EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT:	**MRS D ESCOTT**	
RESPONDENT:	**TESCO STORES LIMITED**	
HEARD AT:	**CARDIFF**	**ON: 20 AUGUST 2019**
BEFORE:	**EMPLOYMENT JUDGE R BRACE**	

REPRESENTATION:

CLAIMANT:	**MR LASSEY (COUNSEL)**
RESPONDENT:	**MISS WHEELER (SOLICITOR)**

JUDGMENT

The judgment of the tribunal is that the respondent is ordered to pay to the claimant the sum of **£30,481.56** in compensation for unfair dismissal as calculated below.

Basic Award		
22 weeks @ £508 per week		£11,176.70
Total basic award		**£11,176.70**
Compensatory award Immediate Loss		
Loss of net earnings		
17 August 2018 – 1 April 2019 33 weeks@ £409.23 per week	£13,504.59	
Loss of pension		
33 weeks@£38.10	£1,257.30	
Loss of Fringe benefits		
Club Card / Staff discount @£6 per week 33 weeks@£6	£198.00	
Loss of statutory rights		
	£500.00	
Total Compensatory Award (Immediate Loss)		**£15,439.89**
Adjustments to Total Compensatory award		
25% uplift ACAS		£3,864.97
Compensatory award after adjustments		**£19,304.86**
SUMMARY TOTALS		
Basic award		£11,176.70
Compensation award		£19,304.86
TOTAL		**£30,481.56**

REASONS

Preliminaries

1. The claimant succeeded in a claim of constructive unfair dismissal. This hearing is set down to deal with the appropriate remedy in that claim. I have heard oral evidence from the claimant, who has also provided a bundle of documents ("Remedy Bundle"). I have also heard submissions from both parties. This judgment is to be read in conjunction with the liability judgment of 20 June 2019.

2. The issues between the parties are solely related to the correct quantum of compensation, the claimant not seeking re-instatement or re-engagement.

3. The claimant seeks a basic award, which the respondent concedes in principle, but there is a dispute between the parties on the calculation of a week's pay for the purposes of the basic award and therefore no agreement on the actual sum calculated by the claimant in the schedule of losses within the Remedy Bundle.

4. The claimant claims a compensatory award from the date of her dismissal on 17 August 2018 to the date of her new employment with Rhondda Cynon Taf Council on 1 April 2019 (33 weeks,) together with a further 26 weeks' future loss of earnings. The respondent argues that compensation for loss of earnings must be limited to losses to 17 February 2019, being a period of 26 weeks/6 months from the termination of employment on 17 August 2018.

5. Again, there is no agreement on the amount of week's pay for the purposes of a compensatory award.

6. The claimant contends that the basic award (and any compensatory award) should be based on contractual pay of £27,779.44 per annum (gross), the respondent's case is that the basic award (and any compensatory award) should be calculated on a 'week's pay' calculated in accordance with s.220 and s.221(3) Employment Rights Act 1996.

7. In relation to the compensatory award, there is an additional dispute between the parties as to:

7.1. what percentage pension loss is claimable, with the claimant seeking to recover contributions at 7.5%, and the respondent claiming that pension losses should be based at 7%;

7.2. what additional or 'fringe' benefits' can be claimed by the claimant as:

7.2.1. The respondent contends that the claimant has had returned to her all contributions made (and so no losses have been sustained) and in any event disputes that the claimant has demonstrated losses in respect of the 'Save as you Earn' share scheme ("Share Scheme") and as a result the tribunal is required to speculate on the losses suffered by the claimant;

7.2.2. The parties do agree that the claimant can recover an amount in respect of the Colleague Clubcard/staff discount at the rate of £6 per week.

8. Despite over two months elapsing since the liability hearing, the claimant and respondent have not been able to agree losses and, in addition to the failure to agree the calculation of a 'week's pay' for the purposes of the calculation of the basic award or assessment of the compensatory award, they have also been unable to agree what the set employer pension contribution rates were and/or the position in relation to the Share Scheme. No application was made by either party for an adjournment to address and/or seek to resolve the issues.

9. In addition to financial losses, the claimant also seeks an award for loss of statutory rights in the sum of £350, and an additional sum for 'loss of long notice rights' at £2,455.38 (being 6 weeks' net pay at a net week pay rate of £409.23). The respondent has indicated that a sum of £250 is more appropriate for loss of statutory rights and contests that the claimant can recover any further amount in respect of loss of long notice rights'.

10. The respondent asks the tribunal to reduce the overall award to find that the claimant would not have found the changes proposed by the respondent to have been acceptable had they followed a correct procedure and/or provided her with the information she sought, and claim that she would have left their employment in any event in March 2018 when the changes took effect (or at the latest in April 2018,) as they maintain she clearly had no appetite for continuing in her old role at the respondent. On that basis, a Polkey approach would mean that the claimant would not be entitled to compensation.

11. If the respondent fails in that submission, Miss Wheeler argues that the claimant has failed to properly mitigate her losses, in that whilst the claimant did undertake a job search, the searches focussed on HR roles which was more congenial to her and took her longer to obtain alternative work, than forms of employment akin to her most up to date retail experience.

12. Finally, with regard to the ACAS uplift, the claimant seeks an uplift on the basis of:

12.1. unfairly suspending the claimant for 5 months with no review or duty of care;
12.2. failure to hear the grievances in line with policy which resulted in unreasonable delays to meetings;
12.3. unreasonable delays in conducting investigatory meetings into suspension;
12.4. not being permitted representation at suspension meeting;
12.5. investigations into suspension were not conducted thoroughly;
12.6. investigations into grievances were not conduct thoroughly; and
12.7. grievance meetings were rescheduled when representative was unavailable

13. Whilst the respondent accepts the tribunal's finding that the claimant was suspended unfairly, it does not consider that this finding merits the full 25% uplift. Further, the additional grounds relied upon to seek an uplift, are not merited and/or do not form part of the liability judgment.

The Relevant Facts

14. The claimant gave a very brief statement at the liability hearing, supported by documentary evidence contained in the Remedy Bundle. The facts of the case are set out in the liability judgment and I do not intend to repeat them here.

15. In relation to the calculation of a 'week's pay', the claimant's gross annual salary was £27,779.44 and she was paid on a 4-week basis the gross amount of £2,136.88 (see Doc 24 and 25 Remedy Bundle). This equates to a contracted gross week's pay of £534.22. It is the contracted pay that the claimant has utilised for the calculation of both the basic (reduced to the capped £508) and compensatory award.

16. The respondent's calculation of the claimant's gross 'week's pay' under s.221 ERA 1996 for the purposes of the basic award is £496.35.

17. The law is clear that it is the calculation of 'week's pay' under the provisions of s.220-229 ERA 1996 that is to be used for the purposes of calculating any basic award.

18. However, I had no evidence before me that the calculation of the claimant's 'week's pay' under the provisions of s.220-229 ERA 1996 would alter from the amount payable under the contract of employment (s.221(2) ERA 1996). This amount has been capped by the claimant in her schedule of loss to £508 due to the statutory cap for the purposes of the Basic Award and it is this amount that I found should be used.

19. The claimant's contracted net weekly pay is £409.23 as claimed in the claimant's schedule of loss. The respondent did not challenge this calculation of the contractual net weekly contracted pay. Rather the respondent included a calculation based on s.221 ERA 1996.

20. Unlike the basic award, there is no obligation to use the statutory calculation of 'week's pay' for the purposes of the compensatory award and it is the net contractual amount for weekly pay that is claimed by the claimant, that I found should be used for the calculation of any compensatory award.

21. In relation to the pension losses, whilst the respondent challenged that the employer contribution rate was 7.5%, Miss Wheeler was not able to assist on why the rate was stated to be 7% and had no evidence to support that rate. On that basis, Miss Wheeler conceded that rate. In any event, on the basis of the evidence before me, I found that the employer pension contribution rate was 7.5% as claimed, not 7% following a review of the Payroll Reports disclosed (page 24 and 25 Remedy bundle,) the amount for employer pension contribution was shown to be £160.27, which I calculated to be a 7.5% employer contribution rate.

22. In relation to the loss of benefit of Colleague Clubcard/staff discount, on the basis of agreement between the parties, I found that the claimant had suffered a loss in the sum of £6 per week in respect of this benefit.

23. In relation to the loss of the benefit of the Share Scheme, as I made clear to the representatives at the hearing, the evidence before me on this issue was confused in terms of the oral evidence from Mrs Escott, and scant in terms of documentary

evidence. The statement submitted by Mrs Escott (para 18 of the witness statement) simply stated that the Share Scheme gave her a 60% profit on savings, and she had suffered a loss in the sum of £4,425.

24. The schedule of loss submitted on behalf of the claimant and contained in the Remedy Bundle showed this to be calculated at the rate of 60% of £125 per week (£500 per 4-week period). At the hearing this was recalculated and reduced by Mr Lassey, Mrs Escott's representative, to £2,696.25.

25. Whilst I accepted that the claimant had saved £500 per month into the Share Scheme, and that she had purchased and sold a percentage of the shares within the Share Scheme account, there was no evidence before me (whether verbal or in documentary form) to support her contention that she had suffered losses, whether

25.1. in the sum of £4,425 as originally claimed in the claimant's schedule of loss;
25.2. £2,696.25 as amended and claimed at the hearing by Mr Lassey,
25.3. or indeed at all.

26. Whilst it is possible that the claimant has suffered a loss as a result of the loss of this benefit, I had no evidence before me to make a finding in the claimant's favour and do not find as a result, on balance of probabilities, that the claimant has suffered a loss in respect to this element of her claim.

Mitigation

27. In relation to mitigation, the respondent submits that the claimant would have found alternative employment, at equivalent level of salary that she had enjoyed with the respondent, within 6 months i.e. to 17 February 2019.

28. The respondent has challenged that the claimant's attempts to find alternative work, limited to roles in HR, was not reasonable. Mr Lassey on behalf of the claimant has submitted that the claimant wanted a stable future, did not see retail as that stable future and that she was forced to explore entry level roles in HR.

29. The claimant had applied for 88 positions since the termination of her employment. Copies of those applications, together with a schedule of those applications, were contained in the Remedy Bundle. Most of the applications i.e. all save for around 4-5 applications, were for entry-level roles within HR. None were in retail management.

30. The claimant restricted her job search, from the outset of her unemployment in August 2018, to roles within Human Resources ("HR"). She did not attempt to find alternative employment within the area of her considerable experience in retail management. She restricted her search in this way throughout the time she was looking for employment, up until she obtained alternative employment within HR at Rhondda Cynon Taf Council. I have no evidence of additional job searches beyond March 2019.

31. The claimant self-funded and completed CIPD Level 5 in Diploma Human Resource Management in October 2018 but I had no evidence before me that the claimant had any other HR qualification.

32. Within the roles undertaken by the claimant at the respondent over the previous 15 years, including that of Stock Manager, the claimant had undertaken human resource responsibilities. The claimant had not however carried out a role which included within the job title 'HR' and whilst she had also deputised for the respondent's HR officers, she had never been employed by the respondent within its Human Resource department or within an HR role.

33. I have no evidence before me on the job market currently within retail management and no evidence has been adduced by the respondents on what, if any, available roles within retail existed since the termination of the claimant's employment, that the claimant could have and/or the respondent says that claimant should have applied for.

34. Whilst the claimant did refer to the fact that the respondents have announced 4,500 job cuts, there was no evidence to demonstrate the lack of general stability in supermarket retail or retail more generally.

35. The claimant did not apply for roles within retail, similar to those she had previously held with the respondent, as she wanted stable future employment and considered that retail was a failing business and not a '*safe option*'. She was encouraged by recruitment agencies as a result to focus on HR due to her knowledge and experience. I found this evidence to be at odds with her other evidence, which I deal with below in relation to *Polkey*, and which I had accepted, that she would have remained at the respondent had she been provided the information she had requested.

36. I was not persuaded by the claimant that there was evidence to demonstrate why she could not longer continue in a career in retail, management or indeed retail management which may have enabled her to obtain alternative employment either earlier or at a similar level to that enjoyed by her at the respondent or which justified the change sought by the claimant from retail management to HR. There was no evidence from the claimant that the effect of the dismissal made her unwilling or unable to look for other retail management roles.

37. I found that the claimant chose to take the opportunity to explore other career opportunities in HR. I do not find, as was submitted by Mr Lassey that the claimant was forced to explore roles in HR.

Polkey

38. In relation to issue of whether the claimant would have resigned/had her employment terminated in any event, the claimant still maintains that the changes to the Stock Manager role were 'major' as opposed to 'minor' changes. In light of this, the claimant was cross-examined on whether, had she been given the information she had requested at the time on the changes i.e. in the run up to March 2018, she would have resigned in March 2018 in any event. The claimant did not accept that this was the case, as had the information been given to her, she would have '*given it a go'*.

39. I accept the claimant's account given today as accurate; it does fit with her earlier evidence. I cannot say with certainty that she would not have left in any event, but I

can say that remaining at the respondent was more probable than not, and certainly at a very high level of probability, despite her misgivings on the retail sector more generally now that she is out of it.

40. Rather than find that her employment would have terminated in March/April 2018, I found that the claimant would, in respect of the new role, have '*given it a go',* as she put it.

ACAS Code

41. In relation to the arguments on failure to comply with the ACAS code, in light of my liability decision (in particular, but not limited to, that set out at paragraphs 45-48 and 85—95) in relation to the suspension, I further find that the respondent's failure to comply with its own policy on suspension and in turn failure to review the suspension to be an unreasonable breach of the ACAS Code.

42. Whilst I found that the claimant's first and second grievances were dealt with within a month of submission, a period that is in excess of the 7 / 14 day' period indicated in the respondent's grievance policy, I did not find that this was an unreasonable time period. I therefore did not consider that there had an unreasonable failure to follow the ACAS Code in relation to delays in grievance meetings.

43. I had no evidence before me to find that grievance meetings were rescheduled and did not find that there had been a failure to follow any aspect of the ACAS Code in this regard.

The Law

44. I am required to consider the question of the claimant's loss, under section 123 of the employment Rights Act 1996 which provides:

> *(1) Subject to the provisions of this section and sections 124 and 124A, 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.*
>
> *(2) The loss referred to in subsection (1) shall be taken to include—*
>
> *(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and*
> *(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.*
>
> *1. In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule*

concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

45. In ***Scope v. Thornett [2007] IRLR 155*** the Court of Appeal guides me as to my need to engage in a certain amount of speculation in the appropriate circumstances in the words of Pill LJ at paragraph 34:

> *"The employment tribunal's task, when deciding what compensation is just and equitable for future loss of earnings will almost inevitably involve a consideration of uncertainties. There may be cases in which evidence to the contrary is so sparse that a tribunal should approach the question on the basis that loss of earnings in the employment would have continued indefinitely but, where there is evidence that it may not have been so, that evidence must be taken into account."*
> And at paragraph 36
>
> *"The EAT appear to regard the presence of a need to speculate as disqualifying an employment tribunal from carrying out its statutory duty to assess what is just and equitable by way of compensatory award. Any assessment of a future loss, including one that the employment will continue indefinitely, is by way of prediction and inevitably involves a speculative element. Judges and tribunals are very familiar with making predictions based on the evidence they have heard. The tribunal's statutory duty may involve making such predictions and tribunals cannot be expected, or even allowed, to opt out of that duty because their task is a difficult one and may involve speculation."*

46. The guidance on consideration of chance in the context of an unfair dismissal claim is summarised in and principles emerge from **Software 2000 Ltd v Andrews & Ors [2007] ICR 895** in that in assessing compensation '*the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal'.*

47. That requires the tribunal to assess for how long the employee would have been employed but for dismissal. If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively, would not have continued in employment indefinitely, it is for them to adduce any relevant evidence that they wish to rely on. However, we must have regard to all the evidence when making that assessment, including any evidence from the employee herself. There will be circumstances where the nature of

the evidence which the employer wishes to adduce is so unreliable that the Tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. Whether that is the position is a matter of impression and judgment for the Tribunal but in reaching that decision we must direct ourselves properly and need to recognise and have regard to any material and reliable evidence which might assist us in fixing just compensation, even if there are limits to the extent to which we can confidently predict what might have been. We must appreciate that there is a degree of uncertainty with that exercise.

48. The claimant must prove loss; the respondent must establish a failure to mitigate loss. In ***Wilding v British Telecom PLC [2002] EWCA Civ 349*** Potter LJ said that five elements were to be considered in respect of the reasonableness of mitigation:

> (*i) It was the duty of Mr Wilding to act in mitigation of his loss as a reasonable man unaffected by the hope of compensation from BT as his former employer; (ii) the onus was on BT as the wrongdoer to show that Mr Wilding had failed in his duty to mitigate his loss by unreasonably refusing the offer of re-employment; (iii) the test of unreasonableness is an objective one based on the totality of the evidence; (iv) in applying that test, the circumstances in which the offer was made and refused, the attitude of BT, the way in which Mr Wilding had been treated and all the surrounding circumstances should be taken into account; and (v) the court or tribunal deciding the issue must not be too stringent in its expectations of the injured party. I would add under (iv) that the circumstances to be taken into account included the state of mind of Mr Wilding.*

Conclusions

Basic Award

49. The Basic Award will be based on calculation of gross week's pay as defined in s.220 to s.229 Employment Rights Act 1996 capped at £508 and a multiplier of 22 will be applied (which was also agreed between the parties to be the appropriate multiplier) taking into account the claimant's age at termination (45) and length of service (20 years).

50. The Basic Award is therefore calculated at **£11,176.00**.

Compensatory Award

Financial Losses

51. I concluded that it was just and equitable to award the claimant a compensatory award based on:
    51.1. loss of earnings calculated at the rate of net pay of £496.35 per week (as claimed by the claimant);
    51.2. loss of employer pension contributions at the rate of 7.5% in the sum of £38.10 per week; and
    51.3. loss of Colleague Clubcard / Staff discount in the sum of £6.00 per week.

52. As a result of my findings in relation to the Share Scheme, I do not consider that the claimant is entitled to any compensation in respect of any losses suffered arising out of the Share Scheme.

Mitigation

49. I am of the view that I should restrict the claimant's losses to a period of 33 weeks i.e. losses to the 1 April 2019 being the date that she commenced employment in HR with Rhondda Cynon Taf. I do not conclude that the losses should be limited to 17 February 2019 as has been submitted by the respondent. I have no evidence from the respondent to support the submission that the claimant would have obtained suitable alternative employment at that date.

50. I did not conclude that the claimant had acted reasonably in taking the lower-paid HR work and further concluded that this was a failure by the claimant to take reasonable steps to mitigate or minimise her losses. There was no evidence of high level of unemployment in the retail sector or that the claimant was forced to look in HR, that justified acceptance of lower paid employment at entry level HR.

53. Having found and concluded that the claimant's decision to embark on a new career in HR was not a reasonable act of mitigation, I have concluded that the claimant is not entitled to compensation from 1 April 2019, being the date that she commenced employment at Rhondda Cynon Taf and/or ceased looking for other alternative work. The claimant's acceptance and commencement in employment in this role broke the chain of causation.

54. In any event, the commencement of this employment was an intervening act relieving the respondent of any further liability for the claimant's losses.

Polkey

55. As I have found that I it was not likely that the claimant would have resigned in any event in March/April 2018. I conclude, that having been given the information she sought on the new Stock and Compliance role, the claimant would have tried out the role and would not have readily left a job she had loved in an organisation that she had worked in since 1989.

56. In my judgment, there was no real evidence which could lead me to conclude that the claimant would have resigned in any event in March/April 2018 from a job she stated that she loved, and from an organisation that she had worked in for 29 years.

57. I therefore do not accept that there was any reduction for the percentage chance that the claimant would have resigned or been dismissed in any event had the respondent's acted fairly

ACAS Uplift

58. In relation to the ACAS uplift, as the Code makes clear in cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action. In light of my liability findings, I concluded that there should be an uplift in respect of the respondent's breach of the ACAS Code in relation to suspension.

59. I considered this to be a significant breach of the Code and for that element alone considered that an uplift of 25% was appropriate.

60. I therefore award the claimant losses from the date of termination to 1 April 2019 (33 weeks) in the sum of

    60.1. £13,504.59 for loss of salary,
    60.2. £1,257.30 for loss of employer pension contributions and
    60.3. £198.00 for loss of Colleague Clubcard/ Staff discount.

61. Further I concluded that the claimant was entitled to compensation for loss of statutory rights and I awarded the sum of **£500.00**. I did not consider it just and equitable to award an element in respect of loss of notice rights.

62. Due to the failure by the respondent to comply with the ACAS Code in relation to the suspension I increase the compensatory award by 25% which amounts to a further **£3,864.97**

63. In total therefore with the basic award I order the respondent to pay to the claimant the sum of **£30,481.56**.

EMPLOYMENT JUDGE R BRACE

Dated: 23 August 2019

Judgment posted to the parties on

……24 August 2019…….

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For the staff of the Tribunal Office