then took place on 2 August was in the nature of a fact-finding meeting as to allegations of wrongdoing rather than being advance consultation about removal of the role. Rather than consulting over this there was a stand off over the difference as to rate of pay if not in a lead worker role.

59. However I accept that the Respondent was entitled to take into account the interest in giving other workers experience of leading a major project. That was not negatived by the fact that Ms Senior's primary role was as administrator. Further, the Claimant did retain other lead worker responsibilities consistent with her PDO role. That was in relation to projects that were not currently being delivered. However given that only the two Fun

Zone programmes were being delivered and there were three PDOs plus Ms Senior and the support worker, not all relevant staff/ PDO's could had lead worker responsibilities for a project currently being delivered on each occasion on which it was delivered.

60. In all the circumstances, whilst I accept the Respondent acted in breach of contract in relation to the decision and approach to removing the Claimant from her lead worker role, it does not follow that if it had lawfully exercised its discretion she would have continued as lead worker in October and February. Mr Henderson had formed a clear view that he wanted to give Ms Senior the opportunity to lead a major project and that the project would benefit at that time from new management with new ideas. I consider that he would have remained of the same view and been entitled to do so.

61. Accordingly I conclude that under this head the Claimant is entitled to recover loss in relation to removal from her leadership role for the Summer Fun Zone but not for October 2017 or February 2018. I do not consider that the absence of evidence of DBS clearance is a bar to this. That issue would have been resolved but for the stand off resulting from the Claimant's removal from her role. Nor do I consider that the Claimant is required to give credit in relation to sums that would have been earned if she had worked at £7.50 an hour on the Fun Zone. Having only been informed of the removal of her lead worker role without prior consultation shortly before the Summer Fun Zone and after she had completed the preparatory work, it was not unreasonable to object to working on that Fun Zone other than as lead worker at £15 per hour and nor in my judgment was it reasonable in those circumstances to suspend the Claimant from work. Nor do I accept the Respondent's submission that the Claimant's failure to pursue a grievance amounted to a failure to mitigate loss. The Respondent chose to deal with the matter by way of a suspension and fact-finding meeting and the position of Mr Henderson, as director and owner, was clear.

62. As to the assessment of the loss under this head:
    62.1 I accept the Claimant's evidence that the programme would have followed that for the April Fun Zone in terms of timing, albeit spread over three weeks. In the Claimant's evidence based on the timetable for the Easter Fun Zone that would entail 5 hours 50 minutes per day at £15 per hour and 2 hours 40 minutes at £7.50 per hour. However the invoice for the Easter Fun Zone indicates that a total of 5 hours 30 minutes was paid for a full day. Whilst the invoice indicates some variations as to hours charged on some days there was no evidence before me as to the basis for this and nor did the Respondent produce the figures, which would have been in its possession of the amounts in fact paid for the lead worker for the Fun Zone. In all, I proceed on the basis that the Claimant would have been entitled to 5 hours 30 a day for 15 days ie 82.5 hours at £15 an hour, totalling £1,237.50.
    62.2 The Claimant would also have been paid through her ordinary pay for the remaining hours at £7.50 per hour. On the basis that each day ran from 8.30am to 5 pm, that would entail (in addition to the 5 hours 30 minutes paid at £15) a further 3 hours per day for 15 days (ie 45 hours) at £7.50 per hour, totalling: £318.75.

62.3 Accordingly the total loss under this head is £1,556.25 before giving credit for sums received.

62.4 The Claimant had given credit for £525 received, but that is the sum paid for the whole period in the 15 September 2017 payslip rather than apportioning pay for the three weeks corresponding to the Summer Fun Zone. Since the Claimant was suspended from work from 20 July to 14 August 2018, but was ultimately paid for this, I proceed on the basis that the sum to be credited is to be calculated by reference to his normal weekly pay, and the credit to be given for three weeks is therefore £360. The total under this head is therefore £1,196.25.

**Breach of contract/ unlawful deduction of wages in relation to being sent home for one week in March 2018**

63. The Claimant is entitled, by way of breach of contract or unlawful deduction of wages, to claim loss for the week in March 2018 when she was sent home despite being ready and willing to work, totalling £120 (16 hours x £7.50).

**Breach of contract in relation to notice pay**

64. The Claimant is also entitled by way of breach of contract to damages for the one week shortfall in her notice pay. As set out above, this falls to be calculated at the uplifted figure of £7.83 to reflect the national minimum wage effective from 1 April 2018, therefore totalling £125.28.

**Summary in relation to contractual award**

65. The total award in relation to breach of contract is therefore £1,441.53 comprised of the following elements:
    65.1 £1,196.25 (in relation to removal from her lead worker role).
    65.2 £120 (in relation to the week in March 2018 when not permitted to work).
    65.3 £125.28 (in relation to one week's notice).

66. The claim in relation to the week in March 2018 can be claimed in the alternative by way of unlawful deduction of wages, but that results in no additional award as it is encompassed in the breach of contract claim.

**B. UNFAIR DISMISSAL**

**Chance of fair dismissal/ termination of employment in any event**

67. For the reasons set out at paragraphs 43 and 45 above I do not accept that the Claimant could have been fairly dismissed. There is a distinct question as to the chance that her employment would have terminated fairly other than by way of dismissal which I address at paragraphs 83 to 85 below.

**Contributory fault**

68. I turn to the issue of contributory fault. I take into account the Claimant's refusal to work on the Fun Zone for less than £15 an hour, whereas I have

found that there was no entitlement to this if not working as lead worker. I accept that there was some culpable conduct in refusing to work on the Fun Zone unless there was agreement that she would be paid at £15 per hour. In my judgment a distinction is to be drawn here between the Summer Fun Zone and the position in relation to working on the Fun Zone in future. For the Summer Fun Zone it was understandable that the Claimant should insistent that she be paid at £15 an hour and continue to be lead worker having been informed of the change without prior consultation only shortly before the programme was to start and after the lead preparatory work had been done. Whilst there was a continuing dispute as to rate of pay for the subsequent Fun Zones, the Claimant had not carried out the preparatory work for them. Given the lack of any documentation as to the rate of pay, there should have been less certainty as to the entitlement to a £15 rate and I have found that there was no such entitlement. Rather than refusing to work on the work on the Fun Zone in future other than at the rate of £15 an hour, it would have been better to pursue a grievance or other lines of remedy to resolve the issue of the correct entitlement. Whilst there would still have bene the DBS issue to resolve, as noted above I consider that in all likelihood that would have been addressed but for the stand-off as to the rate of pay, and the Claimant was aware that the Respondent's position on the DBS was tied to the fact that the Claimant would not be working on the Fun Zone due to the rate of pay issue.

69. However there are several factors which in my judgement substantially reduce the degree of culpability to be attached to the Claimant in relation to this. Notably:

    69.1 As noted above, the Claimant held a genuine belief that she was entitled to be paid at £15 per hour.
    69.2 That belief was understandable in circumstances where the Respondent had contributed to the confusion by failing to document the basis of the entitlement to £15 per hour and insisting on secrecy over what other workers were paid, and where she had been paid at £15 per hour on every previous occasion when delivering an external project including on one occasion when she was not lead worker.
    69.3 Tensions were inflamed by the conduct of the Respondent unreasonably seeking to remove the Claimant from her lead worker role at a time when she had already completed lead worker preparations and also not addressing what other continuing involvement she could have as a lead worker delivering a project in future.
    69.4 Just as it can be said that it would have been better for the Claimant to cooperate in continuing to work on the Fun Zone pending resolution of the dispute as to what the rate of pay would be, it was also open to the Respondent to suggest that course, and in effect to treat the Claimant's concerns as a grievance rather than a disciplinary matter to be the subject of a suspension and fact-finding meeting.
    69.5 Further, the Claimant was not asked to work on the Fun Zone after her return from suspension.

70. I also take into account the objection to carrying out marketing prior to suspension. Whilst there may be an albeit a fine distinction between a

refusal to work, and the objection raised, it indicated a degree of lack of cooperation when taken together with the absence of any offer to carry out the leafletting under protest or if the employer insisted. However the significance of this can only fairly be seen in the context of (a) the Claimant's understanding that Mr Henderson had previously taken her point as to why she felt it was unfair that she be required to undertake marketing, and (b) the Claimant's genuine belief that others should be pulling their weight more, and subsequently her upset to the peremptory removal of her responsibilities.

71. I have also considered the Claimant's delay in attending appointments for a DBS check. However as set out above I do not consider that this was causatively relevant in relation to the dismissal. If I had concluded otherwise I would have given it only insignificant weight given that the initial delay in relation to this was superseded by the failure of the employer to respond to the Claimant's concerns as to the need for an enhanced DBS to be obtained via the company.

72. In identifying the matters relevant to contributory fault at the outset of the hearing two other matters were identified. I have addressed above the issue the criticisms made of the Claimant in relation to period of sick pay and producing a sick note. I do not accept that there was any culpable conduct meriting a reduction for contributory fault. Reference was also made to delay caused in attending a suspension meeting. I do not accept that this was causatively relevant to the dismissal or as culpable conduct. The Claimant had good reason not to attend and the rescheduled meeting date was agreed. Nor have I accepted the Respondent's contentions as to other criticisms of the Claimant's conduct or attitude.

73. Taking the above matters as a whole I consider that there should only be a small reduction for contributory fault. I conclude that a reduction of 20% is appropriate for both the basic award and the compensatory award.

**ACAS uplift**

74. I turn to the issue of whether there should be an uplift to the award for failure to comply with the ACAS code. Clearly there should be. There was a total failure to comply. The failure was unreasonable and it is just and equitable that there should be an uplift.

75. In assessing the extent of the uplift I have taken into account:
    75.1 The fact that there was a total failure to comply with even the most basic requirements of the ACAS code. There was no meeting held to afford the Claimant a chance to answer the allegations and nor was she offered any right of appeal.
    75.2 The Respondent is a small employer and nor does it have its own in house lawyers. Nor did it take legal advice before dismissing.
    75.3 It was submitted on behalf of the Respondent that the failure was inadvertent in that Mr Henderson proceeded in the belief that he was complying with the Respondent's obligations by giving notice in accordance with the terms of the Claimant's contract. I do not wholly accept that submission. If Mr Henderson referred to the terms of the

Claimant's employment contract then that begs the question as to why he chose wholly to ignore the disciplinary procedure which it set out. He provided no adequate explanation for doing so. He was also in contact with ACAS and had the opportunity to discuss the process with them. Indeed on his own evidence he had a discussion bearing on the reasons he chose to give for dismissal. Whilst there was no evidence given as to whether or not he discussed dismissal procedures and requirements with the ACAS officer, he had the opportunity to do so. Had he taken that opportunity he would have been made aware of the minimum procedural safeguard for a dismissal.

75.4 In any event, there was no explanation provided by Mr Henderson as to what enquiries were made to satisfy himself as to any procedural requirements that needed to be follow in relation to dismissal, and it would have been apparent from the most basic enquiries that summary approach taken was impermissible.

76. In all I consider that there was a serious blameworthy breach of the ACAS code. Whilst the Claimant's schedule of loss seeks an uplift of 10%, she is not legally represented and I consider that this understates the uplift which is appropriate. In all the circumstances I consider that it is just and equitable that there be an uplift of 20% in the unfair dismissal compensatory award.

77. No argument was advanced that there should be any reduction in any of the awards by virtue of any non-compliance with procedures by the Claimant. That was a realistic approach.

**Basic award**

78. The Claimant's schedule of loss proceeds on the basis that "a week's pay" for the purposes of the basic award (and therefore also for the ceiling on the compensatory award) is £120. I am satisfied that is correct, reflecting the contractual normal hours of work and rate of pay set out in the contract. On my findings no issue arises as to whether additional hours need to be taken into account due to a right and obligation to work in delivering an external project or as to the different rate of pay for doing so, as the Claimant was not assigned to any such project as at the calculation date (being the date on which notice would have had to be given to comply with the notice requirements ie 24 February 2018).

79. Subject to adjustments, the Claimant was entitled to a week's pay for each full year of employment when aged 22 or over (3 years) and half a week's pay for each full year of employment aged under 22 (s.119(2) ERA). Accordingly, after adjustment for contributory fault, the basic award is £384 ie: 4 x £120, less 20%.

**Compensatory award**

80. On the basis of a week's pay of £120, the ceiling on any compensatory award of 52 weeks' pay is £6,240.

81. The Claimant's schedule of loss sought continuing losses at £120 per week plus expenses. As noted above, the weekly pay claimed needs to be adjusted to reflect the national minimum wage, of £7.83, and the adjusted figure for 16 hours would therefore be £125.28.

82. The Claimant clarified that she claimed these sums for the period up to the end of February 2019. Having regard to the efforts made so far, that whilst the Claimant has obtained a few interviews there is no job offer yet and the proximity of the end of the year, I accept that is a reasonable estimate. On that basis the loss at the rate claimed in the schedule of loss would equate to loss of earnings of £5,888 from 7 April 2018 to 28 February 2019 (about 47 weeks) before giving credit for the sums earned in mitigation or any reduction in relation to any failure to mitigate loss.

83. A difficulty with the Claimant's approach is that it proceeds on the basis that but for her dismissal she would have remained in employment with the Respondent until the end of February 2019. Given the damage to the relationship with Mr Henderson since the period of suspension in July 2017, I consider that realistically, at least once the Claimant had completed her dissertation, she would have focussed on securing alternative employment.

84. The Claimant's evidence was that she would have remained in employment whilst she searched for alternative work. However at different points in her evidence the Claimant offered different scenarios which might have led her to stay with the Respondent, including whether Mr Henderson was around and whether she was permitted to work on the Fun Zone even if only at £7.50 per hour. Whilst Mr Henderson had indicated an intention to move to part time work and was in the office less, he remained a director and the owner of the business. There was a continuing dispute over working on the Fun Zone and the Respondent was not likely to relent over the payment of £15 an hour. Further, once the Claimant completed her course should would have sought to work longer hours. In the past that would have been the natural move as the part time hours were to accommodate the university studies, but as indicated when the Claimant was sent home in March 2018 given the tensions and the Respondent's financial position this may well have been resisted which would be likely to have resulted in further escalation of tensions.

85. In all, whilst it was in the Claimant's financial self-interest to remain the Respondent until she found alternative work, I accept that there is a reasonable prospect that given the breakdown of her relationship with Mr Henderson she would not have done so. However in my judgment that does not necessitate any reduction in the weekly loss claimed in the Claimant's schedule of loss. In particular the chance that the Claimant would have left her employment with the Respondent and still faced a considerable period without being able to find alternative work (as in fact transpired following her dismissal) is at least balanced by:

    85.1 the prospect that even if the Claimant did leave her employment with the Respondent without having secured alternative employment, without the handicap of having to explain a dismissal she would have

been able to find alternative and significantly better paid full time employment earlier.

85.2 the fact that the claim based on £120 per week leaves out of account additional hours that may have been worked if she remained with the Respondent and that if Mr Henderson had not agreed to permit full time work, the Claimant would have been able to seek part time (as well as other full time) employment in addition to her earnings with the Respondent.

86. I accept that the Claimant has acted reasonably in mitigating her loss. The Respondent raised two issues as to the reasonableness of her mitigation. As to this:

86.1 First it was said that the Claimant could have obtained work as a driver or delivery person having previously carried out delivery work with a car provided by the Respondent. Although she did not have her own car it was said that she could have rented a car. For the Claimant's part she said that she had looked into this but that there could be conditions attached if a car was provided for rental or provision of the car, and that she was concerned about the cost. The Claimant was in financial difficulty following her dismissal, finding it difficult to catch up on her rent and pay her phone bill. I accept in the circumstances that it was not unreasonable for the Claimant to shy away from incurring further debts with the outlay and potential liabilities associated with renting a vehicle to carry out deliveries, without any other part time income to cover the costs. Nor was it clear on the evidence before me whether there would have been delivery roles available to the Claimant where a vehicle would be provided and so avoid those concerns. Further it might equally be said that the Claimant could have earned additional sums from driving work had she remained in employment with the Respondent if not permitted to work full time. In all I am satisfied that the losses claimed do not fall to be reduced by reference to whether delivery work could have been obtained.

86.2 The second argument raised on behalf of the Respondent was that the Claimant had not mitigated loss as a result of focussing her efforts on employment in which she would be earning over £20,000. This was the Claimant's focus in the period after she obtained her qualification and was a qualified youth and community worker. I do not accept that there was a failure to mitigate in this respect. First, I accept that the Claimant did include some applications that were wider than this. Second, I accept that in the light of the time invested in obtaining her qualification it was reasonable to focus her search in this way.

87. On that basis extrapolating applying the adjustments set out above entails a compensatory award of £3,291 comprised as follows:

| | | |
|---|---|---|
| Loss of earnings comprised of pay from 7 April 2018 to 28 February 2019 ie about 47 weeks at £125.28 per week. | £5,888.16 | |
| Job seeking expenses (£51 to date and continuing for four months to end of February 2019 at £17 per month) | £119 | |

| | | |
|---|---|---|
| Less earnings in mitigation | (£3,079) | |
| Loss of statutory rights | £500 | |
| Subtotal | | £3,428.16 |
| Sub-total after ACAS uplift (20%) | | £4,113.79 |
| Total after reduction for contributory fault (20%) | | £3,291 |

88. For the purposes of recoupment provisions it is necessary to allocate the part of the compensatory award which relates to the period up until these Reasons. This is calculated as follows:
    88.1 Loss from date of termination to date of remedy judgment (32 weeks out of 48 weeks total loss):
        (a) £3,925.44 (£5,888.16 x 32/48)
        (b) £54 job expenses
        (c) Less £3,079 earnings in mitigation
    88.2 Sub-total: £900.44
    88.3 20% ACAS uplift: £1,080.53
    88.4 20% reduction for contributory fault: £864.42

Employment Judge J Lewis, Watford

……1 November 2018

JUDGMENT SENT TO THE PARTIES ON

.1 November 2018.....

.....
FOR THE SECRETARY TO THE TRIBUNALS

Notes

Public access to employment tribunal decisions Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.