EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104186/2018

Held in Glasgow on 7 May 2019

Employment Judge: C McManus

Ms Lorraine Miller	**Claimant** **Represented by:** **Ms K Osbourne - Solicitor**
Bute House Ltd t/a Acorn Park Care Home	**Respondent** **Represented by:** **Mr V Kumar - Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

- In respect of the claimant's successful claim of unfair dismissal under section 98 of the Employment Rights Act 1996, as set out in the Judgment of the Employment Tribunal (EJ Lucy Wiseman) dated 16 January 2019, the total award made to the claimant in respect of her unfair dismissal by the respondent is £3,921.45, (THREE THOUSAND NINE HUNDRED AND TWENTY ONE POUNDS AND FORTY FIVE PENCE), being comprised of an unfair dismissal basic award of £1,717.74 and a compensatory award of £2,203.71.

REASONS

Background

1. This Remedy Hearing follows the Judgment of the Employment Tribunal in respect of this case, dated 16 January 2019, being the Judgment of EJ Lucy Wiseman. The purpose of this Hearing was to determine the extent of the claimant's remedy in respect of her successful claim against the respondent

of unfair dismissal. The terms of that Judgment are relevant to the conclusions from this Remedy Hearing. I explained at the outset of this Hearing that EJ Wiseman was unavailable to hear this Remedy Hearing. Neither party had any objection to the Remedy Hearing being heard by me.

2. It is set out in the Judgment of 16 January 2019 (at paragraphs 124 and 125) that it would be just and equitable to reduce the basic award by 75%, and to reduce the compensatory award by 90% on application of the Polkey principles. Those conclusions stand and I have applied those reductions for the reasons set out in the Judgment dated 16 January 2019.

3. On 7 May 2019, a Director of the respondent (Mr Kumar) wrote requesting a postponement of the Remedy Hearing on 8 May. The postponement request was made on the grounds that the respondent did not have fair notice of the claimant's argument that her illness was attributable to her dismissal and because the respondent no longer had legal representation. The postponement request was discussed as a preliminary matter, once parties had confirmed that they had no issue with this Hearing being heard by me.

4. In dealing with the postponement request, I first stated that in terms of the reliance on lack of legal representation, the Employment Tribunal is used to dealing with cases where one party is legally represented, and the other is not. I stated that in terms of the overriding objective set out in the Rules of Procedure, it is part of the role of an Employment Judge to seek to ensure that there is equity in a case where one party is legally represented and the other is not, although I cannot provide legal advice to a party. That position was accepted by both parties' representatives.

5. In respect of the respondent's position of their lack of notice on the claimant's reliance on her ill health being related to her unfair dismissal, I noted the position stated at paragraph 3 of the judgement dated 16 January 2019, being:-

> *"Mr Edward for the respondent raised a preliminary issue at the commencement of the Hearing. He noted the claimant had provided a schedule of loss indicating she had been unable to work since the*

dismissal and that she intended to argue responsibility for this lay with the respondent. Mr Edward considered there had been no notice of this and no medical information had been produced to support the claimant's position."

6. I noted that it was for that reason that the hearing in this case was separated into a liability hearing and a remedy hearing. Mr Kumar accepted that there had been notice by the respondent that the claimant intended to rely on her ill health as being attributable to her dismissal, although it was his position that that had not been clarified to the respondent by their representative at the time. In discussions with both representatives, I was told that after the liability hearing, parties' representatives had agreed that further medical evidence would be provided by the claimant. The claimant's representative's position was that the claimant's medical records had been sent to the respondent's previous representative. Mr Kumar confirmed that the claimant's medical records had the previous week been emailed to the respondent by the respondent's previous representatives. Mr Kumar's position was that the respondent's previous representatives had withdrawn from acting the previous Thursday afternoon, after the medical records had been sent to the respondent, and that the respondent had been unable to obtain new legal representation over the bank holiday weekend.

7. The claimant's representative opposed any postponement of these proceedings, on the basis that there would be undue delay, that notice had been given of the claimant's argument, that medical evidence had been produced and because of the lateness of the respondent's postponement request.

8. I took into account all these circumstances, and the overriding objective as set out in Rule 2 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1. In terms of that Rule 2, in dealing with a case fairly and justly, I must, so far as practicable (a) ensure that the parties on an equal footing (b) deal with cases in ways which are proportionate to the complexity and importance of the issues (c) avoid unnecessary formality and seek flexibility in the proceedings (d) avoid delay, so far as

compatible with proper consideration of the issues (e) save expense. It is in line with this overriding objective that I decided to proceed with the Remedy Hearing on 9 May 2019. Parties were informed of that decision and did not object to it.

9. Evidence was heard from the claimant only. Reference was made to a Bundle of Documents, paginated consecutively with numbers 1 – 51.

Issues

10. I required to decide the amount which the claimant should be awarded in respect of her unfair dismissal, being the extent of the basic award and the just and equitable compensatory award, taking into account the levels of deductions set out in the Judgment dated 16 January 2019.

Findings in Fact

11. I made the following additional findings in fact in respect of this case:-

(a) The claimant's date of birth is 28/07/1965. Her employment with the respondent commenced on 7/5/2001. The claimant has been unemployed since the effective date of termination of her employment by the respondent on 3 January 2018. At that time her gross weekly pay with the respondent was £319.58, being a net weekly pay of £262.50. The claimant's wage slips from 20 October 2017 (at document 7); 15 December 2017 (at document 8) and 12 January 2018 (at document 9) show that the respondent made employer's pension contributions. These are the only months for which wage slips are before the Tribunal. These wage slips show employer pension contributions of (£10.08 + £9.26 + £9.33) £28.67. This is an average contribution in these three months of £9.56.

(b) From 5 January 2018 the claimant has been in receipt of Employment and Support Allowance equivalent to payment of that at £73.10. That benefit was suspended for a short period, following the claimant's assessment at Cadogan Street as being fit for work. That decision was reversed shortly thereafter, as noted in the claimant's GP records,

and payment of Employment Support Allowance was reinstated and backdated to cover the period following the claimant's assessment.

(c) The claimant's GP records list the claimant's active problems at document page number 11. This includes record of 'depressive episode' from 3 November 2009. This record shows that the claimant had a history of depressive symptoms prior to her dismissal by the respondent.

(d) The claimant attended her GP in respect of the circumstances which led to her dismissal. The extract from the claimant's GP medical records, at document page number 18, shows a redacted consultation note from 21 December 2017 as follows:- *"looking for med 3 for ****** currently suspended from **** under ix for several allegations, union involved. In floods of tears, really upset feels reputation ruined. Med 3 4 weeks *** related ******".*

(e) The extract from the claimant's GP medical records, at document page number 18, also shows a redacted consultation note from 16 February 2018 as follows:- *"Doing a little better been at Job Centre and trying to find other ****. Struggling at times with side effects but wearing off. Review 3/52.*

(f) The extract from the claimant's GP medical records, at document page number 18, also shows a redacted consultation note from 9 March 2018 as follows:- '*Mood picking up and coping a lot better day to day. Is appealing dismissal and going to *****. Her lawyer is optimistic so thinks this is also helping mood. Med3 6 wks from 1/3/18 depression."*

(g) The extract from the claimant's GP medical records, at document page number 18, also shows a redacted administration note from 18 April 2018 as follows:- ' *Med3 6 wks depression/ ******from 19/4/18 "*

(h) The extract from the claimant's GP medical records, at document page number 18, also shows a redacted administration note from 30 May 2018 as follows:- ' *Med3 6/52 from 1/6/18 depression/ ******"*

(i) The extract from the claimant's GP medical records, at document page number 18, also shows a redacted administration note from 30 May 2018 as follows:- ' *Med3 6/52 from 1/6/18 depression/ ******"*

(j) The extract from the claimant's GP medical records, at document page number 15, shows a redacted consultation note from 17 July which includes the following:- ' *discussed ******, medical assessment Cadogan St found fit to ****but job centre advisor has provided note today suggesting not fit and for med 3 as still struggling *****, low mood. Still having frequent mood swings and struggling day to day. Agreed to increase citalopram to 30mg. Med3 8 wks depression/ ******. Worse since review from 7/7/18 8 wk."*

(k) The extract from the claimant's GP medical records, at document page number 15, also shows a redacted administration note from 29 October 2018 as follows:- ' *Med3 8 wks from 1/11/18 depression/ ******. Asked to attend for review before next sick line due"*

(l) The extract from the claimant's GP medical records, at document page number 14, shows a redacted consultation note from 13 December 2018 as follows:- '*has had a very stressful time as ***** in last few weeks. Should hear outcome before Christmas but found whole experience very stressful. Still using ***bd agreed after Christmas to begin to reduce by doing alternate days 2mg/4mg and then review from there 2. Updated chol and LFTs on statin.*

(m) The claimant has been unfit for work because of depression and stress related symptoms since 21 December 2017.

(n) The claimant's GP records show that she had issues in respect of depressive symptoms prior to the time of her dismissal by the respondent, related to significant family circumstances in respect of her son in 2009, and separately, in respect of her daughter in 2014.

(o) The extract from the claimant's GP medical records, at document page number 51, shows a redacted consultation note from 13 October 2009, including the following:- '*Under *****++ Returned to **** last night and*

*feels she can't manage, ***** as care assistant……..Wishes something to calm her down. Had short course of ******** previously. …..as likely requires longer term meds?....."*

(p) The extract from the claimant's GP medical records, at document page number 51, also shows a redacted consultation note from 3 November 2009, where the diagnosis is stated as '*depressive episode'*.

(q) The extract from the claimant's GP medical records, at document page number 30, shows a redacted consultation note from 1 August 2014, including the following:- '*2. Discussed bereavement is still really struggling crying several times per day long discussion re-management previous input from the Haven Blantyre will contact them to say if still can have support. Declines NHS counselling or antidepressants will reduce ******** as aware my ***** re ***** review if *****"*.

(r) The extract from the claimant's GP medical records, at document page number 29, shows a redacted telephone consultation note from 21 November 2014 as follows:- '*struggling went back to **** but crying in care home struggling to understand and come to terms with ********* the . Boss suggested time off. Not keen on antidepressants. Wishing to speak to someone. Will contact the Haven re counselling. Let me know if a problem.".*

Submissions

12. The claimant's representative had produced a schedule of loss, which was addressed by both parties in their submissions.

13. The claimant's representative's position, on the basis of her revised Schedule of Loss, and taking into account reductions of 75% to the basic award and 90% to the compensatory award, as directed by EJ Wiseman, was that the claimant should be awarded the total sum of £5,284.58, being comprised of a basic award of £1,717.72 and a compensatory award of £3,566.86.

14. Reliance was placed on the claimant being in receipt of Employment Support Allowance ('ESA') since 5 January 2018 at the rate of £73.10 a week.

Reliance was placed on the claimant having satisfied the Department of Work and Pensions that she was unfit for work as a result of depression and anxiety. It was submitted that there has been no failure to mitigate her loss, and that the claimant has been unfit for work since the effective date of termination of employment, and continuing. It was submitted that the claimant's incapacity for work is attributable to her dismissal. It was submitted that the claimant had no prior issues.

15. Reliance was placed on the claimant first seeing her GP on 21 December 2017, which was the date when she was suspended. It was submitted that the claimant was at that time, hoping to go back to work to deal with the allegations made against her. It was submitted that when she got the letter that she was dismissed, this caused the claimant to be very distraught, that the allegations have affected her reputation and she that she has found it very upsetting. It was submitted that from that time the claimant's GP has certified the claimant as being unfit for work because of depression, and for that reason she has been not she has not been able to pursue any employment opportunities, or to claim income other than Employment Support Allowance. It was submitted that, on that basis, the compensatory award should take into account the claimant's losses from the date of dismissal until today's hearing on 7 May 2019, and for an additional 52 weeks future loss.

16. It was submitted that the claimant's only experience is working in the care sector. Reliance was placed on the claimant having health issues which have left her unable to leave the house. Reliance was placed on the claimant's evidence that although she remains suitably qualified to work in the healthcare sector, she does not have the confidence because of her health issues to seek alternative employment and therefore has limited career options. Reliance was placed on the claimant having no date for when she would be likely to start being able to look for work. Reliance was placed on *Mrs Mercy Devine -v- Designer Flowers Wholesale Florist Sundries Ltd 1993 WL 963706* as authority for just and equitable compensation taking into account the effect of the manner of the dismissal on the claimant's fitness for work.

17. The claimant's representative sought a 25% uplift applied to the compensatory award for the respondent's failure to comply with the ACAS code of practice with regard to disciplinary procedures.

18. The sum of £350 was sought in respect of the claimant's loss of statutory rights to claim unfair dismissal.

19. The claimant's representative's position in the schedule of loss was that there had been no employer pension contributions, although an element for pension loss was included in the calculation of the compensatory award.

20. The respondent's position was that employer pension contributions had been made, at the rate of 1% of gross weekly wage. The respondent's representative sought to further criticise what was claimed by the claimant as set out in the claimant's schedule of loss. He noted that the claimant's basic award figure has been based on gross pay (which is in accordance with the statutory provisions). He submitted that on the basis of the wage slips produced, the claimant's net weekly wage was £262.50, equating to £1,050 a month. That figure had been accepted by the claimant in cross examination. The respondent's representative noted that the claimant's representative's calculation in respect of pension loss is based on a contribution payment of £6.79, but from the three payslips produced by the claimant, the average pension contribution is £7.63. It was respondent's position that the pay slips show an employee contribution amount and a separate employer contribution.

21. Reliance was placed on the claimant's medical records, in particular, at page 18, noting that the claimant had been found to be fit for work on assessment at Cadogan Street and that this had then been changed.

22. It was submitted that in respect of alternative employment opportunities for the claimant, there is a national shortage of care workers in the NHS and private sector and a large opportunity for alternative employment opportunities for the claimant.

Relevant Law

23. The basic award is calculated as set out in of the Employment Rights Act 1996 ('ERA') section 119, with reference to the employee's number of complete

years of service with the employer, the gross weekly wage and the appropriate amount with reference to the employee's age. Section 227 sets out the maximum amount of a week's pay to be used in this calculation.

24. The basic award may be reduced in circumstances where the Tribunal considers that such a reduction would be just and equitable, in light of the claimant's conduct (ERA Section 122 (2)).

25. The compensatory award is calculated under s123 of the ERA. The correct approach to compensatory award calculation is based on *Digital Equipment Co Ltd -v- Clements (No 2) [1998] IRLR 134 CA*. Per Lady Smith in *Optimum Group Services plc -v- Muir [2013] IRLR 339*, '*Considerations of justice and equity arise only when determining what, of the loss actually suffered, should be awarded in compensation. Such considerations may, for instance operate so as to limit the award…. if…. A novus actus interveniens occurs or if the claimant himself caused or contributed to his own dismissal (a matter which the Tribunal is, in terms of s123(6) ERA, specifically directed to consider when fixing the award) or to exclude a head of loss which is too remote…..; the object of an award under s123(1)is to compensate, not to award a bonus….The task for the Tribunal is to compensate in respect of loss, not to award a sum which exceeds the loss actually suffered.'*

26. Under s207A Trade Union and Labour Relations Act 1992 ('TULRA') an uplift or reduction, as appropriate, may be applied to an award of compensation under a jurisdiction to which s207A applies, which includes unfair dismissal claims.

Comments on Evidence

27. There was no suggestion from the claimant in her evidence that she would not be able to work in the health care sector again as a result of any reputational damage arising from her dismissal by the respondent. The claimant in her evidence volunteered a clear contrary position. It was the claimant's evidence that if she were fit to do then she would have no difficulty obtaining another job in the healthcare sector and that in particular she could

'*walk straight into'* a job in a care home where she had contacts with former colleagues.

28. In her evidence in respect of the respondent having closed the care home where the claimant had worked, the claimant's position was that her former colleagues at that care home had '*walked straight into another job'*. The claimant did not appear to recognise the distinction between those individual's new employment being with other employers, as distinct from an alternative job with the respondent in another location.

29. The claimant's position in evidence was that the respondent had not made any pension contributions, although she accepted under cross examination that they may have done.

30. I did not find the claimant to be entirely reliable in respect of the issues before me. She did seek to answer the questions put to her. Her oral evidence was not however entirely consistent with the documentary evidence. The claimant's position was that she had been unfit to look for work since her dismissal by the respondent. Her position in respect of the entry in her GP records at 18, which was a redacted note recording the content of a consultation the claimant had with her GP on 16 February 2018 as "*Doing a little better been at Job Centre and trying to find other **** . Struggling at times with side effects but wearing off. Review 3/52*". The claimant's position was that she had not then been looking for work. She offered no explanation as to why her GP then recorded her as having done so.

31. It was the claimant's clear position that she was unfit for work because of how her dismissal had affected her mental health. There was no medical evidence or expert report relied upon other than the extracts of the claimant's medical records. The claimant's evidence was that after her son was diagnosed with a serious health condition in 2009 she was prescribed anti depressive medication but that she only took that for a month and '*I've never had a tablet for depression since then*." She did however admit to having being prescribed Diazepam. Her evidence was that when she went back to work in February 2015, after a close family bereavement, she was "*100% fine*." It was put to the claimant in examination in chief that her GP records note that the claimant

declined NHS counselling and ant-depressive medication. The claimant's evidence was "*I wasn't depressed. I was heartbroken. I didn't take antidepressants. Just Diazepam because I was sobbing and all worked up*." The fact that the GP records show that the claimant did not want to take anti-depression medication, suggests that the GP thought that it was appropriate for the claimant to take anti-depression medication prior to 2017. The claimant refusal to take anti-depressives or go to NHS counselling is not evidence that the claimant had no depressive symptoms prior to 2017. The evidence from the claimant's medical records is that the claimant did have depressive symptoms prior to 2017. There is a diagnosis of a depressive episode in 2009, which remains noted as a live condition. It is reasonable for the claimant's medical history to be taken into account in assessing whether the claimant's current length period of unfitness for work is wholly as a result of the respondent's unfair dismissal of her. On the evidence before me, and without an expert medical opinion on the position, I cannot reasonably conclude that the claimant's current lengthy period of incapacity is entirely because of the circumstances of her unfair dismissal. It is clear from the claimant's evidence that she has unfortunately experienced at least two tragic family circumstances. On the evidence before me, I could not reasonably conclude that the claimant's current state of being unfit for work is wholly attributable to the claimant's unfair dismissal by the respondent. I took that into account in assessing the extent of compensatory award. It was on this basis that I assessed a 30% deduction.

Decision

32. Following the Judgment dated 16 January 2019, for the reasons set out by EJ Wiseman, particularly at paragraphs 109 – 125, I required to reduce the basic award by 75% because of the claimant's conduct at the meeting on 22 November and her subsequent failure to attend for work, and to reduce the compensatory award by 90% because of the application of the Polkey principles.

33. In the Judgment dated 16 January 2019, EJ Wiseman set out at paragraphs 123 – 124 her reasons for deciding why the basic award should be reduced

because of the claimant's conduct (ERA Section 122 (2)). That decision stands.

34. The claimant is entitled to a unfair dismissal basic award of £1,717.74. This is calculated with reference to the effective date of termination of employment (3 January 2018), the claimant's gross weekly wage of £319.58, her age as at the date of termination of employment (52) and number of years of continuous service with the respondent (16). This calculates to £6,870.97, which on the application of the 75% reduction determined by EJ Wiseman, equates to £1,717.74.

35. In respect of the quantification of the compensatory award, I approached this by first assessing on the evidence before me what was the appropriate period of loss, establishing what was the claimant's loss in that period (taking into account any steps taken in mitigation or the reason why such steps were not taken) and then applying reductions I considered to be appropriate, including the reduction of 90% previously determined in respect of Polkey. I determined the award I considered to be just and equitable, taking into account the facts and circumstances. Sections 123 and 124 of the ERA set out the relevant statutory provisions in respect of calculation of the compensatory award. Some of these provisions were taken into account in EJ Wiseman's judgment. I applied s123(1) ERA in assessing compensation of '*such amount as the tribunal considered to be just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer'*

36. I accepted the claimant's representative's position that it is appropriate to take into account in mitigation the income which the claimant has received in respect of Employment and Support Allowance. It is noted that the Recoupment Regulations do not apply to Employment and Support Allowance.

37. On the application of *Digital Equipment Co Ltd -v Clements (No 2) [1998] IRLR 134 CA*, I applied the following approach in my assessment of the financial award:-

(a) Calculation of the attributable loss sustained (including pension loss)

(b) Consideration of mitigation and adjustment if appropriate.

(c) Application of *Polkey –v- Dayton Services Ltd* 1988 ICR

(d) Identification of what is '*just and equitable'* in terms of s123(1).

(e) Consideration of s123(6) if '*the dismissal was caused or contributed to by any culpable action of the claimant'*

(f) Application of any uplift in respect of failure to follow the ACAS Code.

38. The claim concerned a matter which the ACAS Code of Practice on Disciplinary and Grievance Procedures ('the ACAS Code') applies. The ACAS Code includes a provision that employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made. Comment was made on the respondent's failures in respect of the ACAS Code at paragraphs 111 and 112 of the Judgment dated 16 January 2018. In that Judgment there was consideration of deductions, but not of any uplift in terms of failure to apply the ACAS Code. The Judgment left open further deductions to be made to take into account mitigation and the claimant's position that she has been unfit for work since the dismissal. The respondent did not follow the ACAS Code in the application of the disciplinary procedures. I decided that it was appropriate to award an uplift of 10% to the compensatory award under s207A TULRC Act 1992 because of the respondent's failure to follow the ACAS Code of Practice in respect of the dismissal of the claimant, arising from their failure to provide the claimant with details of the particular allegations against her, which was unreasonable and affected her ability to put her case to the respondent. In assessing the appropriate level of uplift at 10%, I took into account that the ACAS Code had been followed by the respondent in part:

some information had been given on the allegations, there was a disciplinary hearing and there was the opportunity allowed for appeal of the decision. I took into account in particular that EJ Wiseman decided (at para 114) "*I was satisfied that the earlier defect of not being aware of the allegations was cured at that stage and prior to the appeal".* In all the circumstances I did not accept the claimant's representative's position in their schedule of loss that a 25% uplift was appropriate in terms of the respondent's unreasonable failure to comply with the ACAS Code of Practice. An uplift of 10% was applied to the compensatory award as being just and equitable, to reflect the extent of the respondent's unreasonable failure to follow the applicable ACAS Code.

39. In my assessment of the attributable loss sustained, I first considered the appropriate period of loss. I took into account that, as set out in the Findings in Fact in the Judgment dated 16 January 2019 (at paragraph 33):-

> "The Acorn Park Care Home closed in September 2018 and all employees were made redundant."

40. I took into account the claimant's evidence that all those employees had immediately secured alternative employment. The respondent did not dispute that position. That position was consistent with the respondent's position that there is a shortage of employees in the care sector which the claimant could pursue. That is also consistent with the claimant's own evidence that she would have no difficulty obtaining a job in the care sector, should she be fit enough to do so.

41. I placed considerable weight on the claimant's medical records as being at least an indication of the professional medical assessment of the claimant's unfitness for work and the reasons for that. I placed considerable weight on the evidence as recorded within the claimant's medical records that she had been assessed as fit for work and that this had then been reversed. That note in the claimant's medical records at page 18, was consistent with the claimant's oral evidence.

42. In all these circumstances, I did not consider it to be just and equitable to treat the closure of the Acorn Park Home in September 2018 as being a

significant event which broke the chain of causation. I was not asked to do so by either representative. I accepted the claimant's evidence that, had the claimant not been unfit for work, had her employment had her employment continued as at the date that closure, then she would have been likely to have secured alternative employment at a similar rate of pay within a short period.

43. On the basis of the evidence before me, including the evidence from the claimant's medical records, I accepted that the claimant has not been fit for work since her dismissal. I accepted as credible the claimant's evidence that she hoped to be able to look for work by May 2020. I accepted as credible the claimant's evidence that once she was fit to look for work, because of her previous experience and contacts within the healthcare sector, she would be likely to be able to obtain alternative employment quickly (after she becomes fit enough to be able to seek such alternative employment). On this basis I accepted the claimant's representative's submissions that the compensatory award should be calculated with regard to a period of loss to May 2020.

44. I did not accept that the claimant's incapacity for work is wholly attributable to her unfair dismissal and the way in which she was treated by the respondent in respect of that dismissal. There was no medical evidence before me to support the claimant's position in that regard. I took into account the evidence in the claimant's medical records, including (at page 11) of active problems including 'depressive episode' from 3 November 2009. I took into account the claimant's own evidence on the effect on her of other traumatic life experiences.

45. In did not accept the claimant's representative's reliance on *Mrs Mercy Devine -v- Designer Flowers Wholesale Florist Sundries Ltd 1993 WL 963706* as authority for just and equitable compensation taking into account the effect of the manner of the dismissal. I noted the comments of Phillips J in *Fougere -v- Phoenix Motor Co Ltd [1976] IRLR 259*, as quoted in *Mrs Mercy Devine -v- Designer Flowers Wholesale Florist Sundries Ltd 1993 WL 963706.* I took into account and applied the Ld Coulsfield's comments in *Mrs Mercy Devine -v- Designer Flowers Wholesale Florist Sundries Ltd 1993 WL 963706* , as follows:-

"*The case envisaged by Phillips J towards the end of that paragraph is similar to the circumstances of the present case. It is, in our view, clear that Phillips J did not intend to suggest that, in such a case, the employee should receive no compensation for loss of earnings. The question in regard to which he reserved his opinion was whether the employee could recover loss of earnings for the extended period of unemployment resulting from the nervous breakdown. There is no reason whatever why such an employee should not be entitled, at least, to compensation for loss of earnings for a reasonable period following the dismissal, until she might have reasonably been expected to find other employment. Further, since the question is one of assessing the loss sustained by the individual employee has been dismissed, there is, in our view, no reason why the personal circumstances of that employee, including the effect of the dismissal on her health, should not be taken into account in asserting the appropriate amount of compensation. That does not mean that if the employee becomes unfit for work, wholly or partly as a result of the dismissal, she is necessarily entitled to compensation for loss of earnings for the whole period of such unfitness. The Industrial Tribunal has to have regard to that loss, consider how far it is attributable to action taken by the employer, and arrive at a sum which it considers just and equitable. In a case of this kind, there may well be a question as to how far prolonged unfitness for work can properly be regarded as attributable to the actions of the employer. In the end, of course, the question what sum is just and equitable is one for the Industrial Tribunal."*

And

"As we have said, the fact that unfitness followed upon, and is attributable to, a dismissal does not necessarily imply that the whole period of unfitness following thereupon must be regarded as attributable to the actions of the employer. There may, for example, be questions as to whether the unfitness might have manifested itself in any event. Further, the letter from the appellant's medical

> *practitioner, to which the Industrial Tribunal refer, states, inter alia x, that the appellant is unfit for managerial work, but does not certify that she has been unfit for any form of remunerative employment; and it appears to attribute her condition, in part, to the manner in which the dismissal was brought about. It is well established that the manner of dismissal is not a proper subject of compensation."*

46. In all the circumstances of the present case, I considered it to be just and equitable in assessing the compensatory award in terms of s123(1) to reduce the figure calculated in respect of the claimant's financial loss by 30% to take into account that the claimant's unfitness for work has not been proven to me as being wholly attributable to the respondent's actions in unfairly dismissing the claimant. I considered that level of deduction to be just and equitable to take into account that although the claimant has been and remains unfit for work, that incapacity is not wholly attributable to the respondent.

47. The conclusions of EJ Wiseman at paragraph 118 of the Judgment dated 16 January 2019 as follows:-

> *"I concluded that even if the claimant had been provided with written details of the allegations against her and copies of the statements prior to the disciplinary hearing, she would still have been dismissed by the respondent. I say that because of the nature of the allegations. The fact the respondent had statements from two employees, and the fact night shift employees had confirmed the allegations to be true. I considered there would be a 90% chance of dismissal. I could not accept it would, as suggested by Mr Edward be 100% because there must be scope of the chance the claimant may have brought something forward to explain or mitigate her actions*."

48. The reduction of 90% in respect of Polkey therefore takes into account EJ Wiseman's conclusion that he claimant would have been likely to have been dismissed had proper procedure been applied by the respondent. That reduction of 90% in terms of Polkey is, on the application of *Digital Equipment Co Ltd -v Clements (No 2) [1998] IRLR 134 CA*, a separate consideration to identification of what is '*just and equitable'* in terms of s123(1).

49. It was just and equitable and in accordance with ss 122 and 123 ERA to calculate pension loss in respect of the same period as was found to be just and equitable in respect of the calculation of wage loss i.e. from 1/4/15 until 31/10/17.

50. For the reasons set out above, I accepted the claimant's representative's submissions that the appropriate period of loss is from 3 January 2018 to May 2020. I then calculated the just and equitable financial compensation in the determined period of loss. In calculation of the compensatory award, I accepted the basis of the claimant's representative's schedule of loss with regard to calculation of loss, but applied the respondent's figure of £262.50 for weekly net pay, which had been accepted by the claimant in cross examination. In respect of pension loss, a simple pension loss calculation was applied, as suggested by the claimant's representative. I applied the figure which was the average of the pension contributions in the months where wage slips were before me, being £9.56. I accepted the claimant's representative's position that it was appropriate to take into account the claimant's income at the rate of £73.10 per week from Employment Support Allowance as mitigation of loss. I accepted the claimant's representative's submission that taking into account the claimant's current unfitness for work , it was appropriate to calculates the compensatory award with regard to a future loss period of 52 weeks. I accepted the figure of £350 as being just and equitable in respect of loss of statutory rights relating to length of service. I applied an uplift of 10% in respect of failure to apply with ACAS Code of Practice.

51. I considered it to be just and equitable to make a deduction of 30% in terms of section 123(1) to reflect my conclusion that the claimant's incapacity is not wholly attributable to the respondent.

52. For the reasons set out by EJ Wiseman in her judgment dated 16 January 2019 at paragraph 120 – 122, no reduction is made to the compensatory award because of any conduct by the claimant (i.e. under section 123(6)).

53. On the approach I outlined above, I calculated the compensatory award as follows:-

(a) Calculation of the attributable loss sustained (including pension loss)

Wage loss of £262.50 + pension loss of £9.56 for a total of 121 weeks = (£272.06 x 121) £32,919.26

(b) Consideration of mitigation and adjustment if appropriate.

Less mitigation re ESA of £73.10 per week x 121 weeks

= £8,845.10

Loss = (£32,919.26 - £8,845.10) £24,074.16

(c) Application of *Polkey –v- Dayton Services Ltd* 1988 ICR

Deduction of 90% applied (following Judgment of 16 January 2019) = £21,666.74 deduction

= (£24,074.16 - £21,666.74) £2,407.42

(d) Identification of what is '*just and equitable'* in terms of s123(1).

Deduction of 30% applied to take into account that claimant's lengthy incapacity is not entirely due to the unfair dismissal and therefore it is not just and equitable for the compensatory award to reflect 100% of financial loss in the period of loss

= (£2,407.42 - £722.23) £1,685.19

(e)Consideration of s123(6) if '*the dismissal was caused or contributed to by any culpable action of the claimant'*

No deduction applied (following Judgment of 16 January 2019)

(e) Application of any uplift in respect of failure to follow the ACAS Code.

10% uplift applied

= (£1,685.19 + £168.52) £ 1,853.71

54. I considered it to be just and equitable to award the sum of sum of £2,203.71, being £1,853.71, as calculated above, plus £350 in respect of loss of statutory rights. For all these reasons, the Compensatory Award made to the claimant is £2,203.71.

55. The total award made to the claimant in respect of her unfair dismissal by the respondent is £3,921.45, being an unfair dismissal basic award of £1,717.74 and a compensatory award of £2,203.71.

56. The award was not in excess of £30,000, therefore no grossing up of the loss is required to be done to compensate for any tax that may be payable on the compensation under section 401 of the Income Tax, Employment and Pensions Act 2003.

Employment Judge **C McManus**

Date of Judgment **4 June 2019**

Date sent to parties **5 June 2019**