EMPLOYMENT TRIBUNALS
At a Default Judgment Remedy Hearing

Claimant: Ms S Graham

Respondent: Hart Hambleton plc

Heard at: Leicester
On: Tuesday 4 June 2019

Before: Employment Judge Faulkner (sitting alone)

Representation
Claimant: Ms Gordon-Walker (Counsel)
Respondent: Mr Hart (Owner)

JUDGMENT ON REMEDY

1. The Respondent's application for reconsideration and revocation of the default judgment dated 14 May 2019 is refused.

2. The Claimant is awarded the sum of £4,743.84 as compensation for unfair dismissal, comprised of a basic award of £2,240.86 and a compensatory award of £2,502.98. The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply.

3. The Respondent is ordered to pay to the Claimant the sum of £5,395.78 (gross) as compensation for breach of contract.

REASONS

1. Following the Respondent's failure to present a Response in time, this matter came before me to determine first of all the question of whether default judgment should be set aside following the Respondent's application for reconsideration and whether correspondingly the Respondent should be permitted to file its Response late. If the Respondent's application were granted, then it would also be necessary to make Case Management Orders dealing with the future conduct of the case and to set it down for a Final Hearing. If it were not granted, then it would be necessary to determine the compensation to be awarded to the Claimant accordingly, this Hearing having been originally set down as a Remedy Hearing.

2. Although listed as a three-hour hearing, as it transpired the Respondent's application was dealt with in the morning and as it was refused, with the

agreement of the parties, the Hearing continued into the afternoon to consider remedy, with judgment in that respect being reserved. These Reasons deal first with the Respondent's application to set aside default judgment, confirming the oral reasons given at the Hearing and secondly and separately with remedy issues.

Application to set aside default judgment

3. Neither party invited me to consider any documents in relation to this application, other than those which appeared on the Tribunal file, which I had read in full. I did however hear oral evidence from Mr Hart, the Respondent's owner, focused on the question of why no Response was filed in time and, given its relevance to the Respondent's application, his view of the merits of the case. I made the following brief findings of fact based on that material, also taking into account the submissions of both parties.

Facts

4. The Claimant pursues complaints of unfair dismissal and breach of contract. As is evident from her Claim Form and as clarified by Ms Gordon-Walker, there are in fact two breach of contract complaints, namely first related to alleged failure to give notice of termination (her claim is that she was constructively dismissed) and secondly related to alleged failure to make payments in the last few months of her employment when the Claimant says she was deprived of the opportunity to work up to 24 hours per week as she says was her contractual right.

5. It is necessary to briefly state the background to the complaints, some of which is taken from the Response that the Respondent wished to submit, as it was plainly relevant to consider the apparent merits of the proposed Response as part of my consideration of whether to set aside the default judgment. Some of these findings of fact will also be relevant to the question of remedy.

6. It is agreed that the Claimant was employed from 10 January 2007 until her resignation on 2 November 2018. She was employed as a receptionist who also carried out some back- office duties. The Respondent company owns and runs a hotel, Hambleton Hall, in Oakham, Leicestershire, where it employs around 70 people. It appears the Respondent employs around 40 other people elsewhere. Mr Hart also has two other businesses, which are run as separate legal entities from the Respondent, but which both employ other staff. He has been in business for around 40 years, and has had four employment tribunal claims in total in that period. He is not involved in his wife's or his sons' businesses, but through the latter has access to professional HR advice if needed.

7. The Claimant's case is in essence that she was employed on a contract which entitled her to work 24 hours per week. Neither party put any written contract of employment before me, nor any documentary evidence of the hours actually worked by the Claimant, until we came to the question of remedy. The Claimant accepts there was some flexibility in the hours she worked and that she was not always available for 24 hours per week. I therefore take her case to be that she was contractually entitled to work 24 hours per week but regularly reached agreement with the Respondent that she would work fewer.

8. The Claimant says that from 2017 the Respondent severely restricted the hours she was able to work, a situation which she says continued into 2018. She says that although available for 24 hours per week from April 2018 until termination of her employment, she worked one shift in April 2018 (the Respondent says she worked more), and then no shifts from May to August.

9. The Respondent says the parties always operated a flexible arrangement, such that there was no commitment on its part at any point to the Claimant working 24 hours per week. If there was any such arrangement initially, the Respondent says that this was changed by the issue of a new contract in 2008 to reflect a mutually flexible arrangement. It also says that for the last five years of her employment, the Claimant worked on average 16 hours per week, earning £144 net.

10. The Claimant had a number of discussions with the Respondent regarding her hours. These took place from June to October 2018. The first discussion was with her line manager, Ms Pinder, then she spoke with the General Manager, Mr Hurst, then with the Finance Director, Mr Edgson. I will deal further with these discussions in the context of remedy. Eventually, being unsatisfied with the outcome of the discussions, the Claimant told the Respondent on 29 October 2018 that she would be resigning and did so on 2 November 2018 with immediate effect. As already noted, the Claimant's case is that she was constructively dismissed.

Procedural history

11. The procedural history of the case is as follows.

12. The Claim Form was received by the Employment Tribunal on 7 January 2019. Notice of Claim was sent to the Respondent on 23 March 2019, together with Notice of Hearing for July 2019 and standard Case Management Orders. Both in the Notice of Claim and in the cover sheet for the Response, it was highlighted and made clear that the Response was due by 22 April 2019.

13. The Respondent emailed the Tribunal on 29 March 2019 acknowledging receipt of the Claim and saying that it would be defending it. The email also set out a request for the July hearing to be postponed, preferably to a date in September, and confirmed the Respondent's address for correspondence. On 5 April 2019 the Tribunal informed the parties that the application for a postponement had been granted and that a new hearing date would follow. On 25 April 2019 – by which time the deadline for filing the Response had passed – the Tribunal sent new hearing dates to the parties for September 2019, that is 6 weeks later than the original hearing date.

14. On 14 May 2019, in the absence of any Response, default judgment was entered by Employment Judge Heap pursuant to rule 21 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"). It was sent to the parties on 17 May 2019.

15. On 20 May 2019, Mr Hart wrote to the Tribunal apologising for not having submitted a Response and saying that he had assumed that the six-week deferral of the Final Hearing dates meant that the time for submitting the

Response had also been deferred to the same extent. He asked for reconsideration of the default judgment saying that there were factual mistakes in the Claim Form. He also said that the Respondent had no professional assistance in defending the matter.

16. The Claimant wrote to the Tribunal opposing the application for reconsideration. She pointed out that the Respondent had not requested an extension of time for filing the Response when it requested a postponement of the Final Hearing, or at all. She also stated that the Respondent had not sought to check the position with the Tribunal, disputed that there were factual mistakes in her Claim Form and said that the Respondent is a large company employing over 150 employees – in other words it should have been more than capable of dealing with the matter.

17. A Response was eventually sent to the Tribunal on 22 May 2019. It was not copied to the Claimant as required by rule 20 of the Rules, though given that the Respondent is not professionally represented, I would have been prepared to waive that requirement under rule 6 of the Rules had I granted the Respondent's application to set aside the default judgment and thus would have given it the requisite extension of time.

18. In his oral evidence, Mr Hart said that the failure to file the Response was entirely his fault. He accepts that he should have responded on time. The main point he was keen to emphasise in his evidence was his belief that the Claimant's case was ill-founded for two main reasons. First, he says that her contract of employment was varied as referred to above. Secondly, he says that this was illustrated by the hours actually worked by the Claimant in the latter years of her employment.

19. Mr Hart offered three reasons for the Response not being presented on time, the second and third being mentioned for the first time today:

19.1. He believed the company had more time to attend to the Response because it had asked for a change to the Final Hearing date. This was what was said in the letter to the Tribunal of 20 May. He said in his evidence before me that he filed the case away in his mind so that he regarded it as not so urgent. He was hoping for the submission deadline to be deferred.

19.2. He failed to diarise the date.

19.3. He was waiting for some information from someone before preparing the Response and, essentially, forgot about the date. He did not specify who he was waiting to hear from or what information he was waiting for.

Law

20. Rule 21 of the Rules provides as follows:

"*(1) Where on the expiry of the time limit in rule 16 no response has been presented, or any response received has been rejected and no application for a reconsideration is outstanding … paragraphs (2) and (3) shall apply.*

(2) An Employment Judge shall decide whether on the available material (which may include further information which the parties are required by a Judge to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Judge shall issue a judgment accordingly. Otherwise, a hearing shall be fixed before a Judge alone.

(3) The Respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge."

21. A default judgment under rule 21 is clearly a judgment within the meaning of the Rules. Reconsideration under rule 70 is thus the correct route for dealing with an application to set aside a default judgment, confirmed by the relevant Presidential Guidance. It provides that a judgment may be reconsidered where it is necessary in the interests of justice to do so – and, if it is, that judgment can be confirmed, varied or revoked. If it is revoked, it can be taken again.

22. If revocation is to be of assistance to the Respondent, it is clearly necessary to then extend time for service of the Response. Rule 20 of the Rules provides, as far as relevant, as follows:

"*(1) An application for an extension of time for presenting a response shall be presented in writing and copied to the Claimant. It shall set out the reason why the extension is sought and shall, except where the time limit has not yet expired, be accompanied by a draft of the response which the Respondent wishes to present or an explanation of why that is not possible and if the Respondent wishes to request a hearing this shall be requested in the application.*

(4) If the decision is to refuse an extension, any prior rejection of the response shall stand. If the decision is to allow an extension, any judgment issued under rule 21 shall be set aside".

23. Ms Gordon-Walker referred to **Ministry of Justice v Burton [2016] ICR 1128**, relatively recent authority on the principles governing reconsideration. Langstaff J reminded employment judges that the discretion to grant reconsideration on the basis of the assessment of the interests of justice must be exercised in a principled way. In particular, this means having regard to the importance of finality in litigation, which militates against the discretion being exercised too readily.

24. The leading authority on extensions of time for presenting a response, albeit under a previous version of the Rules, is the decision of the Employment Appeal Tribunal in **Kwik Save Stores Ltd v Swain and others [1997] ICR 49**. Having made the general point that time limits are laid down as a matter of law and are therefore requirements to be met, particularly in employment tribunal litigation which is intended to provide a quick, cheap and effective means of resolving employment disputes ("failure to comply with the rules causes inconvenience, resulting in delay and increased costs"), Mummery J outlined three essential principles to consider in deciding whether to permit a response to be presented late:

24.1. "The explanation for the delay which has necessitated the application for an extension is always an important factor in the exercise of the discretion … The

tribunal is entitled to take into account the nature of the explanation and to form a view about it … In each case it is for the tribunal to decide what weight to give to this factor in the exercise of the discretion. In general, the more serious the delay, the more important it is for an applicant for an extension of time to provide a satisfactory explanation which is full, as well as honest. In some cases, the explanation, or lack of it, may be a decisive factor in the exercise of the discretion, but it is important to note that it is not the only factor to be considered".

24.2. "An important part of exercising this discretion is to ask these questions: what prejudice will the applicant for an extension of time suffer if the extension is refused? What prejudice will the other party suffer if the extension is granted? If the prejudice to the applicant for an extension outweighs the prejudice to the other party, then that is a factor in favour of granting the extension of time, but it is not always decisive. There may be countervailing factors".

24.3. "If a defence is shown to have some merit in it, justice will often favour the granting of an extension of time … That does not mean that a party has *a right* [emphasis original] to an extension of time on the basis that, if he is not granted one, he will be unjustly denied a hearing. The applicant for an extension has only a reasonable expectation that the discretion relating to extensions of time will be exercised in a fair, reasonable and principled manner. That will involve some consideration of the merits of his case".

25. In summary, the assessment of the interests of justice under rule 70 and the principles to be considered under rule 20 in the light of **Kwik Save** coincide. Whether the default judgment should be set aside and an extension should be granted is essentially a discretionary matter for the Tribunal considering the case, weighing up the various relevant factors, which are principally the explanation for the delay, the question of prejudice and the merits of the proposed response. I must of course also have regard to the overriding objective to deal with cases fairly and justly, including, so far as practicable, ensuring the parties are on an equal footing, but also avoiding delay, so far as compatible with proper consideration of the issues and saving expense.

Conclusions

26. I begin with the reasons for the Response not being submitted in time. This is clearly a highly relevant factor in the exercise of my discretion.

27. Essentially, Mr Hart proceeded on the basis of an assumption that he would be given more time. He failed to diarise the deadline and made vague reference to waiting for information. He is an experienced employer, who had access to professional HR support. He also had previous experience of Tribunal proceedings, albeit no more than one would expect of a medium-sized employer over a period of 40 years.

28. Ms Gordon-Walker invites me to find that Mr Hart's first explanation, namely that given in writing to the Tribunal on 20 May 2019, was dishonest. Particularly in view of the Respondent's application to defer the hearing to September, I would not be prepared to go that far, but it does remain the case that the Respondent's explanations for the failure to provide a Response in time are wholly inadequate. In short, Mr Hart was hoping the deadline would be

deferred, and proceeded on the basis of an assumption that this is what would happen – an assumption which he accepted was false.

29. In addition, the date for submission was clear; Mr Hart accepts he knew about it. The Respondent did not ask for an extension of time, when asking for the Hearing to be rescheduled or otherwise, or check with the Tribunal when the Response was due – though as I have said, there could have been no reasonable doubt about that. Mr Hart accepted there was no excuse for what had happened. He said the Tribunal would be "within its rights" to refuse his application to set aside default judgment, though he added that it should be set aside because of the merits of the Respondent's defence.

30. It is relevant to assess, secondly, whether there is on the face of it merit to the Response in its draft form – as the Employment Appeal Tribunal put it in **Kwik Save**, giving "some consideration" to the merits of the Respondent's case. There are two main points to note:

30.1. On a summary assessment, if one takes the Response at face value, there does appear to be an arguable case to be considered on the question of the nature of the contract with the Claimant, either overall or otherwise in the last few years of her employment.

30.2. Ms Gordon-Walker suggests that the Response does not set out a complete defence to the unfair dismissal and notice pay claims, because whilst it may contest the Claimant's case that she was constructively dismissed on the basis of the difficulties she encountered with her working hours, the same is not the case with her complaint that the Respondent failed to address her complaint about it, what she describes as her grievance. I do not accept that analysis. Not only is there a general denial of the claim, it is also agreed that there were several meetings with the Claimant about her hours and the Respondent contends that her concerns were thereby addressed. Whilst the meetings were "without prejudice" and whilst the Respondent did not issue any written outcome to the Claimant, matters I will return to this in more detail on the question of remedy, the point to be made here is that on the face of the Response there are points to be argued. The term to be implied into every employment contract, referred to in **WA Goold (Pearmak) Ltd v McConnell [1995] IRLR 516**, which Ms Gordon-Walker referred to, is that employees have a right to have their grievances addressed, not necessarily to have a decision made in their favour. It is at least arguable that the Respondent discussed with the Claimant the substance of her complaints.

30.3. I do however accept Ms Gordon-Walker's second point. The Respondent has on the one hand said that there was a change in the Claimant's contract in 2008 which, if it was in doubt before, was said to remove any right to work 24 hours per week. It also agrees on the other hand that the Claimant was informed at the time that the new contract was not intended to introduce any significant changes. The Respondent's reply to that would no doubt be to say that nothing changed because the arrangement had always been flexible. I am not seeking to make a detailed assessment of the merits, nor saying that there are no arguable points. I am simply saying that although there are arguable points, the Respondent's defence cannot be regarded as so obviously compelling that this becomes an overwhelmingly important factor in exercising my discretion. The EAT in **Kwik Save** said that where merits appear strong justice will often favour

the granting of an extension of time, but as it also clearly stated this is not the only factor to be weighed in the exercise of my discretion, or even necessarily the chief factor.

31. Consideration of prejudice is also plainly relevant to the exercise of my discretion, not only as suggested in **Kwik Save** but also because it must also be part of assessing the interests of justice. Of course, there will almost always be prejudice to the Respondent where an application to set aside a default judgment is refused, but in considering the question of prejudice it is important to balance the interests of both parties and take into account the crucial importance of finality in litigation. In short, as Ms Gordon-Walker submitted, the Claimant will be prejudiced as a result of delay in having her case considered, were I to grant the Respondent's application. She was due to have her case heard in July; granting the application would mean that it would be heard several months later, quite possibly early in 2020. As to prejudice to the Respondent, I accept Ms Gordon-Walker's submission that this can be materially mitigated by permitting it to participate in the proceedings on the question of remedy.

32. As the EAT in **Kwik Save** made clear, and as must also be the case in weighing the interests of justice in a principled way, the Respondent's explanation for delay is always an important factor. It is clearly of crucial importance to the question of whether the interests of finality in litigation should be outweighed because the explanation is of such merit that it would be unfair to the Respondent to let things take their already-established course. In some cases, a full explanation or lack of it may be a decisive factor. That is equally the case of course in deciding whether justice requires judgment to be set aside. In this case, in summary, no adequate explanation has been provided as to why no Response was presented on time, it is accepted by the Respondent that there was no excuse for this omission, there would be obvious prejudice to the Claimant in delaying the matter by some months, and I must also take into account the public interest in finality of litigation. Furthermore, any prejudice to the Respondent can in part be mitigated by its involvement in deciding remedy. For those reasons – notwithstanding that there were potentially arguable points as to the merits – the Respondent's application to set aside default judgment is refused. It is the complete absence of an adequate explanation in particular which means that it would not be in the interests of justice to do otherwise.

Remedy

Facts

33. Ms Gordon-Walker accepted that the Respondent should be permitted to participate in the Remedy Hearing that followed the above decision, presenting evidence, briefly questioning the Claimant and making submissions. The recent decision of the Court of Appeal in **Office Equipment Systems Ltd v Hughes [2019] ICR 201** makes clear that there is no absolute entitlement to participate in a remedy hearing following default judgment, so that in straightforward cases a Respondent can have no complaint if the outcome is decided in its absence. Where remedy is sufficiently substantial or complex to require separate assessment however, as it transparently was in this case, the Court said that a Respondent should only exceptionally be excluded from a remedy hearing. The findings of fact that now follow thus take into account the evidence and submissions of Mr Hart as well as the evidence and submissions of the Claimant

and the agreed bundle, handed up for consideration of remedy, of around 60 pages.

34. Given that default judgment remains in place, I am bound to accept those facts set out in the Claim Form on which the Claimant relies to establish liability. As already noted, I take her case to be – and therefore find as a fact – that she was contractually entitled to work 24 hours per week but regularly reached agreement with the Respondent that she would work fewer. It is undisputed that she earned £216 for a 24-hour week, namely £9 per hour, before any deductions. The parties agreed that given the level of her earnings, her gross and net pay should be deemed to be the same for the purposes of any compensation calculations.

35. I also accept the Claimant's account of her attempts to resolve her concerns about her hours of work. Accordingly, I find as a fact that she contacted Ms Pinder on 15 July 2018 – it is agreed that this was by way of a WhatsApp message, shown to me during the Hearing and beginning "Hey Doll" – and that she met with Ms Pinder on 23 July 2018 to discuss why Ms Pinder was not allocating her sufficient work. Although arranged by an informal WhatsApp message, the Claimant regarded this as a formal work meeting. She said in evidence that she did not think of the message as a grievance but supposes with hindsight that it was, because she was unhappy with the situation and felt she was being "edged out".

36. I further accept that the Claimant emailed Chris Hurst on 18 August 2018, explaining her concerns about the lack of work and requesting a response, and that she met with him on 11 September 2018. At that meeting, which it is agreed the Respondent insisted take place on a without prejudice basis, Mr Hurst gave two reasons for the lack of work being provided to the Claimant, namely her availability and the flexible nature of her contract as he saw it. I accept the Claimant's case that she wrote to Mr Hurst setting out her case in respect of both matters, on 14 September 2018. I also accept that Mr Hurst wrote to the Claimant on 21 September 2018, reiterating that the Claimant had limited availability to work, stating that the Respondent did not wish to terminate her contract, and enclosing a rota offering her three shifts per week during October and November 2018.

37. The Claimant wrote again to Mr Hurst on 25 September 2018 and was subsequently offered a meeting with Steve Edgson, arranged for 12 October 2018. A further meeting with Mr Edgson took place on 19 October 2018. It is agreed both meetings with Mr. Edgson were also without prejudice. He maintained the Respondent's view that the Claimant's contract of employment was flexible and did not have a set number of hours in it. It was shortly after this that the Claimant resigned. Although I have not seen any of the correspondence referred to above, I take it that the Respondent's correspondence at least was sent on a without prejudice basis.

38. The Claimant has claimed no State benefits. She said in evidence that since the termination of her employment in early November 2018 she has made just two job applications, one in December 2018 and one in January 2019. The one in December was to be a part time sales assistant at a shop in Stamford, on a zero hours contract, and the one in January was to Evergreen Care Trust, a charitable organisation concerned with care for older people, also based in

Stamford. She was not called to interview following the first application. She had two interviews with Evergreen, but the person seeking to recruit her left the charity and the Claimant was offered what was essentially a cleaning job which she did not wish to take.

39. The Claimant says that there have been a number of other demands on her time since the termination of her employment. She was away a lot during November 2018 and it was then Christmas. She says that she was not rushing to look for employment. Thereafter she was dealing with a number of personal issues. First, her dog, to whom she was very close, became ill in November 2018. She was nursing him intensively in January and February. He died on or around 10 February 2019. Secondly, her sister was diagnosed with colon cancer in early 2019. The Claimant visited her in April 2019 for three or four days and also spent many hours talking with her on the telephone. The Claimant also has an elderly mother who came to stay with her on three occasions for around a week each between December and the date of this Hearing. Her mother was diagnosed with liver failure shortly before this Hearing took place.

40. In the light of the above, the Claimant said that she expects she would have worked, had she remained with the Respondent, for an average of 5 hours per week during November, December and January – one day in November and two or three days in each of December and January, each day being around 8 hours. Prior to that however, before any of the personal difficulties arose and before her employment terminated, the Claimant says, and I accept, that she would have been able to work 24 hours a week. From 10 February 2019 when her dog died until the end of May 2019, she says, and again I accept, that she would have been able to work two or three days per week. As for the future, she says that she is project managing a house renovation and so probably will not look for paid work.

41. Mr Hart put to the Claimant a number of jobs, currently available and set out in the bundle, as examples of the sort of work she could have secured following the termination of her employment with the Respondent. The Claimant is clearly particular about where she works, expressing reluctance to work in other hotels which are not of the same quality as the Respondent's. She did not look on any job websites, in the local newspaper or register with an agency. As she put it, because of her secure financial situation she can "pick and choose".

Law

42. I need say little about the law on compensation for breach of contract. It is well-established of course that the purpose of compensation in such cases is to put the Claimant in the position she would have been in had the breach had not occurred. It is also equally well-known that a Tribunal should not order payment of compensation for breach of contract and award compensation for unfair dismissal in respect of the same, overlapping, period. Of course the Tribunal's jurisdiction, derived from the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order"), covers claims for damages for breach of contract, over which a Court in England and Wales would have jurisdiction, where the claim arises or is outstanding on the termination of the employee's employment (article 3 of the Order).

43. The basic award for unfair dismissal (section 119 Employment Rights Act 1996 ("ERA")) consists of one and a half week's pay for each complete year of service at the age of 41 or over. The first key question when determining a week's pay for these purposes is whether or not the employee had normal working hours under the contract of employment in force on the calculation date. If there are normal working hours, sections 221 to 223 of the ERA apply. Section 221(2) provides:

"*Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week*".

44. Section 221(3) deals with the situation in which "*an employee's remuneration for employment in normal working hours (whether by the hour or week or other period) varies with the amount of work done*". Section 222 deals with the situation in which an employee's remuneration varies according to when they carry out their work.

45. Section 224 deals with employments with no normal working hours. It provides:

"*(1) This section applies where there are no normal working hours for the employee when employed under the contract of employment in force on the calculation date.*

(2) The amount of a week's pay is the amount of the employee's average weekly remuneration in the period of twelve weeks ending –

(a) where the calculation date is the last day of a week, with that week, and

(b) otherwise, with the last complete week before the calculation date.

(3) In arriving at the average weekly remuneration no account shall be taken of a week in which no remuneration was payable by the employer to the employee and remuneration in earlier weeks shall be brought in so as to bring up to twelve the number of weeks of which account is taken".

46. The calculation date for these purposes is in this case the date on which the Claimant's employment would have terminated had the Respondent given her the statutory minimum (11 weeks') notice of termination of employment on the date on which her employment terminated – see ERA sections 226 and 97(4).

47. Section 123(1) of the ERA provides that subject to certain other provisions, "*the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*."

48. The Tribunal should measure loss of earnings from the effective date of termination up to the date of assessment, i.e. the date of the remedy hearing if appropriate. Ms Gordon-Walker did not seek to maintain a case for compensation for loss of future earnings and so nothing more need be said about the law in relation to that. It is standard practice – and just and equitable – to award a sum for loss of statutory rights, to reflect the fact that in any replacement employment the Claimant will have to work for two years before obtaining unfair dismissal protection and indeed longer than that to accrue entitlement to the same statutory notice. The amount is at the Tribunal's discretion, again based on what it determines to be just and equitable in all the circumstances of the case.

49. If any adjustments are to be made to the compensatory award, it is vital to be clear about the order in which they should be made. In **Digital Equipment Co Ltd v Clements (No. 2) 1998 ICR 258***,* as far as relevant to this case, the Court of Appeal made clear that a Tribunal should first measure the loss arising in consequence of the dismissal, insofar as it is attributable to the Respondent's actions; it should then consider any deduction for mitigation; it should then make any adjustment for failure to comply with a relevant ACAS Code; and finally it should apply the statutory cap if relevant.

50. The Tribunal should be conscious of the duty on the Claimant to mitigate her losses as referred to in section 123(4) of the ERA, whilst noting also that it is for the Respondent to raise questions about and cast doubt upon the Claimant's fulfilment of that duty. Whilst the Tribunal should not be too stringent in its demands, the Claimant does have a duty to mitigate her losses, and if the Tribunal is satisfied that she has not fulfilled that duty, it should make the best assessment it can, based on the evidence before it, of when and to what extent her losses would have been mitigated had she done so. **Cooper Contracting Ltd v Lindsay [2016] I.C.R D3** is the most recent pronouncement of the EAT on this issue. Langstaff J held that the burden is on the wrongdoer, that is the Respondent, to demonstrate failure to mitigate, so that if evidence of failure to mitigate is not put forward by the wrongdoer, the Tribunal has no obligation to find it. What has to be established to justify a reduction in compensation on this basis is that a Claimant acted unreasonably, not that she failed to act reasonably. The Tribunal must not apply too exacting a standard.

51. With regard to the question of increasing the compensatory award because of failure to comply with the ACAS Code of Practice, section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 states that "*if, in the case of proceedings to which this section applies, it appears to the employment tribunal that:-*

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%".

52. As far as grievances are concerned, the ACAS Code provides that if a grievance cannot be resolved informally the employee should raise it in writing with a manager who is not the subject of the grievance. It then sets out, in familiar terms, various obligations on the employer: to hold a formal meeting without unreasonable delay; allow the employee to explain their grievance and, if they so wish, to be accompanied; communicate the decision in writing; and allow an opportunity for appeal.

53. If adjusting the award for failure to comply with the ACAS Code, the Tribunal has a broad discretion in deciding the appropriate percentage, provided of course that what it takes into account relates to the failure to comply with the Code. Certainly, the nature and gravity of the failure will be relevant, as will whether the failure was deliberate or otherwise, and whether there were mitigating circumstances.

54. Schedule A2 of the 1992 Act provides a list of jurisdictions to which section 207A applies, and includes both breach of contract and unfair dismissal. In **Shifferaw v Hudson Music Co Ltd [2016] UKEAT/0294/15**, the Employment Appeal Tribunal held that where compensation is awarded for both, the Tribunal has a choice of how to apply the uplift. It can either calculate unfair dismissal compensation from the period commencing immediately after what would have been the notice period and apply the uplift only to that, or it can calculate unfair dismissal compensation from the date of termination, apply the uplift to the whole amount and only then deduct the sum due for breach of contract following failure to give notice.

Conclusions

Breach of contract – back pay

55. I am satisfied that this is a claim falling within article 3 of the Order. It is plainly a matter over which the civil courts would have jurisdiction, and it was outstanding on termination of the Claimant's employment. The basis of the compensation to which the Claimant is entitled under this heading can be stated quite briefly.

56. Although Mr Hart said in submissions that it cannot be the case that the Respondent would have given the Claimant a regular 24 hours per week, because she would have had to fit into its rota with other staff, I have made clear that in view of the default judgment, the Claimant is to be taken as having been contractually entitled to work up to 24 hours' per week where she was available to do so. I have no hesitation in accepting that in the period covered by her claim for back pay, 6 April to 2 November 2018, she was available to that extent. I say this because she was completely candid about her lack of availability during other periods, and indeed about her very limited search for employment, even though that evidence is to her detriment in relation to compensation under the other heads of claim. As I accept her evidence, she is entitled to compensation reflecting the earnings she would have received had she worked 24 hours per week during the period of her claim.

57. There was no dispute that on the basis of that entitlement, the amount of the back-pay claim is £4,826.53. This is based on the Claimant's calculation of

her earnings over the period from 6 April to 2 November, less what are agreed to have been her actual earnings over that period, taken from her P45. There is therefore no need for me to go into any further detail. The Respondent is ordered to pay the Claimant **£4,826.53 (gross)** accordingly.

Breach of contract – notice

58. Compensation for failure to give notice, otherwise known as wrongful dismissal, is of course the classic breach of contract claim brought under the Order. It is accepted, based on her length of service, that the Claimant was entitled to 11 weeks' notice of termination of employment.

59. Again, compensation for breach of contract is intended to put the Claimant in the position she would have been in had the contract not been breached. In other words, under this head of claim, the compensation should be equal to what the Claimant would have earned had she worked during her 11-week notice period. Eleven weeks from 2 November 2018 ends on 18 January 2019.

60. It is accepted that during November, December and January, the Claimant would have been available to work an average of 5 hours per week. She would therefore have earned, on average, based on £9.00 per hour, £45.00 per week. Over an 11-week period, this amounts to £495. The Respondent is therefore required to pay her compensation of **£495 (gross)**, though see further below relating to the uplift for failure to comply with the ACAS Code.

Unfair dismissal – basic award

61. The calculation of the basic award is agreed to be 1.5 weeks' pay for each of 11 years of service, namely 16.5 weeks in total, as the Claimant was aged over 41 for all eleven complete years of service. The only disputed matter is the amount of a week's pay for these purposes.

62. Ms Gordon-Walker says that I should calculate a week's pay for these purposes on the basis of a 24-hour week as these were the normal working hours of the Claimant under her contract. Alternatively, if section 224 ERA applies, it would still be wrong in her submission to adopt anything other than a fully paid 24-hour week as the basis for calculation because it is established that the Respondent was in breach of contract in the period from April 2018 by refusing to provide the Claimant with that amount of work. It was thus submitted that her basic award will be artificially diminished if the calculation is based on hours actually worked as section 224 would require.

63. I am satisfied that section 221(2) does not apply in this case, as even under the terms of the Claimant's contract as I have found them to be as a result of the default judgment, her pay was not fixed regardless of the hours she worked. Section 221(3) does not apply either – Ms Gordon-Walker did not seek to argue that it did – as it could not be said that the Claimant's work in normal working hours varied with the amount of work done, such as may be the case with someone earning commission, or a piece-worker. It seems equally clear that section 222 does not apply as the Claimant's pay did not vary depending on the times at which she actually carried out her work. I conclude therefore that section 224 applies, because it is agreed that, notwithstanding the Claimant's entitlement to work 24 hours if she was available, in fact her hours varied quite

considerably. Accordingly, at the calculation date, the Claimant was in practice engaged in employment with no normal working hours.

64. The basic award is therefore to be calculated using the average of the last 12 weeks' remuneration ending on the calculation date, discounting any weeks during which no remuneration was paid. I invited the parties to undertake calculations on that basis and, given that they did not have that information to hand at the Hearing, to provide their calculations to the Tribunal in writing subsequently. It was however agreed by the parties that a basic award calculated in this way should be based on a weekly pay figure of £135.81. This was a figure provided by the Respondent as the average pay the Claimant received in the last 13 weeks worked in 2018 ending on 30 April. Accordingly, the basic award for unfair dismissal is 11 x 1.5 x £135.81 = **£2,240.86**.

Unfair dismissal – compensatory award

65. Particularly given that there was no objection from Mr Hart, I was satisfied that it was fair and just to permit the Claimant to rely on an updated schedule of loss compared to the calculations set out in her original Claim Form. I was also satisfied that it was fair and just to permit her to contend for an increase in the compensatory award as a result of the alleged failure to comply with the ACAS Code. There was no uplift in the Claimant's calculation of her losses in her Claim Form but failure to deal with her grievance was plainly part of the basis of her claims and, particularly in those circumstances, this is a matter the Tribunal could have raised of its own motion provided both parties had adequate opportunity to deal with the point. I gave Mr Hart the opportunity to address me as to whether the Hearing should be deferred to enable him to do so, particularly given that those who had met with the Claimant to address her concerns about working hours were not present to give evidence. He did not wish me to take that course of action and said that he would defend the point as well as he could. He made clear that the main point for him was the amount of a week's pay to be used as the starting point for the calculation.

66. The first point for me to consider in assessing the compensatory award is the question of mitigation. Ms Gordon-Walker submitted that it was reasonable for the Claimant to limit her job search as she did, in the light of her various personal circumstances. She accepts that the compensatory award can only be calculated on the basis of the hours the Claimant would have worked, based on her own evidence, in the period since termination. On this basis she would contend that the Claimant should be compensated on the assumption that she would have worked for 5 hours per week from the date of termination to 10 February 2019 and then 24 hours per week thereafter to date. As already noted, quite properly, on the basis that the Claimant is not looking for work for the future, Ms Gordon-Walker did not maintain any claim for future loss.

67. Mr Hart submitted that the Claimant had not properly mitigated her losses. He described Rutland, the area in which she worked for the Respondent, as an area of full employment, although of course that may not be the case for all surrounding regions – the claimant lives in Stamford. As I have said, Mr Hart also produced several up to date examples of the sorts of the jobs the Claimant could in his view have applied for.

68. As the case law summarised above makes clear, the standard to be applied in determining whether the Claimant has acted unreasonably is not to be too exacting. I am therefore prepared to give her the benefit of any doubt in relation to the first couple of months of the post-employment period, namely November and December 2018. Whilst she says that she was largely unavailable for work that during this time, there would be very few claimants who would be able to obtain similarly remunerated, or any, work within such a short time and I am unable to conclude that she acted unreasonably during this period even though some claimants would have commenced work within such a timescale. I am also unable to conclude that she acted unreasonably in the period up to 10 February 2019, given the combination of difficult personal circumstances I have referred to. Again, some claimants would find the wherewithal to deal with such circumstances and seek employment at the same time, but it cannot be said to be unreasonable not to be able to do so.

69. For the period from 10 February 2019 onwards however, the Claimant's own case is that she would have been available to work for two or three days per week. It is plain from her very candid oral evidence that she does not particularly need to work and that she has made, to say the least, very limited attempts to obtain paid employment since the termination of her employment with the Respondent. In fact, there is no evidence at all of her having made such efforts since 10 February. I do not say that she should have secured work immediately after that date, not least because she continued to deal with some of the difficult personal circumstances, and of course it is not unreasonable for a claimant to take a few weeks to secure further paid work. It is unreasonable however in my judgment to do nothing to this end for the whole of the period from 10 February 2019 to the date of this Hearing when there is plainly work available if it is wanted. As a result, I am not prepared to compensate the Claimant for the whole of that period. In my judgment, had she not acted unreasonably, and on the safe assumption that the picture of the job market outlined by Mr Hart for the period around the date of this Hearing would have been no different a few months previously, she would have obtained similarly remunerated work within eight weeks of 10 February, that is by 7 April 2019.

70. The next matter I have to deal with is the argument for an uplift in the compensatory award for failure to comply with the ACAS Code of Practice. Ms Gordon-Walker submits that there was clearly a grievance, the only formal meetings were without prejudice and therefore not in compliance with the Code, there was no written outcome and there was no appeal. She adds that the Claimant first raised her concerns in April 2018 and left employment in November 2018 with the matter unresolved. These were, she says, unreasonable and multiple failures and thus the maximum 25% uplift should apply, or at least the uplift should be 15%. Although of course accepting that the compensatory award and any compensation for failure to give notice should not overlap, her case is that the uplift should apply to the whole of the period from the date of termination until the date of this Hearing.

71. Mr Hart's submissions in relation to the uplift were that the original WhatsApp message could not be viewed as a grievance, given its obvious informality. He submitted that the meetings with Mr Hurst and Mr Edgson were on a without prejudice basis so as to enable both parties to talk freely.

72. The pre-requisite for an uplift is of course that there was a grievance. In that regard, I must again take into account the effect of the default judgment. In addition to arguing that the Respondent was in fundamental breach of her contract of employment by not supplying her with the work she was available for, the Claimant asserts in her Claim Form that the Respondent's failure to address her grievance also amounted to a fundamental breach of her contract entitling her to treat it as at an end. I am bound by those assertions to conclude that the Claimant did lodge a grievance with the Respondent. That seems to me in any event to be confirmed by the factual matrix as far as it can be discerned based on the evidence. The WhatsApp message was an informal means of raising concerns, was informal in its content and was in effect raised with the person who was the subject of the Claimant's concerns. It is clear from the remainder of the Claim Form however that the Claimant also put her concerns in writing to Mr Hurst. I do not know whether that document was also headed as a "without prejudice" communication, but even if it was I would be reluctant to find that the Claimant had failed to file a grievance as a result, in circumstances in which she was effectively compelled to conduct her discussions with the Respondent in that way. There was therefore, in my judgment, a grievance and thus the Code applied.

73. The next question is whether the Respondent failed to comply with the Code, and if so whether that non-compliance was unreasonable. It is difficult to disagree with Ms Gordon-Walker's submissions as to the ways in which the Respondent failed to comply with the Code. There was a meeting with Mr Hurst, he did write to the Claimant, and she was given the opportunity to meet with Mr Edgson who is presumably more senior, though Mr Edgson did not provide a written outcome. The difficulty for the Respondent is that it has accepted that all of these discussions took place on a "without prejudice" basis. Conducting without prejudice meetings is something very different to following a grievance procedure. I heard no explanation for why the Respondent dealt with matters in this way, except that it was not thought the Claimant had brought a grievance and that without prejudice discussions enabled both parties to talk freely. In my judgment it ought to have been clear to the Respondent, particularly by the time the Claimant wrote to Mr Hurst, that she was pursuing a grievance. The Respondent's insistence on conducting the discussions "without prejudice" meant that it did not have to commit itself openly to any particular course of action, which is plainly what the Claimant sought. Particularly for a medium-sized employer, with access if needed to specialist human resources advice, these were in my judgment unreasonable failures to comply with the Code.

74. Given that the substance of the grievance, and the failure to deal with it appropriately, were at the heart of the Claimant's reasons for resigning, based on which she has established through default judgment that she was constructively dismissed, it is in my judgment just and equitable in all the circumstances to increase the relevant compensation. As Ms Gordon-Walker submitted, there were multiple failures to comply with the Code, such that it would be just and equitable to apply more than a modest increase. I do think it right however to step back from the maximum increase on the basis that, even though cloaking the discussions as "without prejudice" suited the Respondent, it does seem to have made some effort to seek to resolve the Claimant's concerns and did not ignore them altogether nor act in a high-handed manner. Exercising my broad discretion and taking all of these factors into account therefore, it seems to me that a 15% increase is appropriate.

75. As to the amount to which the increase should apply, I have taken account of the guidance of the EAT in **Shifferaw**. The case before me however is one where both the unfair dismissal and the wrongful dismissal (failure to give notice) claims can properly be said to concern a matter to which the Code of Practice applies. In other words, the failure to properly address the Claimant's grievance was a significant contributing factor to her constructive dismissal, which of course gives rise to both claims. The 15% uplift should therefore be applied to both the compensation for wrongful dismissal and the compensatory award for unfair dismissal, without netting off the amount of the wrongful dismissal compensation once the uplift is applied. Of course, in that case, the compensatory award only falls to be calculated from the date on which the 11 weeks' notice would have expired, namely 18 January 2019, to avoid double-counting.

76. The final matter for me to determine are other heads of compensation. There is a modest claim of £300 for compensation for loss of statutory rights, which I accept. More contentiously, Ms Gordon-Walker says that if I feel bound to calculate a week's pay for the purposes of the basic award based on the Claimant working fewer than 24 hours per week, as I have done, that produces an unjust outcome because it means the Respondent benefits from a reduced basic award by not having given the Claimant 24 hours of work per week from April to November (the period of her back pay claim). She submitted that the Claimant should be compensated for the difference between that and a "full" basic award, as part of what would be a just and equitable compensatory award. I do not accept that submission. First it is as far as I am aware without precedent. It would subvert, and in effect impugn, the statutory provisions for calculating the basic award. Secondly and in any event, the Respondent has not benefitted in the way Ms Gordon-Walker suggests, because the basic award has in fact been calculated based on weeks worked leading up to 30 April.

77. The results of all of the above produce the following compensatory award:

77.1. From 18 January to 10 February 2019 was 3.3 weeks. On the basis that the Claimant would have worked an average of 5 hours per week during this period, her loss of earnings would have been 5 x £9 x 3.3 = £148.50.

77.2. For the remaining 8 weeks over which it is just and equitable to award compensation, the Claimant would have worked an average of 24 hours per week. Her loss of earnings would therefore have been 24 x £9 x 8 = £1,728.

77.3. Compensation for loss of statutory rights is £300.

77.4. Adding all of these elements together, £148.50 + £1,728 + £300 = £2,176.50.

77.5. The application of the 15% uplift increases this total to an overall compensatory award of **£2,502.98**.

78. The compensation for breach of contract (failure to give notice) of £495 also falls to be increased by 15% for the reasons I have outlined, making a total of **£569.25.**

79. The final figures are therefore as follows, with no recoupment in respect of State benefits:

79.1. Compensation for breach of contract in relation to "back pay" of **£4,826.53**;

79.2. Compensation for breach of contract in relation to failure to give notice of **£569.25**;

79.3. The total compensation for breach of contract is thus **£5,395.78**;

79.4. Compensation for unfair dismissal comprising a basic award of £2,240.86 and a compensatory award of £2,502.98, making an overall total of **£4,743.84**.

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Employment Judge Faulkner
Date: 1 July 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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