EMPLOYMENT TRIBUNALS

Claimant: Ms Kamila Bulla

Respondent: (1) Kopernik
(2) Mr Dominik Sobolewski
(3) Mr Dominik Sobolewski T/A Kopernik

Heard at: North Shields **On: 5 July 2019**

Before: Employment Judge A.M.S. Green

Representation

Claimant: Mr A Sierant – Legal Representative
Respondent: In person (Second Respondent)

RESERVED JUDGMENT

1. The claims against the first and the third respondents, on being withdrawn, are dismissed by consent.

2. The claimant was unfairly dismissed, and the second respondent shall pay her **£2,471.56.** The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply.

3. The claimant's claim for breach of contract is upheld. The second respondent shall pay the claimant **£84.83**

4. The claimant's claim for unauthorised deductions from wages is upheld and the second respondent shall pay her **£247.68.**

5. The claimant's claim for holiday pay is upheld. The second respondent shall pay her **£124.38.**

6. The second respondent shall pay the claimant **£923.84** for failing to provide her with a written statement of particulars of employment as required by Employment Rights Act 1996, section 1.

REASONS

1. The claimant was employed by the second respondent between 15 May 2015 and 29 October 2018 when she was dismissed with notice. The second respondent claimed that she was guilty of gross misconduct in falsely overstating the hours that she had worked. After a period of Early Conciliation, she presented the following claims to the Tribunal:

    a. Ordinary unfair dismissal

    b. Payment of holiday pay upon termination of employment

    c. Breach of contract – underpayment of notice pay

    d. Unauthorised deduction of wages in the period April to October 2018.

2. As the claimant was unsure who her employer was, she made claims against all three respondents. At the beginning of the hearing, the second respondent conceded that at all material times, he had employed the claimant. Consequently, I dismissed the claims against the first and third respondents. The second respondent also admitted that he had made a mistake regarding the claimant's holiday pay and he conceded that claim. I also noted during the evidence that the second respondent admitted that he had not provided the claimant with a written statement of particulars of employment as required by Employment Rights Act 1996, section 1 ("ERA"). I have made a monetary award in respect of that failure.

3. The parties produced a hearing bundle in advance of the hearing. The purpose of the hearing was to determine liability and remedy. The claimant, Dariusz Katulski and the second respondent adopted their witness statements and gave their evidence through an interpreter, the language was Polish. I carefully explained the procedure to the second respondent as he was not represented and gave him extra time to prepare his submissions. I heard closing submissions from both sides.

4. The claimant must establish her claims on a balance of probabilities. In reaching my decision I have considered the oral and documentary evidence. The fact that I have not referred to every document produced in the hearing bundle does not mean that I have not considered them.

5. I identified the following issues:

    Unfair dismissal

    (i) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's conduct.

    (ii) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all

respects act within the so-called 'band of reasonable responses'?

Remedy for unfair dismissal

(iii) If the claimant was unfairly dismissed and the remedy is compensation:

a. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would [still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway]? See: **Polkey v AE Dayton Services Ltd [1987] UKHL 8**; paragraph 54 of **Software 2000 Ltd v Andrews [2007] ICR 825**; **W Devis & Sons Ltd v Atkins [1977] 3 All ER 40**; **Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604**;

b. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

c. did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

Unauthorised deductions

(iv) Did the respondent make unauthorised deductions from the claimant's wages in accordance with ERA section 13?

Breach of contract

(v) To how much notice was the claimant entitled?

Remedy

(vi) If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

a. did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade

Union & Labour Relations (Consolidation) Act 1992 ("section 207A")?

b. did the claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to decrease any compensatory award and if so, by what percentage (again up to a maximum of 25%), pursuant to section 207A?

6. Having considered the evidence, I make the following findings of fact:

a. The claimant worked as a shop assistant at the second respondent's Sunderland shop. The shop is a Polish grocery store. Until March 2018, the second respondent co-owned the shop with Mr Katulski. However, Mr Katulski left and set up his own shop. On hearing the second respondent's evidence, it was clear that it was not an amicable split and both men are not on speaking terms.

b. The second respondent operated CCTV in the shop. Images were recorded and stored on a hard drive. The second respondent admitted that images were overwritten.

c. The claimant worked 3 days per week (Monday, Tuesday and Thursday). Her average weekly take home pay was £230.96. She claimed to have signed a written contract of employment which was not in her possession and it was not produced by either party. The second respondent admitted that he did not give the claimant a statement of written particulars of employment.

d. The claimant and her two co-workers entered the hours that they worked in a notebook which was kept at the shop. Examples of these entries were produced [50-59]. The time was rounded up into whole hours. If the claimant arrived at work at 07:30 she would enter her start time as 07:00. On many occasions she worked longer hours either arriving earlier or leaving later. At the end of the month, the second respondent would telephone the shop to take a note of the hours and he would use that information to calculate the claimant's and her co-workers' wages. Under cross examination, the second respondent admitted that he allowed his employees, including the claimant, to round up their hours.

e. Prior to her dismissal, the claimant had a clean disciplinary record. She was well regarded and rewarded with a monthly allowance of £50 to spend in the shop.

f. The claimant did not see the second respondent often. She would see him when he came into the shop to collect the money and to check the CCTV footage or when they passed each other in the front of the shop.

g. In August 2018, Mr Katulski asked the claimant if she wanted to work in his shop. She reused the offer because his shop was further away than the second respondent's shop.

h. On 24 September 2018, the claimant injured her spine. One of her discs had prolapsed [87]. Her doctor advised her to rest and to take painkillers. She was off work for 8 days which she took as holiday rather than sick leave. On or around 3 October 2018, she spoke to the second respondent on the telephone asking for more time off work. He refused and threatened to dismiss her if she did not return to work. He agreed to allow her to sit at work if she returned. She returned to work on that understanding.

i. On 26 October 2018, the second respondent visited the shop and told the claimant that she should spend less time sitting. She was told not to sit if she was the only member of staff in the shop. He also alleged that he had noticed some shortcomings in her performance and withdrew her £50 allowance. He was unhappy with the way that she had entered her hours. Although she disagreed with him, she changed the hours in the diary. There was conflicting evidence about this. In her oral evidence, the claimant said that the second respondent told her to do this. Under cross examination, the second respondent said that he had not told her to change the entries; she had changed the entries on her own volition. I preferred the claimant's evidence as I found her to be general consistent in her evidence and more generally credible. The claimant telephoned the second respondent on 27 October 2018 to complain that she felt mistreated.

j. The second respondent dismissed the claimant on 29 October 2019. In his evidence, the second respondent claimed that he decided to dismiss the claimant after he had reviewed CCTV footage that showed material discrepancies about the claimant's hours. He had compared the CCTV footage to the claimant's entries in the notebook and concluded that she had overstated her hours. He believed that she had been dishonest. He dismissed her with immediate effect and paid her what he believed to be her correct notice. He also assumed that she had overstated her hours between April and October 2018 based on what he had seen in the October 2018 CCTV footage. However, when giving his oral evidence, he admitted that the April to October 2018 CCTV footage had been overwritten and he had not reviewed it. He admitted that he was simply speculating that the claimant had overstated her hours in that period. There was no evidence to prove this Despite this, he applied a deduction to her final wage packet to recover what he believed was the overpayments made between April and October 2018. He deducted £247.68 net.

k. The second respondent admitted in oral evidence that he did not show the CCTV footage to the claimant prior to dismissing her. He also admitted that he did not tell her about the alleged acts of misconduct in advance of the disciplinary meeting on 29 October 2018. He carried out both the investigation and the disciplinary meeting even though there were two other employees in the shop who could have assisted. The second respondent admitted that he did not offer the claimant the right to appeal the decision. He did not give her written reasons for her dismissal. He admitted that he had not followed the ACAS disciplinary code. In fact, he told me that he was not familiar with the code. Under cross-examination he said

that during the discussion on 29 October 2019 he told the claimant he had found out that Mr Katulski had offered her a job. It was put to him that this was the operative reason why he had dismissed her; he felt betrayed. The second respondent denied this but when asked why he had mentioned this to the claimant, he simply did not answer the question.

l. On reviewing a selection of CCTV footage during the hearing, there were some discrepancies between the claimant's notebook entries and the recordings, but it was unclear why the note-book entries had been changed. Furthermore, under cross examination, the second respondent accepted that he had only provided a selection of CCTV footage and he accepted that there was probably other CCTV footage in the relevant period that showed the claimant arrived earlier or stayed later than what was in the notebook. Given the selective nature of this CCTV evidence, I give it little weight.

m. The claimant did not appeal the decision.

n. On 31 October 2018 the second respondent emailed the claimant [45-46] informing her that he was paying her three weeks' pay in lieu of notice and was deducting 36 hours for "added hours for period since April". He paid her £634.23 gross for payment in lieu of notice. He deducted £390.60 which he claimed related to overpayment of 36 hours since April.

o. The claimant commenced working with Mr Katulski on 1 December 2018. She is paid less. She is paid £8.00 per hour as opposed to £8.60 that she enjoyed with the second respondent. She has not claimed any state welfare benefits since her d

7. I now turn to the applicable law.

Unfair dismissal

8. The circumstances under which an employee is dismissed are set out in section 95 ERA as follows:

> *"(1) for the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) …., only if) –*
>
> *(a) the contract under which he is employed is terminated by the employer (whether with or without notice),*
>
> *…*

9. The fairness of a dismissal is set out in section 98 of ERA as follows:

> *"(1) in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

…

(b) relates to the conduct of the employee,

…

(4) Where the employer has fulfilled the requirement of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason) shown by the employer –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee,

(b) shall be determined in accordance with equity and the substantial merits of the case."

10. The employer must show that misconduct was the reason for the dismissal. According to the Employment Appeal Tribunal in **British Home Stores Limited v Burchell 1980 ICR 303,** a threefold test applies. The employer must show that:

    a. It believed that the employee was guilty of misconduct;

    b. it had in mind reasonable grounds upon which to sustain that belief; and

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

    This means that the employer need not have conclusive direct proof of the employee's misconduct; only a genuine and reasonable belief, reasonably tested.

11. Exactly what type of behaviour amounts to gross misconduct depends upon the facts of each case. However, it is generally accepted that it must be an act which fundamentally undermines the employment contract (i.e. it must be repudiatory conduct by the employee going to the route of the contract) (**Wilson v Racher ICR 428, CA**). The conduct must be a deliberate and willful contradiction of the contractual terms or amount to gross negligence.

12. An employer is expected to have regard to the principles for handling disciplinary and grievance procedures in the workplace set out in the ACAS

Code on Disciplinary and Grievance Procedures (the "Code"). The Code is relevant to liability and will be considered when determining the reasonableness of the dismissal. If a dismissal is unfair, the Tribunal can increase an award of compensation by up to 25% from unreasonable failure to follow the Code if it considers it just and equitable to do so.

13. The Code states that the employer's disciplinary rules should give examples of what the employer regards as gross misconduct (i.e. conduct that he considered serious enough to justify summary dismissal). This could include theft or fraud, physical violence, gross negligence or serious insubordination. Some types of misconduct may be universally considered to amount to gross misconduct whereas others will depend upon the nature of the organisation and what it does. The ACAS Guide (which does not have statutory force), which accompanies the Code, gives examples of gross misconduct including: physical violence or bullying, unlawful discrimination and harassment.

14. Even where gross misconduct may justify summary dismissal, an employer suspecting an employee of such conduct should still follow a fair procedure including a full investigation of the facts. If an employer does establish a reasonable belief that the employee is guilty of misconduct in question, he must still hold a meeting and hear the employee's case, including any mitigating circumstances that might lead to a lesser sanction. Accordingly, even if the employee has committed an act of gross misconduct, the fairness or otherwise of any subsequent dismissal remains to be determined in accordance with the statutory test.

15. A conduct dismissal will not normally be treated as fair unless certain procedural steps have been followed. Without following these steps, it will not in general be possible for an employer to show that he acted reasonably in treating the conduct reason as a sufficient reason to dismiss. In **Polkey v AE Dayton Services Limited 1988 ICR 142, HL**, Lord Bridge set out these procedural steps as follows:

    a. A full investigation of the conduct; and

    b. A fair hearing to hear what the employee wants to say in explanation or mitigation.

16. When assessing whether the employer adopted a reasonable procedure, the Tribunal should use the range of reasonable responses test that applies to substantive unfair dismissal claims. In **Sainsbury plc v Hitt 2003 ICR 111, CA** Lord Justice Mummery stated that:

> *The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason.*

17. The Code sets out the basic requirements for fairness that will be applicable in most conduct cases. It is intended to provide a standard of reasonable

behaviour in most instances. The Code sets out the steps employers must normally follow namely:

a. Carry out an investigation to establish the facts of the case;

b. Inform the employee of the problem;

c. Hold a meeting with the employee to discuss the problem;

d. Allow the employee to be accompanied at the meeting;

e. Decide on appropriate action;

f. Provide employees with an opportunity to appeal.

18. The Code acknowledges that sometimes it may not be practicable for all employers to take all the steps set out in the Code. Dismissal may still be reasonable. Conversely if all the steps have been followed, a dismissal may be unfair.

19. An employer should carry out a full investigation before deciding whether dismissal is a reasonable response in the circumstances. Applying the Burchell test, the employer should not act based on mere suspicion. It must have a genuine belief that the employee is guilty, based on reasonable grounds, after having carried out as much investigation into the matter as was reasonable in all the circumstances of the case. The employer's job is to gather all the available evidence. Once in full possession of the facts, the employer will be able to make a reasonable decision about what action to take. It is also important that the employer puts itself into a position of being able to make specific rather than general allegations against the employee. If an employer fails to establish all the facts it risks a finding that a resulting dismissal was unfair both in respect of a failure to carry out a reasonable investigation and a failure to comply with the Code.

20. The Code states that "a fair disciplinary process should always be followed before dismissing for gross misconduct". Unless the misconduct is so heinous as to require instant dismissal (e.g. where there is a danger to life or severe damage to the business) even serious conduct cases should be dealt with in the normal way.

21. The extent of the investigation and the form it should take depends on the circumstances of the case. In some cases, as the Code explains, the investigation stage will only involve the employer collating evidence; in others an investigatory meeting with the employee will be required. If the employer decides to hold an investigatory meeting, it should not result in disciplinary action. If it becomes clear during the meeting that disciplinary action is needed, the meeting should be adjourned, and the employee given separate notification of a disciplinary hearing and notified of his/her right to be accompanied.

22. There is no hard and fast rule as to the level of inquiry the employer should conduct into the employee's suspected misconduct in order to satisfy the **Burchell** test. It will depend on the circumstances, the nature and the gravity of the case, the state of the evidence and the potential

consequences of an adverse finding on the employee. The Code emphasises that the more serious the allegation, the more thorough the investigation conducted by the employer ought to be. An investigation leading to a warning need not be as rigorous as one leading to dismissal ***(*****A v B 2003 IRLR 2003 IRLR 405, EAT*****)***. There should be careful and conscientious enquiry with the investigator putting as much focus on evidence that may point towards innocence as on that which points towards guilt. The Code stresses that employers should keep an open mind when carrying out an investigation. Their task is to look for evidence that weakens as well as supports the employer's case. If disciplinary action results in dismissal and there is an indication that the employer has pre-judged the outcome, that can be enough to make the dismissal unfair.

23. The Code provides that "where practicable, different people should carry out the investigation and the disciplinary hearing". Such a division of functions is recognised by the Tribunal as an important indicator of impartiality (**Warren James Jewelers Ltd v Christy EAT 1041/02**). It is not always possible in small organisations for functions to be separated. Where there are a limited number of people available it is not necessarily unfair for the same people to be involved in the early stages of the disciplinary process and in the decision to dismiss (**Barlow v Clifford & Co (Sidcup) Ltd EAT 0910/04**). The Tribunal must determine whether, on the facts of a particular case and having regard to the nature of the allegations made, the manner of the investigation, the size and capacity of the employer's undertaking, and all other relevant circumstances, it was unfair in a particular case for the investigator also to chair the disciplinary meeting and be the dismissal decision taker (**Premier International Foods Ltd v Dolan and anor EAT 0641/04**).

24. The purpose of the disciplinary hearing is twofold: it allows the employer to find out whether or not the misconduct has been committed and it allows the employee to explain the conduct or any mitigating circumstances. The ACAS Guide recommends that employers arrange for someone who is not involved in the case to attend the meeting to take a note and act as a witness to what was said. The ACAS Code sets out the following requirements:

    a. The employer should explain the complaints against the employee and go through the evidence that has been gathered;

    b. The employee should be allowed to set out his or her case and answer any allegations that have been made;

    c. The employee should be given a reasonable opportunity to ask questions and present evidence and call witnesses;

    d. The employee should be given an opportunity to raise points about any information provided by witnesses;

    e. Where an employer or employee intends to call relevant witnesses, they should give advance notice of intent to do this.

25. The ACAS Guide points out that the purpose of the meeting is to establish the facts rather than to catch people out, and suggested it contains the following five elements:

a. Statement of the complaint by the employer outlining the complaint and the evidence;

b. The employee's reply answering any allegations that have been made;

c. General questioning and discussion, which should be a two-way process;

d. Summing up;

e. Adjournment before a decision.

If the employer fails to ensure that the employee is given a fair chance to refute any allegations of misconduct against him or her, this may lead a Tribunal to conclude that the decision to dismiss was a foregone conclusion.

Breach of contract

26. If an employee is dismissed with no notice or in adequate notice in circumstances which do not entitle the employer to dismiss summarily, this will amount to a wrongful dismissal and the employee will be entitled to claim damages in respect of the contractual notice. The measure of damages will be limited to the employee's losses occurring during the period between dismissal and the point at which the contract could lawfully have been brought to an end by the employer, normally the contractual notice period. In these circumstances the employee will be under a duty to mitigate her losses by taking reasonable steps to find another job. Notice pay is also recoverable as an element of the compensatory award for unfair dismissal.

Unauthorised deduction from wages

27. Under section 13 (1) ERA, a worker has the right not to suffer unauthorised deductions. Section 13 (1) ERA defines deductions as follows:

> *Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated… As a deduction made by the employer from the worker's wages on that occasion.*

28. Section 13 (1) ERA states that an employer must not make a deduction from the wages of worker unless:

a. The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract (section 13 (1) (a);

b. The worker has previously signified in writing his or her agreement to the deduction (section 13 (1) (b).

29. Section 13 does not apply where the purpose of the deduction is the reimbursement of the employer in respect of an overpayment of wages. If an employer discovers that such an overpayment has for any reason been made to a worker, it may simply deduct the sum overpaid from a subsequent pay packet without further ado.

30. Section 23 (1) ERA gives workers the right to complain to the Tribunal about deduction from wages or payments received by the employers that are not permitted under the Act and to seek reimbursement of the sums involved. There is a three-month time limit for presenting a complaint to the Tribunal. If the complaint relates to a deduction by the employer, the operative date from which time starts to run as the date of payment of the wages from which the deduction was made (section 23 (2) (a).

31. If a Tribunal finds a complaint to be well founded it must make a declaration to that effect. It must also order the employer to reimburse the worker for the amount of any unauthorised deduction made or payments received.

Failure to provide a statement of written particulars of employment

32. Section 1 ERA provides that an employee is entitled to be provided with a statement of written particulars of employment after completing two months service with her employer. The Tribunal has the power to award compensation for failing to provide a statement of written particulars of employment under Employment Act 2002, section 38 where, upon a successful claim being made under any of the Tribunal jurisdictions listed in Schedule 52 that Act, it becomes evident that the employer was in breach of its duty under section 1 ERA.

33. The Tribunal must award compensation to an employee where, upon a successful claim being made under any of the Tribunal jurisdictions listed in Schedule 5. The list of jurisdictions set out in Schedule 5 is extensive and it includes unfair dismissal, breach of contract and breach of the Working Time Regulations 1998. The Tribunal must award the minimum amount of two weeks' pay and may, if it considers it just and equitable in the circumstances award the higher amount of four weeks' pay. The tribunal does not have to make any award if there are exceptional circumstances which would make an award or increase and just or inequitable. A week's pay is capped to the maximum under section 227 ERA (£508 as at the date of the claimant's dismissal).

Application of the law to the facts.

34. I am satisfied that the principal reason for the dismissal was the second respondent's belief that the claimant was guilty of misconduct. Conduct is a potentially fair reason to dismiss an employee.

35. I am not satisfied that the dismissal was fair. The procedure followed by the second respondent was fundamentally flawed from the outset. Regarding his claim that the claimant had overstated her hours in October 2018, whilst the second respondent relied upon CCTV evidence, he did not show that evidence to the claimant. He conducted a partial investigation. He did not give the claimant an opportunity to view the material that he relied upon. He did not warn her in advance of the disciplinary hearing what the alleged acts

of misconduct were. He did not warn her that she faced the risk of dismissal. He simply ambushed her with allegations on 28 October 2018. I also note, that whilst the second respondent was a small employer it would have been reasonable for someone else to have conducted the investigation. There was no need for the second respondent to investigate the claimant and to hold the disciplinary hearing. I am also concerned that the second respondent was selective in the CCTV evidence that he collated. He only seemed to be interested in finding evidence that he believed established the claimant's guilt. For example, he admitted in his oral evidence that there was probably CCTV evidence that showed that she arrived earlier or later than what was recorded in the notebook. He did not carry out a balanced investigation as required by the ACAS Code. He did not notify the claimant that she had the right to be accompanied by a colleague or a trade union representative. He did not offer the claimant a right of appeal. I suspect that part of the second respondent's motivation in dismissing the claimant was he perceived her to be disloyal because he thought she was going to work for Mr Katulski. However, I believe that was not the operative reason why he decided to dismiss the claimant.

36. I cannot see that dismissal was within the range of reasonable responses for an employer to follow.

37. The second respondent deducted 36 hours wages from the claimant's final pay packet. He purported to do this because he believed that she had overstated her hours between April and October 2018. He had absolutely no basis for doing this. Under cross examination he admitted that he was simply speculating. He thought that as she had allegedly overstated her hours in October, she must have done the same between April and October. Furthermore, he admitted that he had no CCTV evidence to rely upon because it had been overwritten. He had not established that there was an overpayment. Furthermore, there was no evidence that the claimant consented to such deduction being made. Consequently, the inevitable conclusion to be drawn is that the second respondent made unauthorised deductions from the claimant's wages.

38. The second respondent has not established that the claimant acted dishonestly. Whilst he paid her three weeks' notice, the figure that he used to calculate the final payment was incorrect. I have dealt with this in more detail below when addressing the question of remedy.

39. Regarding the claim for unpaid holiday pay on termination of employment, the second respondent has already admitted that he made a mistake and has conceded the claimant's claim.

Remedy

40. The claimant told me that she is only interested in compensation. She is not seeking reinstatement or re-engagement.

41. I am satisfied that there was a complete failure on the part of the second respondent to follow the ACAS code of practice. Under the circumstances, it would be just and equitable to increase the compensatory award by 25%. Under all the circumstances, I do not think that the claimant can be criticised

for not appealing the decision. She was not told about any right of appeal and it was clear that the second respondent had made his mind up.

42. The dismissal was procedurally unfair. Would the outcome have been the same if the second respondent had followed a fair and reasonable procedure? It seems, however, unlikely that dismissal would have followed given the fact that a fair procedure should have included a balanced investigation, the opportunity for the claimant to state her claim and to offer mitigating circumstances. A fair procedure should also have required the second respondent to consider the claimant' is otherwise clean disciplinary record throughout the several years that she had worked for him. This could have resulted in a lesser sanction such as a final written warning. No reduction should be made to the compensatory award.

43. I do not see that the claimant was guilty of any blameworthy conduct. The second respondent has not established this and, consequently, it would not be just and equitable to reduce the amount of the claimant's basic award pursuant to section 122 (2) ERA.

44. If a dismissal is both wrongful and unfair, the common practice of the Tribunal is to consider damages for the wrongful dismissal as part of the compensatory award for unfair dismissal. Once dismissed, the employee is under a duty to mitigate her loss by taking reasonable steps to find another job. Where she is successful, the salary and other benefits earned during the damages period must be deducted from the award of damages.

45. The compensatory award for unfair dismissal is deductible from the award for wrongful dismissal. The basic award is probably not deductible as it represents loss of job security and not loss of earnings.

46. I have had the benefit of the claimant's schedule of loss which was not challenged by the second respondent. Compensation is calculated as follows:

Breach of contract

£84.83

Unlawful deductions from wages

36 hours x £8.60 gross = £309.60 gross

Total: £247.68 net

Failure to pay annual leave (conceded)

£124.38 net

Unfair dismissal

Head of claim	**Amount (£)**
Basic Award: 3 full years in employment under the age of 40 – 3 x gross weekly pay	740.26
Deduction	0
Compensatory award Loss of earnings between 30/10/18 and 01/12/18 – 4.71 weeks' pay Less payment in lieu of notice £634.23 Earnings in new employment (differential) Benefits Polkey reduction Contributory fault **Sub total** Increase under section 124A ERA by 25% Loss of statutory rights	 1,088.81 454.56 222.72 0 0 0 **856.97** 1071.21 500
Total	**2,471.56**

Failure to provide written statement of particulars of employment

The second respondent has shown scant regard for employment law and practice and I believe it would be just and equitable to award 4 weeks' pay

£230.96 x 4

£923.84

Employment Judge A.M.S. Green
Date 12 July 2019

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2500374/2019**

Name of case(s): **Ms K Bulla** v **Kopernik & Others**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **25 July 2019**

"the calculation day" is: **26 July 2019**

"the stipulated rate of interest" is: **8%**

MISS K FEATHERSTONE
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at **www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426**

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.