EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102473/2019

Held at Dundee on 10 September 2019

Employment Judge A Kemp
Tribunal Member J McCullagh
Tribunal Member A Matheson

Ms K Lowe	**Claimant** **Represented by:** **Mr C Jackson** **Solicitor**
Shop & Save Limited	**Respondent** **Represented by:** **Mr M Anees** **Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

1. The claimant was dismissed by the respondent on 22 December 2018.

2. The dismissal was unfair.

3. The claimant is awarded the sum of Eight Thousand and Seventeen Pounds and Eighty Two Pence (£8,017.82) payable by the respondent.

4. For the purposes of the Employment Protection (Recoupment of Benefits) Regulations 1996:

(i) The monetary award is Eight Thousand and Seventeen Pounds and Eighty Two Pence (£8,017.82).

(ii) The prescribed element is Five Thousand, Nine Hundred and Sixty Two Pounds and Eighty Two Pence (£5,962.82).

(iii) The date to which the prescribed element relates is 6 September 2019, and the prescribed period is that from 22 December 2018.

(iv) The amount by which the monetary award exceeds prescribed element is Two Thousand and Fifty Five Pounds (£2,055).

REASONS

Introduction

1. The claimant pursued only a claim of unfair dismissal. It was confirmed at the commencement of the hearing by her solicitor Mr Jackson that no claim was pursued under the Equality Act 2010. The claim made was disputed. The claimant was represented by Mr Jackson, and the respondent by Mr Anees, a director. The respondent had earlier been represented by solicitors, who had prepared the Response Form and the bundle.

2. Mr Anees did not have legal qualifications, or any experience of Employment Tribunals. The Judge explained initially the issues, and the process that would be followed. It was confirmed that the only oral evidence would come from the claimant and Mr Anees himself.

The Issues

3. The issues before the Tribunal were–

    1. Was the claimant dismissed?
    2. If so, what was the reason?
    3. Was any dismissal unfair?
    4. In the event of any finding in favour of the claimant what award should be made, having regard to loss, which included the issue of whether a different procedure lead to a fair dismissal, the duty to mitigate, and contribution if any by the claimant?

5. Should there be any increase in any award on account of a failure to follow the ACAS Code of Practice on Discipline and Grievance Procedures, and if so what?

The evidence

4. The Tribunal heard evidence from the claimant, and from Mr Anees. Documents had been produced in a joint bundle.

The facts

5. The Tribunal made the following findings in fact:

6. The claimant is Ms Kelly Lowe.

7. The respondent is a limited company called Shop & Save Limited. It operates a shop on High Street, Leven, which is a newsagent selling newspapers, magazines, alcohol, non-alcoholic drinks, snacks and cigarettes. It is operated by Mr Mohammed Anees, a director, and his wife. It otherwise had about four employees.

8. Mr Anees and his wife also operate a gift shop in the premises next door.

9. The claimant commenced employment with the respondent on 18 December 2013. She was a shop assistant. She worked about 27.5 hours per week. She was paid at the rate of the national living wage, and latterly her gross earnings were £211 per week, together with employer's pension contributions under the auto-enrolment provisions of the Pensions Act 2008. Her net earnings were £203 per week.

10. The claimant was spoken to by Mr Anees on a number of minor disciplinary matters, primarily around what he considered to be her attitude, about four times per year. None of those discussions were formal, and none were recorded in writing in any way.

11. On 21 March 2018 an incident occurred at the shop involving the claimant and a customer. The claimant was charged on summary complaint in the Justice of

the Peace Court in Kirkcaldy with assault of the customer by seizing her hair, pulling her to the ground and knocking her glasses off. No trial of that charge has yet taken place. The respondent was aware of that incident, but took no action in relation to it at the time. The claimant has always denied the charge.

12. In late September 2018 the claimant discovered that she was pregnant. The baby was due to be born in late May 2019. She informed her employer of this fact in about October 2018, and they had discussions both then and the next month. The intention was that the claimant would commence her maternity leave in late April 2019, and return to work in about February 2020, but earlier if she was able to arrange childcare. The claimant also stated that she may wish to reduce her hours to 16 per week, but no formal application to do so was made.

13. On about 14 December 2018 the claimant attended the respondent's Christmas party.

14. On 18 December 2018 the wholesaler who provided newspapers and other goods to the respondent failed to make the due delivery. The claimant was asked to call the wholesaler about it and did so on a number of occasions. She was due to finish work that day at 1.30pm. Shortly before she was due to leave she went to the gift shop and spoke to Mr Anees. She explained what she had been told by the wholesaler. He asked her to call them again before she left, and to make a claim for credit for the failure of delivery. The claimant returned to the newsagent to do so. There was an argument between them as to the claimant's manner and attitude.

15. On 19 December 2018 the claimant was called into the gift shop for a meeting with Mr Anees towards the end of her shift. He explained that he had an issue with her attitude, given what had happened on the day before. He made comments about her drinking coffee when at work. The discussion became an argument and lasted about ten minutes. The claimant was upset by the comments made, and the manner in which Mr Anees had done so.

16. On 20 December 2018 the claimant consulted her General Practitioner. She was assessed as not fit for work, on account of "stress at work" and was advised that that would be the case for four weeks. A fit note was signed by her GP that day.

17. The claimant took the fit note to the respondent. Mr Anees was not present when she did so, and she left it with his wife. Shortly thereafter Mr Anees telephoned the claimant and said that he rejected her fit note, and that she should come back to work. He said that he did not believe that she was genuinely unwell. He was under pressure as a result of the time of year, with the time before Christmas being very busy particularly for the gift shop, and he was concerned that he would not have staff to operate the newsagent. The claimant stated that she would follow her doctor's advice.

18. At 20.54 that evening Mr Anees sent the claimant a message on WhatsApp, a social media platform, stating:

> "Sorry to let you know that I don't have to accept doctor's sick line as there is no valid reason to be off sick. You have to decide now if you want come back to work or not. You have to let me know. Anees."

19. The claimant responded at 12.04 on 21 December 2018 as follows:

> "There is a valid reason on the doctors line from my doctor. Which cannot be refused by any employer. I will back at work when my doctors say I'm fit to return."

20. Mr Anees replied at 12.51 the same day as follows:

> "I have checked all rules and law employer don't have to accept doctor line. You could come back by tomorrow otherwise we don't need you anymore."

His reference to having checked the rules and law was to a search on Google.

21. Later on 21 December 2018 the claimant wrote a letter to the respondent challenging the position taken, stating that the comment that she had to return

to work by 22 December otherwise would not be needed was against the law, and that if she was dismissed whilst off sick that would be unfair dismissal. When she arrived to deliver that to Mr Anees at the newsagents at about 3pm that day, he was with a customer and said that he would not take it. She left it on the counter, and he read it later that day. He did not reply to it.

22. The claimant did not attend for work on 22 December 2018.

23. On 29 December 2018 the respondent issued a form P45 to the claimant stating a termination date of 24 December 2018.

24. The claimant commenced early conciliation on 31 December 2018.

25. The claimant's pay included deductions under auto-enrolment provisions for pension, payable to NEST, of on average £7 per four week period, the claimant being paid on a four weekly cycle.

26. The employer pension contributions under auto-enrolment increased to 2% with effect from 6 April 2018. The respondent ought to have paid the claimant's pension contributions of £4.22 per week on earnings of £211 per week, and the employee pension contributions ought from 6 April 2018 to have been 3%, or £6.33 per week.

27. After her dismissal the claimant took steps to seek alternative employment by submitting her CV to shops in her local area, and attending a Jobs Fayre in March 2019, but was unable to secure a new position partly in light of her pregnancy.

28. The claimant's baby was born on 20 May 2019.

29. The claimant has been in receipt of benefits since termination of employment with the respondent.

30. There are, and were from 22 December 2018 onwards, limited employment opportunities in Leven and the surrounding area.

Claimant's submissions

31. Mr Jackson invited the Tribunal to hold that there had been a dismissal, and that it had been unfair. He referred to the WhatsApp messages, and the P45. He asked the Tribunal to hold that no offer of re-instatement had been proved. He suggested that Mr Anees' position had been uncertain and vague. The claimant had mitigated her loss. She had been honest and reliable in her evidence. At no stage had there been any formal warnings. The claimant may have given the impression of being quite a strong character. He sought a basic and compensatory award in terms of the revised schedule.

Respondent's submissions

32. Mr Anees said that he believed that the claimant had herself contributed to the situation. He had had no intention to dismiss her, and had invited her shortly before the events to the Christmas party. He gave her every opportunity to come back to work. She produced the doctor's certificate in protest that she had been called back into the office where there had been an explanation about her attitude. She got the certificate to hide behind, and that annoyed the respondent. There was no evidence that she had applied for jobs. She had been offered her job but refused it.

The law

(i) Dismissal

33. Section 95(1) of the Employment Rights Act 1996 provides:

> "**95 Circumstances in which an employee is dismissed**
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—
> (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
> (b) he is employed under a contract for a fixed term and that term expires without being renewed under the same contract, or

[(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

34. The following passage from ***Harvey on Industrial Relations and Employment Law*** in Division DI paragraph 230 summarises the test to be applied in the context where language used as to either dismissal or resignation may be considered to be ambiguous:

> "Unfortunately the authorities do not speak with one voice as to the answer. There is one rather ambiguous Court of Appeal decision, ***Sothern v Franks Charlesly & Co [1981] IRLR 278*** and the following reported decisions of the EAT: ***B G Gale Ltd v Gilbert [1978] IRLR 453, [1978] ICR 1149*** (in which the EAT reviewed two earlier EAT decisions, ***Tanner v D T Kean Ltd [1978] IRLR 110*** and ***Chesham Shipping Ltd v Rowe [1977] IRLR 391); Martin v Yeoman Aggregates Ltd [1983] IRLR 49, [1983] ICR 314; J & J Stern v Simpson [1983] IRLR 52; Barclay v City of Glasgow District Council [1983] IRLR 313***. It is submitted that the following propositions can be drawn from these cases: (1) The intention of the speaker is not the relevant test. It is true that in ***Tanner v Kean*** the EAT suggested that the crucial question was to find the speaker's intention, but none of the other authorities support this view, and it is submitted that it is wrong in principle, for why should the speaker be able to rely upon his undisclosed intentions when they are at variance with the words he has used? As Arnold J commented in the case of Gale v Gilbert:
>
> > 'It is of course well-known that the undisclosed intention of a person using language whether orally or in writing as to its intended meaning is not properly to be taken into account in concluding what its true

meaning is. That has to be decided from the language used and from the circumstances in which it was used.'

Similarly in the ***Sothern*** case, Fox LJ approved the decision in ***Gale,*** adding that 'the non-disclosed intention of a person using language as to his intended meaning is not properly to be taken into account in determining what the true meaning is.' This narrows it down to (in the jargon) the subjective or objective approaches.

(2) If the words used by the speaker are on their face ambiguous, then the test is how the words would have been understood by a reasonable listener. Provided the listener honestly and reasonably construed them as a dismissal or resignation, he should be permitted to rely upon his construction even if that was not the intention of the speaker, ie test 3 above should apply. It is submitted that the genuine understanding of the listener is not the test here, for why should his possibly unreasonable construction of the words bind the speaker? In other words, the test is objective rather than subjective and the question of whether or not there has been a dismissal or resignation must be considered in the light of all the surrounding circumstances. Support for this proposition is found in the dictum of Arnold J in ***Gale v Gilbert*** quoted above, and from the two EAT decisions in ***Martin v Yeomen Aggregates*** and ***J & J Stern v Simpson.*** Indeed, in the last mentioned case the EAT preferred to state the test as being 'to construe the words in all the circumstances of the case in order to decide whether or not there has been a dismissal' rather than as being to apply an objective test to ambiguous words. But with respect, there would appear to be no distinction between these two formulations: by focusing on the surrounding circumstances rather than seeking to discover the actual intention of the speaker or the honest understanding of the listener, an objective test is inevitably involved."

(ii) The reason

35. It is for the respondent to prove the reason for a dismissal under section 98 of the Employment Rights Act 1996 ("ERA"). The burden is on the employer.

36. In ***Abernethy v Mott Hay and Anderson [1974] ICR 323***, the following guidance was given by Lord Justice Cairns:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

These words were approved by the House of Lords ***in W Devis & Sons Ltd v Atkins [1977] AC 931***. In ***Beatt v Croydon Health Services NHS Trust [2017] IRLR 748,*** Lord Justice Underhill observed that Lord Justice Cairns' precise wording was directed to the particular issue before that court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which caused him or her to take that decision.

37. If the reason proved by the employer is not one that is potentially fair under section 98(2) of the Act, the dismissal is unfair in law.

(iii) Fairness

38. If the reason for dismissal is one that is potentially fair, the issue of whether it is fair or not is determined under section 98(4) of the Act and

> "depends on whether in the circumstances…..the employer acted reasonably or unreasonably in treating [that reason] as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case."

There is no onus on either party to prove fairness or unfairness under the terms of section 98(4). The onus under that part of the section is neutral.

39. That section was examined by the Supreme Court in ***Reilly v Sandwell Metropolitan Borough Council [2018] UKSC 16***. In particular the Supreme Court considered whether the test laid down in ***BHS v Burchell [1978] IRLR 379*** remained applicable. Lord Wilson considered that no harm had been done to the application of the test in section 98(4) by the principles in that case,

although it had not concerned that provision. He concluded that the test was consistent with the statutory provision. Lady Hale concluded that that case was not the one to review that line of authority, and that Tribunals remained bound by it.

40. The Burchell test remains authoritative guidance for cases of dismissal on the ground of conduct in circumstances such as the present. It has three elements

(i) Did the respondent have in fact a belief as to conduct?
(ii) Was that belief reasonable?
(iii) Was it based on a reasonable investigation?

41. It is supplemented by ***Iceland Frozen Foods Ltd v Jones [1982] ICR 432*** which included the following summary:

> "in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;
> in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
> the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

42. The manner in which the Employment Tribunal should approach the determination of the fairness or otherwise of a dismissal under s 98(4) was considered and summarised by the Court of Appeal in ***Tayeh v Barchester Healthcare Ltd [2013] IRLR 387***.

43. Lord Bridge in ***Polkey v AE Dayton Services [1988] ICR 142***, a House of Lords decision, said this after referring to the employer establishing potentially fair reasons for dismissal, including that of misconduct:

> "in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation."

44. The Tribunal is required to have regard to the terms of the ACAS Code of Practice on Disciplinary and Grievance Procedures. It gives guidance on the procedure to follow when an employee is suspected of misconduct.

Observations on the evidence

45. Not all the evidence that might have been material to the issues was placed before the Tribunal. There was no contract of employment or statement of terms and conditions of employment required by section 1 of the Employment Rights Act 1996. There was no written disciplinary procedure provided. There was reference to a letter written by solicitors which is alleged to have contained an offer to the claimant to be re-instated, but no such letter was in the bundle, and its receipt was denied by the claimant.

46. The claimant gave straightforward and clear evidence. She became upset on one occasion when describing the meeting held on 19 December 2018, after which her GP had signed her off work. She explained that she had previously had two occasions of absence from work because of sciatica and an abscess respectively. She accepted that she might come across as being rather abrupt to some.

47. Mr Anees, the Tribunal concluded, did genuinely believe that he was doing the right thing when he acted as he did. It was however concerned at what appeared to it to be a serious lack of understanding of the duties of an employer, of the law that applies to employment matters, and how matters raised by the Tribunal should be conducted by a reasonable employer. There were some questions that he did not answer, either by stating that he had no comment, or specifically that he refused to answer. Where there was a dispute over a matter of fact the Tribunal preferred the evidence of the claimant.

Discussion

(a) Was there a dismissal?

48. The Tribunal considered that the claimant had discharged the onus on her of showing that there was a dismissal. That arose from the words used in the WhatsApp messages, the letter from the claimant of 21 December 2018 and the lack of any response to it from the respondent, the terms of the P45 issued on 29 December 2018 and stating an end date of 24 December 2018, the terms of the Response Form which did not dispute the dismissal, and the evidence of the claimant and Mr Anees. Whilst the words “you are dismissed” were not issued, nor was any written reason for dismissal provided, the circumstances were such that looking at matters objectively the words used clearly evinced the intention to dismiss. That was also not effectively disputed in the Response Form, which was consistent with there having been a dismissal, but that dismissal was said to have been one prompted by the actions of the claimant. That is also the stance taken by Mr Anees in evidence. The Tribunal concluded from the evidence that there was a dismissal of the claimant under section 95 of the Employment Rights Act 1996, and that that took place on 22 December 2018 when the claimant did not attend for work.

(b) Reason

49. The Tribunal concluded that Mr Anees did genuinely believe that he was entitled to reject the fit note, that the claimant was not truly unwell, and that her failure to return to work when required to do so at a busy time, on or around 22 December 2018 and therefore shortly before Christmas amounted to gross misconduct such that he dismissed her. That is, at least potentially, a matter of conduct. Conduct is potentially a fair reason for dismissal.

(c) Fairness

50. The Tribunal found that there was an unfair dismissal. There were a number of reasons for their doing so. Firstly, the claimant had been to see her GP, and received a fit note. The GP, medically qualified, made that assessment. The GP heard from the claimant about the stress that had been felt by her at work.

The claimant herself was pregnant. Against that background the fit note was, on the face of it, perfectly proper. Secondly, Mr Anees is not medically qualified. He is not properly in a position to challenge the opinion of an independent doctor who is. If he as employer wishes to do so, the only proper course of action, being one a reasonable employer could take, was to seek advice from someone who did have suitable qualifications and experience to do so. That is almost always done by instructing an occupational health professional of some kind. That was not done. Instead Mr Anees said that his wife had attended a doctor, whose details were not provided, said that she wished to have time off work, and was given that. There was however no written evidence of that, no detail of what was said to which doctor, when and in what circumstances, and no factual findings could be made. In any event that was not a basis on which the fit note provided by the claimant's GP could properly be challenged. It was not relevant evidence. No reasonable employer would have acted in such a manner. Thirdly, there was a complete failure of understanding by Mr Anees of what an employer can and cannot do in such a situation. He said that his information as to legal duties came from a Google search. Whatever that search said,and no written evidence with regard to that was provided, and no detailed evidence given orally about it, it appears to have been entirely wrong. He did not search the ACAS website, or that of the government with advice on dismissals, or elsewhere. He was not, he told us, aware of the terms of the ACAS Code of Practice at all. He did not carry out any form of investigation into the issues about which he had a concern. He did not hear from the claimant at a disciplinary hearing, of which she had received advance notice and the right to be accompanied by a fellow employee, or trade union representative. There was a wholesale failure to follow the Code of Practice, which sets out a very basic standard of what leads to a fair dismissal.

51. The Tribunal have taken account of the fact that this is a very small business, with very limited resources accordingly. It also took account of the fact that the respondent did not have legal advice at the time, and had not had any prior experience of employment law issues. Those matters do not however suffice to convert what is an otherwise obviously unfair dismissal into a fair one. The respondent as employer had duties to its employees. There are many sources

of advice that can be utilised, both online and elsewhere. That includes organisations such as ACAS, the CAB, Business Gateway and other business organisations. Websites from ACAS and the government, amongst others, provide information. The respondent only sought to take advice by a search of Google, and that is not, by itself, an adequate step. No reasonable employer would have acted as the respondent did. The decision to state that the claimant was not needed unless she returned to work, in the face of a fit note from her GP advising her against doing so, was not one that any reasonable employer could have taken.

52. Against that background, the Tribunal considered that the dismissal was both procedurally and substantively unfair.

(d) Remedy

53. The basic award under section 119 of the Employment Rights Act 1996 was quantified by the claimant's solicitor at £1,055, and accepted by the Tribunal.

54. The compensatory award is assessed under section 123 of the Act, and is dependent on proof of loss sustained in consequence of the dismissal. In this regard the claimant's solicitor lodged a further document to reduce the sums sought from the previous quantification. Whilst the respondent challenged the claimant's evidence on mitigation, the Tribunal accepted that given the circumstances and the claimant's pregnancy it would have been difficult to secure new employment. The Tribunal considers that the claimant has mitigated her loss.

55. The Tribunal also considered firstly whether a fair dismissal may have followed a different procedure, normally called a ***Polkey*** deduction after the case referred to above, secondly whether the claimant contributed to the dismissal for the purposes of sections 122(2) and 123(6) of the Act, and thirdly whether the claimant had unreasonably refused an offer of re-instatement.

56. It concluded that there would not have been a fair dismissal by a different procedure. The respondent had not followed hitherto any formal procedure at all. If there were issues as to attitude or performance or otherwise, they were

not properly addressed. If that process had commenced in December 2018 it would not likely have led to a fair dismissal by the time the claimant's maternity leave would have started at the end of April 2019.

57. In relation to contribution, whilst the claimant may well not have handled some issues well, and may indeed have had an attitude that her employer found inappropriate, the question in law is whether the conduct of the claimant contributed to the dismissal. In this regard, the dismissal was caused by the fit note, which the respondent considered was improperly sought. The fit note was not improperly sought. That the claimant was stressed was, in the circumstances, understandable and that was against the background that she was pregnant. The fact however is that a medically qualified practitioner advised her to remain absent from work. The claimant was fully entitled to provide that advice in the form of the fit note to her employer. She in no way acted wrongly in doing so. Whilst it does not in reality affect the issue, the Tribunal did note that the only time that the claimant became distressed in her evidence was in commenting on the meeting on 19 December 2018, and the fit note issued the following day. The Response Form sought to argue that the claimant had been guilty of gross misconduct. There was no evidence of that, no formal warnings of any kind were given, and no action was taken at the time in relation to the incident on 21 March 2018. The claimant is entitled to the presumption of innocence in relation to that incident. In all the circumstances, the Tribunal concluded that the claimant had not contributed to dismissal.

58. In relation to the alleged offer of re-instatement, no written evidence of that was produced. The respondent alleged that it had been made between Christmas and New Year at the end of 2018. If it was made by letter from the solicitors, as Mr Anees suggested, it is impossible to understand why his solicitors did not provide it in the bundle. The claimant in her evidence denied receipt of any letter. The Tribunal did not consider it likely that such a letter had been sent. The Tribunal noted that early conciliation did not commence until 31 December 2018. When asked about an offer of a return to work in cross examination, the claimant said that she would not return given what had happened. The Tribunal did not consider that it had been proved that any offer of reinstatement had

been made. If it was made during ACAS discussions, those discussions are privileged under section 18(7) of the Employment Tribunals Act 1996, unless waived, which it was not. The Tribunal is not able to take such discussion into account. In any event, even if an offer of that nature was made the Tribunal considered that the claimant would not have been acting unreasonably in the event that it was not accepted. In light of that, no reduction in any award is made.

59. The Tribunal concluded that loss is to be assessed as follows:

(i) The claimant would have had four weeks of absence on sick pay as a result of the fit note, being four weeks at £94.25 per week, the sum of £377.

(ii) The claimant would then have returned to work until going off on maternity leave. That would have been in the period from 18 January 2019 to 30 April 2019, a period of 15 weeks, during which the loss is at the rate of £203 net per week, with £4.22 of employer pension contributions at 2%, a total of £207.22 per week and an overall total of £3,108.30.

(iii) The claimant would then have the higher rate of statutory maternity pay (SMP) commenced a period of statutory maternity pay, with six weeks at 90% of gross earnings, which is a total of £1,338.12.

(iv) Thereafter in the period to the hearing, 9 weeks, the loss is at the lower rate of SMP of £146.68 per week, a total of £1,338.12.

(v) The claimant did not seek future loss beyond the date of the hearing.

(vi) The claimant sought an award for loss of statutory rights of £500, and the Tribunal considers that that is appropriate in the circumstances of her length of service and evidence of difficulties in obtaining employment.

60. The total of those sums is £6,462.82.

Uplift

61. In order to provide an incentive to follow proper procedures and recommended practice, section 3 of the Employment Act 2008 contains provisions giving employment tribunals the discretion to vary awards for unreasonable failure to comply with any relevant Code of Practice relating to workplace dispute resolution, by the introduction of section 207A and Schedule A2 to the Trade Union and Labour Relations (Consolidation) Act 1992. The relevant Code of Practice is one which relates exclusively or primarily to procedure for the resolution of disputes, and the only one that meets that description is the Code of Practice referred to above.

62. Section 207A(2) provides that an employment tribunal may, if it considers it just and equitable, increase any award to an employee by up to 25% if it appears to the tribunal that the employer has unreasonably failed to comply with the relevant code of practice.

63. The claimant sought an uplift in regard to the failure to follow procedure, by which the Tribunal inferred that reference was being made to the foregoing provisions. The Tribunal considers that an increase is appropriate, having regard to all the circumstances, and notes that the claimant sought a moderate sum in the schedule of loss, less than could have been argued for. The Tribunal awards the sum sought, £500, against that background.

Total

64. The total awards are accordingly £8,017.82.

Recoupment

65. The claimant stated in evidence that she did receive benefits after the dismissal. The Employment Protection (Recoupment of Benefits) Regulations 1996 therefore apply to the award. For the purposes of those Regulations:

    (i) The monetary award is £8,017.82.

(ii) The prescribed element is £5,962.82

(iii) The date to which the prescribed element relates is 10 September 2019, and the prescribed period is that from 22 December 2018.

(iv) The amount by which the monetary award exceeds prescribed element is £2,055.

66. The effect of the Regulations is that the sum of £2,055 is now payable. There is a period of 21 days after this Judgment is sent to the parties for the service on the parties of a Recoupment Notice, which sets out the amount if any that must be deducted from the prescribed element and paid to the Department for Work and Pensions. The balance of the prescribed element is then payable to the claimant. If there is no Recoupment Notice served within that time, the full amount of the prescribed element is payable to the claimant save where there are sufficient reasons for any delay in serving such a notice.

Penalty

67. Employment Tribunals have a discretionary power in certain circumstances to order employers who lose a claim to pay a financial penalty to the Secretary of State, under the Employment Tribunals Act 1996 section 12A. This power was granted to tribunals, according to the Explanatory Notes, 'to encourage employers to take appropriate steps to ensure that they meet their obligations in respect of their employees, and to reduce deliberate and repeated breaches of employment law'. It is exercisable where a tribunal, when determining a claim involving an employer and a worker, both concludes that the employer has breached any of the worker's rights to which the claim relates, and is of the opinion that the breach has one or more aggravating features; in such circumstances, the tribunal may order a penalty to be paid regardless of whether or not it also makes a financial award.

68. In light of the complete failure to follow the ACAS Code of Practice, and the purported rejection of the fit note issued by a GP without any independent qualified advice, the Tribunal did consider whether to impose a penalty. It

concluded, having regard to the position explained by Mr Anees that he had not had any such issues in the past, his failure to understand his legal obligations, his failure to address issues of conduct in any formal way earlier when that might have been considered, the difficulties he expressed in trading at present in the high street, as is widely reported, and the fact that matters took place at a busy time, causing him stress and the need to carry out work personally to cover the absence of the claimant, together with the difficult trading conditions he spoke to including that there were periods that he and his wife did not take a wage from the business, that it is not appropriate to impose any such penalty.

69. In making this decision however the Tribunal wish to make it clear that there could have been a penalty of up to £5,000, that other issues may have been brought before the Tribunal, and that the respondent may be well advised to investigate the extent of its legal duties, taking advice where possible, and consider whether there may be other steps required for other staff.

70. The absence of a written statement of terms in the bundle is one example that may or may not require attention. Another is the pension contributions. The Tribunal did not consider that the pension contributions shown on the wage slips were likely to be correct. The employer contributions ought to have been 2% after 6 April 2018 under the auto-enrolment provisions. The employee contributions ought to have been 3%. The written records from pay slips indicate that those contributions were not the ones made. Mr Anees was not able to explain matters himself as he said that he left that to his accountant. The Tribunal has taken into account the minimum pension contribution by the employer of 2% in its calculation above.

71. As no claim other than unfair dismissal was made however the Tribunal does not consider it appropriate to comment further.

Conclusion

72. The claimant was unfairly dismissed on 22 December 2018.

73. She is awarded the sums set out above.

Employment Judge:	A Kemp
Date of Judgment::	26 September 2019
Date sent to parties:	27 September 2019