EMPLOYMENT TRIBUNALS

Claimant: Mr D Vergara

Respondent: Plowman and Partners

Heard at: London Central **On:** 19 and 20 August 2019

Before: Employment Judge Quill (Sitting Alone)

Representation
Claimant: In Person
Respondent: M Salter, Counsel

JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claim for unfair dismissal is well-founded and succeeds.

2. The claim for breach of contract fails.

3. The Respondent is ordered to pay to the Claimant £2604.90 comprising:

    a. £789.25 for the basic award; and
    b. £1815.65 for the compensatory award.

Recoupment applies in this case and I refer to the Annex attached.

For the purposes of the Recoupment Regulations therefore:
- The monetary award is £2604.90
- The prescribed element is £1515.65.
- The period to which the prescribed element relates is 5 November 2018 to 4 August 2019.
- The amount by which the monetary award exceeds the prescribed element is £1089.25.

REASONS

Introduction

1. The Respondent is a partnership which is in business as a dental practice. The Claimant was employed as a cleaner from 10 February 2010 to 5 November 2018.

2. Following a period of early conciliation from 31 January 2019 to 12 February 2019, the claimant issued a claim on 8 March 19. The claim was in time in relation to all the claims which the Claimant intended to bring.

3. It was confirmed at the hearing that the only claims which the Claimant intended to bring were for unfair dismissal, and for failure to pay proper notice. The claimant confirmed that he had not intended to bring claims for holiday pay, or arrears of pay, or redundancy pay, or any other types of payment whatsoever. So regardless of what boxes were ticked on the form, my finding was that none of those claims were before the tribunal.

4. There was no dispute that the Claimant had more than 8 years, but less than 9 years, continuous service. He therefore had the necessary service to bring a claim for unfair dismissal, and was entitled to at least 8 weeks' notice.

5. It is convenient to note at this point that during the hearing, the Claimant accepted that he had been paid for 4 weeks in lieu of notice at the point of termination, and he received a further such payment of a further 4 weeks in March 2019, and for that reason the claim for breach of contract does not succeed.

The Hearing

6. I had a bundle of 68 pages. The Respondent had attempted to get disclosure from Claimant, but Claimant had provided nothing. The Claimant confirmed to me that he had not wanted to add any additional documents to the bundle, other than in relation to remedy.

7. I had a written statement from S Joyce on behalf of Respondent. There was no statement from Claimant. The Claimant said that he was aware that he was supposed to bring a statement (as per the case management orders issued in April 2019). He said that he could have done it himself, but he thought the CAB needed to do it, and they had not done so. I gave permission for Claimant to give evidence orally. He confirmed he was not seeking to bring any other witnesses.

Findings of Fact

8. There are 4 partners in the Respondent firm: Robertson, Bailey, Mirza, Edworthy. The practice manager is Samantha Joyce.

9. The Claimant's hours of work were 6pm to 9pm, Monday to Friday. That is 15 hours per week. The Claimant has had those hours since at least September 2016, when he signed a written contract stating those hours.

10. The hours were not subsequently varied. To the extent that Claimant argues that he was told that it was OK to arrive later than 6pm so long as he arrived before 6.30pm, my finding is that that is not the case, and the Respondent did not give him that information.

11. When the Claimant arrived at the respondent's premises to start his shift each day, he needed to collect a key from the room in which Ms Joyce worked. Ms Joyce finished at 6pm most days. Therefore, Ms Joyce would see the Claimant at 6pm if he was on time. Alternatively, when Ms Joyce did not see the Claimant at 6pm, she knew that he was late. She could not always know how late he was, as she did not usually wait for his arrival if he was late.

12. On 6 April 2017, the Claimant was given a formal warning for poor timekeeping by Ms Joyce. The warning was due to last for 6 months. It expired and had no direct relevance to the dismissal, save that it was further confirmation, in addition to the Claimant's contract, that the Claimant was aware that he was due to be at work from 6pm to 9pm.

13. On 10 July 2018, the Claimant informed Ms Joyce, by email, that his journey was making him late. His email implied that this had happened quite frequently in the recent past. His email also implied that, until recently, the Claimant had usually seen Ms Joyce when he arrived for work. The same day, Ms Joyce replied by email to remind the Claimant that he was in breach of contract if he did not work the full 3 hours.

14. As of September 2018, the Claimant's partner was due to give birth imminently. The Claimant had a period of absence from work due to annual leave and paternity leave between Wednesday 26 September and Friday 12 October 2018.

15. On 25 September 2018, the Claimant was given a letter, issued by Ms Joyce, described as "first written warning". It said that the consequences of no improvement in timekeeping would be "*a disciplinary hearing, final warning and potential dismissal*".

16. The letter said that he could appeal within 7 days. As noted above, the Claimant was just about to commence an absence from work. In any event, he did not appeal.

17. The Claimant was supplied with the disciplinary procedure by an email sent the following day, 26 September. In other words, he did not receive the procedure with the letter, but received it on the first day of his absence.

18. The disciplinary procedure was in the bundle. At paragraph 10, "Disciplinary penalties", it said "*the usual penalties for misconduct are set out below. No penalty should be imposed without a hearing*". It went on to list stages:

    a. Stage 1 was first written warning.
    b. Stage 2 was final written warning.
    c. Stage 3 was dismissal, and stated
       "*Dismissal may be authorised by the Partners. It will usually only be appropriate for*
       - *Any misconduct during your probation period*
       - *Further misconduct where there is an active final written warning on your record or*

- *Any gross misconduct regardless of whether there are active warnings on your record…*"

19. A "hearing" is discussed in the procedure at paragraphs 7 to 9, which includes details of the procedure to be followed and notification to be given.

20. Amongst other things, the employee is to given between 2 and 7 days notification of a hearing, told of the right to be accompanied, given information in writing about the allegations, and the evidence gathered during the investigation (if any).

21. None of these steps took place prior to the issuing of the 25 September 2018 letter. There was no "hearing".

22. The Claimant returned to work on Monday 15 October 2018. On 17 October 2018, the Claimant was given a letter issued by Ms Joyce which was described as a "second written warning". This was said to be because he had been late the previous day, 16 October 2018. Again, the letter said that Claimant could appeal, and again the Claimant did not appeal.

23. Once again, no hearing had taken place, as required by the disciplinary procedure, and nor had Claimant been given details of evidence against him, or the chance to comment on that evidence, while accompanied.

24. Ms Joyce's witness statement makes no reference to having had any discussion at all with the Claimant prior to issuing this letter, and nor does the letter itself refer to any discussion at all. My finding is that there was no discussion with him prior to issuing this letter.

25. The disciplinary procedure does not refer to a "second written warning". It refers to first written warning (Stage 1) and final written warning (Stage 2). At paragraph 11, the procedure says that the former type of warning would remain active for 6 months and the latter for 12 months.

26. The 17 October letter did not say that it was a final written warning, or that it would last for 12 months. It said the warning would remain active for 6 months.

27. My finding is that the 17 October letter is not a final written warning as per the respondent's disciplinary procedure. This is because none of the procedure to issue a written warning was complied with, and also because the document did not describe itself as a final written warning.

28. In reaching this decision, I acknowledge that the letter does tell the claimant that a failure to improve could lead to dismissal. However, that does not cause me to treat the letter as a final warning.

29. For completeness, I add that when the Claimant was invited to a disciplinary hearing, to take place on 29 October, that letter did not describe the 17 October letter as a final warning. Furthermore, the notes of the 29 October meeting do not include any assertion that the Claimant had received a "final written warning", and nor did the dismissal letter assert that the Claimant had previously received a "final written warning".

30. The letter inviting the Claimant to a hearing was sent 23 October 2018. The letter alleged that the Claimant had been late the previous day (the letter refers to the previous day having been 23 October, but this must be a mistake and the actual date must have been 22 October). The letter does not specify how late the Claimant was alleged to have been, and nor does it give details of any evidence that would be relied upon.

31. The letter does not supply the Claimant with the outcome of any "investigations" as defined/described at paragraph 4 of the respondent's disciplinary procedure. My finding is that that was because there had been no such "investigations". In itself, that is not fatal to the respondent's case. The procedure does not make paragraph 4 "investigations" mandatory.

32. The 23 October letter informed the Claimant that he can be accompanied to the disciplinary hearing.

33. The meeting took place on 29 October. Ms Joyce confirmed, and the correspondence indicates that this was a disciplinary hearing, not an investigation meeting. Ms Joyce and Mr Edworthy are each described as

"interviewers". Ms Joyce's statement says that she and Mr Edworthy chaired the meeting.

34. No documentary evidence of the times at which the Claimant was said to have started and finished work was produced to the meeting.

35. The relevant dates on which the Claimant had been in work between the letter dated 25 September 2018 and the date of the alleged incident which led to dismissal were Monday 15 October to Friday 19 October, and then again Monday 22 October. That is six days.

36. It is not clear from the meeting notes whether, on 29 October, the Claimant was alleged to have been late on all six days, or else just two: 16 and 22 October.

37. The meeting notes record that the Claimant apologised and said he would try harder, and that Ms Joyce said that it was too late, that this was a disciplinary hearing, and that the "contents" would be shown to all Partners and debated.

38. The notes do not make clear if the Claimant was admitting to, and apologising for, one or two latenesses (on 16 and/or 22 October) or whether he was apologising for being late more generally. The notes say that Claimant said he was "late last week" due to train, which implies he meant that lateness was unusual.

39. The meeting notes indicate that Ms Joyce referred to the April 2017 warning ("*a warning was given last year about the same problem*"). The meeting notes describe no specific evidence of lateness on specific dates between that April 2017 warning and September 2018 having been produced. There is no evidence before me to indicate whether the July 2018 email exchange was discussed at the disciplinary hearing.

40. Following the end of the 29 October meeting, the Claimant left. There later followed a meeting of the four partners, which was also attended by Ms Joyce, according to her oral evidence. It was not attended by the Claimant. I received no evidence of what was discussed at that meeting, other than from Ms Joyce. There were no minutes produced. I accept that the meeting

took place, but I did not even have any evidence about the date of the meeting.

41. In her statement, Ms Joyce says that she told Mr Edworthy that the Claimant was repeatedly 30 minutes late. This was something which the Claimant had not accepted during the hearing.

The law

42. Section 98 of Employment Rights Act 1996 says (in part)

> a. 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—
> i. the reason (or, if more than one, the principal reason) for the dismissal, and
> ii. 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.
> b. A reason falls within this subsection if it—
> …
> (b) relates to the conduct of the employee,
> …
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
> i. 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, and
> ii. shall be determined in accordance with equity and the substantial merits of the case.

43. The respondent bears the burden of proving, on a balance of probabilities, that the claimant was dismissed for misconduct. If the respondent fails to persuade me that it had a genuine belief that the claimant committed the misconduct and that it genuinely dismissed her for that reason, then the dismissal will be unfair.

44. Provided the respondent does persuade me that the claimant was dismissed for misconduct, then the dismissal is potentially fair. That means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) ERA 1996.

45. In considering this general reasonableness, I take into account the respondent's size and administrative resources and I will decide whether the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissal. I have also had regard to the guidance in British Homes Stores Ltd v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Ltd v Jones [1993] ICR 17 EAT; and Foley v Post Office / Midland Bank plc v Madden [2000] IRLR 82 CA.

46. In considering the question of reasonableness, I must analyse whether the respondent had a reasonable basis to believe that the claimant committed the misconduct in question.

47. I should also consider whether or not the respondent carried out a reasonable process prior to making its decisions. In terms of the sanction of dismissal itself, I must consider whether or not this particular respondent's decision to dismiss this particular claimant fell within the band of reasonable responses in all the circumstances. The band of reasonable responses test applies not only to the decision to dismiss, but also to the procedure by which that decision was reached. (Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23 CA).

48. It is not the role of this tribunal to access the evidence and to decide whether the claimant did or did not commit misconduct, and/or whether the claimant should or should not be dismissed. In other words, it is not my role to substitute my own decisions for the decisions made by the respondent.

49. The ACAS Code of Practice on Disciplinary and Grievance Procedures must be taken into account by the Employment Tribunal if it is relevant to a question arising during the proceedings (see section 207 of the Trade Union and

Labour Relations (Consolidation) Act 1992). The following paragraphs of the Code are relevant:

> 19. Where misconduct is confirmed or the employee is found to be performing unsatisfactorily it is usual to give the employee a written warning. A further act of misconduct or failure to improve performance within a set period would normally result in a final written warning.
> 20. If an employee's first misconduct or unsatisfactory performance is sufficiently serious, it may be appropriate to move directly to a final written warning. This might occur where the employee's actions have had, or are liable to have, a serious or harmful impact on the organisation.
> 21. A first or final written warning should set out the nature of the misconduct or poor performance and the change in behaviour or improvement in performance required (with timescale). The employee should be told how long the warning will remain current. The employee should be informed of the consequences of further misconduct, or failure to improve performance, within the set period following a final warning. For instance that it may result in dismissal or some other contractual penalty such as demotion or loss of seniority.

50. A written warning is something that can potentially be taken into account by a reasonable employer when deciding whether to dismiss.

51. In Wincanton Group plc v Stone [2013] IRLR 178, at para 37 Langstaff P gave the following summary of the law on warnings in misconduct cases:

> We can summarise our view of the law as it stands, for the benefit of Tribunals who may later have to consider the relevance of an earlier warning. A Tribunal must always begin by remembering that it is considering a question of dismissal to which section 98, and in particular section 98(4), applies. Thus the focus, as we have indicated, is upon the reasonableness or otherwise of the employer's act in treating conduct as a reason for the dismissal. If a Tribunal is not satisfied that the first warning was issued for an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facie grounds for making it, then the earlier warning will be valid. If it is so satisfied, the earlier

warning will not be valid and cannot and should not be relied upon subsequently. Where the earlier warning is valid, then:

a. The Tribunal should take into account the fact of that warning.
b. A Tribunal should take into account the fact of any proceedings that may affect the validity of that warning. That will usually be an internal appeal. This case is one in which the internal appeal procedures were exhausted, but an Employment Tribunal was to consider the underlying principles appropriate to the warning. An employer aware of the fact that the validity of a warning is being challenged in other proceedings may be expected to take account of that fact too, and a Tribunal is entitled to give that such weight as it sees appropriate.
c. It will be going behind a warning to hold that it should not have been issued or issued, for instance, as a final written warning where some lesser category of warning would have been appropriate, unless the Tribunal is satisfied as to the invalidity of the warning.
d. It is not to go behind a warning to take into account the factual circumstances giving rise to the warning. There may be a considerable difference between the circumstances giving rise to the first warning and those now being considered. Just as a degree of similarity will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way. There may be some particular feature related to the conduct or to the individual that may contextualise the earlier warning. An employer, and therefore Tribunal should be alert to give proper value to all those matters.
e. Nor is it wrong for a Tribunal to take account of the employers' treatment of similar matters relating to others in the employer's employment, since the treatment of the employees concerned may show that a more serious or a less serious view has been taken by the employer since the warning was given of circumstances of the sort giving rise to the warning, providing, of course, that was taken prior to the dismissal that falls for consideration.
f. A Tribunal must always remember that it is the employer's act that is to be considered in the light of section 98(4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur.

52. I also note the Court of Appeal's review in Davies v Sandwell Metropolitan Borough Council [2013] IRLR 374).

53. Subject to the comments above, where a written warning is live, then the issue of whether the decision to dismiss was fair or unfair requires consideration (as per Section 98(4)) of whether, in the particular case, it was reasonable for the employer to treat the conduct, taken together with the circumstance of the written warning, as sufficient to dismiss the claimant.

Submissions

54. The Claimant does not allege bias or improper motive. He alleges the decision was too harsh and also suggests that he cannot understand how the employer could just dismiss him based on the 29 October meeting. He does not deny receipt of the relevant letters mentioned above.

55. The Respondent made both written and oral submissions, all of which I have carefully considered. It alleges that it is clear that the dismissal was for misconduct and also that there was a reasonable investigation, and that the dismissal, bearing in mind the written warnings was within the band of reasonable responses.

Discussion

56. I have found that the reason for dismissal was conduct, specifically the Respondent's opinion that the Claimant's timekeeping was poor.

57. I have found the dismissal to be unfair for two reasons. Firstly, the procedure which led to the dismissal was not a reasonable one; it was so unreasonable that no reasonable employer would base a dismissal decision on it. Secondly, the decision itself was outside the band of reasonable responses.

58. In terms of procedure, there was no formal investigation prior to the 29 October disciplinary hearing itself. It seems that the only evidence presented

to the 29 October hearing came from Ms Joyce herself, who was jointly chairing the meeting with Mr Edworthy. The evidence had not been provided to the Claimant in advance of the hearing. At the hearing, the Claimant denied being repeatedly late, and admitted being late at least once, for which he apologised.

59. After the 29 October hearing was over, one of the chairs, Ms Joyce, informed the other chair, in the absence of the Claimant, that the Claimant had been lying.

60. I have no clear evidence to say whether Ms Joyce also repeated that allegation of dishonesty to the other partners. However, that is another failure of the procedure. There was no documentary evidence produced to me about what the evidence was before that decision-making body. Other than Ms Joyce's opinion about what the partners decided, I have no evidence about what evidence they based their decision on.

61. Amongst other things, I do not know if the decision-making body was told that the Claimant was on a final written warning or not. My finding is that he was not. I do not know if the partners wrongly thought there had been a final written warning, or if they decided that the conduct was such that a dismissal was appropriate despite the absence of a final written warning.

62. My finding that the decision was outside the band of reasonable responses is based on the fact that the relevant allegations of lateness were all in a very short period of time (in September and October 2018) compared to the 8 years for which the Claimant had been employed. While I accept that the Claimant did not have an unblemished record previously, all of the first warning, second warning and dismissal were within a very compressed period of time, and happened when the Claimant's partner had recently given birth.

63. My finding is that no reasonable employer would have dismissed the Claimant based on this evidence and in these circumstances. No final written warning had been previously issued, and my finding is that a reasonable employer would – at the most – have given a final warning to the Claimant as a result of the alleged lateness on 22 October.

Findings relevant to reduction or uplift of remedy

64. I note that the dismissal letter did not refer to right to appeal. I note the disciplinary procedure did inform claimant of right to appeal. The Claimant did not appeal.

65. I have considered Section 207A of the Trade Union and Labour Relations Act 1992. In this case, I do not make any uplift to the award. The respondent did enough to make claimant aware of his right to appeal. For avoidance of doubt, nor do I think it right to reduce award due to failure to appeal given the absence of express notification of the right in the dismissal letter.

66. In relation to Polkey, I think that had the correct procedure been followed, there is some chance that the Claimant would have improved in the future, and thereby not been dismissed but also a chance that he would not have improved and might have been dismissed in the future, had he continued to be late after having been given valid warnings in accordance with the procedure.

67. I am not going to make a separate and additional reduction for contributory fault, but rather, taking account of the fact that the Claimant had been late several times, and was aware of the requirements, I am going to make a 25% reduction to the compensation that I would have otherwise awarded to reflect the chance that he might have been fairly dismissed in due course. I am making no reduction to the basic award.

Remedy

68. I first need to comment on the Claimant's gross pay and net pay.

69. In terms of gross pay, I am satisfied that £574 does represent 4 weeks' gross pay. This was the gross sum paid in March 2019 for 4 weeks. It is on page 65 of bundle.

70. The Claimant did not dispute that was correct, and - in any case - it closely matches the gross sums mentioned both in the claim form and response form, albeit those were monthly figures rather than weekly.

71. So gross pay is £574 divided by 4 = £143.50.

72. In terms of net pay, I do not think the March 2019 payslip, on page 65, is the best document to use for the net pay calculation, out of all the pages of evidence presented to me.

73. I prefer instead the combination of the November 2018 payslip at page 59 of bundle and the P45 at pages 60, 61 and 62.

74. The payslip indicates an income tax deduction of £22.80 in that November 2018 period, and does not indicate any earlier income tax deductions for earlier periods.

75. The payslip and P45 both state a tax code of 754L.

76. The P45 states that the only tax deducted from 6 April 2018 until dismissal was the £22.80 in November. That makes sense given that the Claimant's annual income, at £143.50 per week would have been under £7500.

77. Therefore, my finding is that the Claimant's average weekly net pay was also £143.50.

Basic Award

78. The claimant's dates of employment were 10 Feb 2010 to 5 November 2018. The Claimant's 22nd birthday was 16 March 2015. The Claimant was therefore employed for 3 complete years when he was not less than 22, out of the total of 8 complete years.

79. So the multiplier is of [(3 x 1.0) + (5 x 0.5)] = 5.5.

80. The basic award is therefore £143.50 x 5.5 = £789.25

Compensatory Award

81. I was not supplied with clear evidence about when the Claimant started in his new job. Generally speaking, the Claimant has taken a very poor approach to supplying documents to the respondent and the tribunal, and he provided me with no direct evidence of his start date.

82. He told me that his start date was 31 May 2019, and he provided a printout from his bank statement showing a payment on 8 July 2019, from the new employer Pavillion, which he says was the first payment from them. I was not given printouts for June, and so could not directly verify that there were no payments made in June.

83. The claimant has given evidence on oath that his start date was 31 May 2019, and I will rely on that assurance in assessing his compensation.

84. The Claimant received net payments of £510 and £345 respectively in July and August, which he says covered the period 31 May to 31 July. No payslips were provided.

85. The Claimant says that his pay fluctuates based on the hours worked, and that he has asked for additional hours but his employer has said that he is new and needs more experience before they give him extra hours. No documentary evidence of the number of hours worked was provided.

86. I note that the Claimant appears to have had more work when he was newer, in the first month, than he did with some slight experience in Month Two.

87. My finding is that the Claimant's current weekly average is £98.65 net per week. In due course, the Claimant will be able to earn as much from his new job as he did from the old one. Given that he earned £510 in June (plus one day of May) my assessment is that he will be earning an average of more

than £143.50 per week by the time he has completed 6 months' service with Pavillion.

88. My finding is that the Claimant has failed to act reasonably to mitigate his loss. He admitted that he did not look for work until May 2019. The only exception to this was that he applied for two jobs unsuccessfully around February 2019. He says the reason that he did not look for work was that he and his partner had a young child. While it is true that he had a young child, that should not have stopped him looking for work. He is seeking loss of earnings from the respondent, and the loss of income during the period that he was not looking for work was not caused by the Respondent.

89. There was a period in which the Claimant's Universal Credit had ceased. While giving his evidence, the Claimant at first stated that he did not know why that was. On being asked if it was anything to do with not actively looking for work, the Claimant indicated that DWP had ceased his payments because he had failed to attend a meeting with a work coach. He said that he had missed one appointment, and the reason for that was illness. I was given no evidence of any communications between Claimant and DWP. In any event, based on his own oral evidence to me today I am satisfied that the Claimant failed to act reasonably to mitigate his losses as soon as he could.

90. The Claimant commenced a training course to be a security guard in December 2018, and this course finished around 21 December 2018. I accept that the Claimant could not actually do work as a security guard until he got his SIA certification, and I note that was in February. However, while waiting for that certification to come through, he could have been applying for cleaning jobs, but did not do so. In any event, even when he got the certification, he only applied for two jobs around February, before taking another break in the employment search until May. When he did start looking in May, he found work, and was able to start, by the end of the month.

91. So my finding re mitigation is that in November and December 2018, the Claimant did not act unreasonably. He started the course, which finished 21 December. There was then the Christmas and New year period.

92. From January through to April 2019, he did act unreasonably. Had the Claimant started looking for work near the start of January, my finding is that he could have got work to start by no later than Monday 4 February. That would have been at a deemed rate of £98.65 per week for 26 weeks, and thereafter at more than £143.50 per week.

93. So the Claimant's loss of income was:
    a. For the period Monday 5 November 2018 to Sunday 4 February 2019: 13 weeks at the rate of £143.50 per week. That is £1865.50.
    b. For the next 26 weeks: a loss of £44.85 net per week. (ie the difference between £143.50 and £98.65). That is £1166.10.

94. It is convenient to mention here that the period of 26 weeks from Monday 4 Feb would expire on Sunday 4 August 2019.

95. So the total loss of income was £1865.50 plus £1166.10 **= £3031.60**.

96. From that I must deduct the sums which the Respondent has paid.

97. Looking at the November 2018 payslip, £574 was payment in lieu of notice out of a total of £794.03. So the payment in lieu of notice was 72.29% of the total payment. I therefore am going to treat 72.29% of the total deductions as attributable to payment in lieu of notice. Total deductions were £33.84. So £24.46 were the deductions from the payment in lieu of notice.

98. This means that the net amount of payment in lieu of notice in November 2018 was £574 - £22.46 = £551.54. The net amount paid in March 2019 can be taken straight from payslip and was £459.20.

99. So combining those two sums, the Respondent paid **£1010.74.**

100. Therefore, the Claimant's net loss was £3031.60 - £1010.74. That is £2020.86.

101. For loss of statutory rights, the Claimant has sought £500 and the Respondent has suggested £350. My opinion is that £400 is an appropriate

sum in all the circumstances, including the fact that the Claimant is now back in work, and could have been back in work sooner.

102. The Claimant does not have additional travel expenses to his new job, and I was not given information about costs of job search. The DWP appears to have provided some assistance and other applications appear to have been made on-line.

103. So the amount which I would otherwise award the Claimant is £2020.86 for financial loss plus £400 for loss of statutory rights, which is £2420.86.

104. I said in my liability decision that I would apply a 25% reduction.

105. I reached that percentage by taking account of the fact that had the respondent applied a fair process to tackle the Claimant's lateness, then he might have improved and not been dismissed, or else he might not have improved, and might eventually have been dismissed fairly at some point in the future.

106. Arriving at that 25% reduction was not an exact science. It was not a prediction that there was a 25% chance that the Claimant would be dismissed on a specific future date, for example. However – as I mentioned – it already took account of the fact that the Claimant's timekeeping had raised concerns, and that therefore I was making no separate reduction, to either basic or compensatory award, specifically under the heading of contributory fault.

107. Applying the 25% reduction to £2420.86, that produces a figure of £1815.65.

108. I now have to calculate the sum for the prescribed element.

109. Above, I mentioned that the Claimant's loss of earnings was decided by me to have been £2020.86, and that those losses ceased to accrue after Sunday 4 August 2019, because that is the date after which I consider that the Claimant's earnings would have matched his old earnings, had he acted reasonably to mitigate his losses.

110. I did not award the Claimant the full £2020.86, but rather applied a 25% reduction. The prescribed element will therefore be recorded as £1515.65.

111. The Recoupment Regulations apply to this award, and I am required by law to explain their operation to the parties.

112. Included in the award which the tribunal has ordered the Respondent to pay to the Claimant, there is a sum of £1515.65 in respect of the Claimant's loss of pay from the day he was dismissed until today's hearing. (In fact, as mentioned, I decided that the losses ceased to occur after 4 August, which was before the hearing).

113. If the Claimant keeps the Universal Credit which he has received up to today, then the Claimant would be better off than if he had been at work. The same would apply in relation to any Jobseeker's Allowance and/or income-related Employment Support Allowance, and/or Income Support which the Claimant received, although I am not aware that any such benefits were in payment.

114. The Government has passed legislation to enable to seek to have its money back, in circumstances such as these. The way the Government gets it back is through the Recoupment Regulations.

115. The Respondent must retain that part of the award which relates to the Claimant's loss of earning up to to-day - it is called the Prescribed Element and is **£1515.65** - until the Respondent receives a Notice from the Department for Work and Pensions ("DWP").

116. The Notice will either require the Respondent to pay all, or part, of the Prescribed Element to the Department, or else will tell the Respondent that it does not require any payment.

117. When the Respondent receives the Notice the Respondent must pay to the DWP the sum specified in the Notice and the balance should be paid to the Claimant.

118. The rest of my award today (over and above the Prescribed Element), which amounts to £1089.25 (£300 from the compensatory award plus the basic award of £789.25) is due to the Claimant straight away.

Footnotes:

The liability decision was given to the parties on Day 1. The Claimant was wholly in breach of the order to disclose documents prior to the hearing. The Claimant was therefore asked to bring hard copies of all of his remedy documents to the tribunal by 9.30am on Day 2 to allow the Respondent the opportunity to consider them. In fact, on Day 2 the Claimant did not arrive at the tribunal until after 10am.

On Day 2, the Claimant sought to include a claim for holiday pay &/or paternity pay in his schedule of loss. I reminded him that he had made clear the previous day that he had not intended to bring any such complaints when he issued his claim form, and that therefore I would not hear any evidence, or make any rulings, on these new allegations. For the avoidance of doubt, I did not make a finding that he had not been lawfully entitled to such sums.

At the end of the hearing, as the parties were vacating the room, the Claimant sought to persuade me to accept a gift-wrapped bag from him. I do not think the Claimant meant any harm by this, but, as I made clear to him at the time, this was highly inappropriate.

Employment Judge Quill

Date: 23.August 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

02/09/2019

.....
FOR THE TRIBUNAL OFFICE

Claimant **Mr Mr D Vergara**

Respondent **Plowman and Partners**

ANNEX TO THE JUDGMENT (MONETARY AWARDS)

Recoupment of Benefits

The following particulars are given pursuant to the Employment Protection (Recoupment of Benefits) Regulations 1996, SI 1996 No 2349.

The Tribunal has awarded compensation to the claimant, but not all of it should be paid immediately. This is because the Secretary of State has the right to recover (recoup) any jobseeker's allowance, income-related employment and support allowance, universal credit or income support paid to the claimant after dismissal. This will be done by way of a Recoupment Notice, which will be sent to the respondent usually within 21 days after the Tribunal's judgment was sent to the parties.

The Tribunal's judgment states: (a) the total monetary award made to the claimant; (b) an amount called the prescribed element, if any; (c) the dates of the period to which the prescribed element is attributable; and (d) the amount, if any, by which the monetary award exceeds the prescribed element. Only the prescribed element is affected by the Recoupment Notice and that part of the Tribunal's award should not be paid until the Recoupment Notice has been received.

The difference between the monetary award and the prescribed element is payable by the respondent to the claimant immediately.

When the Secretary of State sends the Recoupment Notice, the respondent must pay the amount specified in the Recoupment Notice to the Secretary of State. This amount can never be more than the prescribed element of any monetary award. If the amount is less than the prescribed element, the respondent must pay the balance to the claimant. If the Secretary of State informs the respondent that it is not intended to issue a Recoupment Notice, the respondent must immediately pay the whole of the prescribed element to the claimant.

The claimant will receive a copy of the Recoupment Notice from the Secretary of State. If the claimant disputes the amount in the Recoupment Notice, the claimant must inform the Secretary of State in writing within 21 days. The Tribunal has no power to resolve such disputes, which must be resolved directly between the claimant and the Secretary of State.