RM

EMPLOYMENT TRIBUNALS

Claimant: **Mrs Susan Masters**

Respondent: **Liberty Carers Limited (trading as "Caremark")**

Heard at: **East London Hearing Centre**

On: **27, 28 and 29 November and (in Chambers) 2 December 2019**

Before: **Employment Judge Ross**

Members: **Mrs. A Berry**
Mr. P. Quinn

Representation

Claimant: Mr. Waseem, Counsel

Respondent: Mr. Taylor, Director of the Respondent

JUDGMENT

1. **The complaint of direct age discrimination is dismissed on withdrawal.**

2. **The complaint of disability discrimination under section 15 Equality Act 2010 is dismissed.**

3. **The complaint of unfair dismissal succeeds. The Claimant was unfairly dismissed by the Respondent.**

REASONS

1 The Claimant was continuously employed by the Respondent from January 2012 until dismissal in November 2017. After a period of early conciliation, between 17 January and 17 February 2018, a claim was presented on 15 March 2018. The Claimant brought complaints of unfair dismissal, disability discrimination under section 15 Equality Act 2010 ("EQA") and direct age discrimination (section 13 EQA).

Issues

2 An application to amend the Claim on the first morning of the hearing to include a complaint of failure to make reasonable adjustments was refused for reasons given orally at the time.

3 Further, the Tribunal considered a second application to determine whether the complaint under section 15 EQA could be advanced on the basis of disability-related absence as the "something arising" or whether this would require an amendment to the Claim. For reasons given orally at the time, the Tribunal concluded that this complaint was part of the Claim as originally pleaded and it could be advanced. In brief, the Tribunal determined that the Claimant had previously given inadequate further information, despite the order to provide further information of the disability discrimination complaints; we ordered that the necessary further information should now be set out in writing.

4 Having determined the above applications, the parties agreed a final list of issues, which is at Appendix 1. This was done from a draft prepared by the Employment Tribunal, which had been prepared by working from the draft list prepared by the Claimant, and the comments upon it by the Respondent, removing the reference to the alleged breach of the duty to make reasonable adjustments (which was not part of the Claim as pleaded).

5 At the start of submissions, the Claimant withdrew the complaint of direct age discrimination. This was dismissed on withdrawal.

The Evidence

6 There was an agreed main bundle of documents and an agreed Additional Bundle. Page references in this set of Reasons refer to the main bundle save where stated. We pre-read witness statements and heard oral evidence from the following witnesses:

6.1 Lee Taylor, director of the Respondent;

6.2 Zoe Smith, Care and Support Worker;

6.3 The Claimant.

7 In addition, we read the statement of Sarah Rossi, Managing Director of the Respondent, which states only that she agrees with "the statement" made by Lee Taylor in its entirety. This is likely to refer to his first statement only. In any event, the Tribunal attached to this evidence such weight as we thought fit, which was very little in the circumstances because:

7.1 The witness statement gave no particulars of evidence that only she could have given as direct evidence. We found that this was inconsistent with the significant role that she played in the events leading to the Claimant's dismissal. This was particularly relevant given her non-attendance at this hearing and the lack of explanation for such a sparse statement.

7.2 Ms Rossi's non-attendance meant that her evidence was not subject to cross-examination.

7.3 There had been no application to postpone this hearing to secure Ms. Rossi's attendance, despite Mr. Taylor contending that she had a pre-booked holiday arranged before the Respondent had received this hearing date.

The findings of fact

8. The Claimant was employed as Care Co-ordinator between January 2012 and February 2015, under a contract of employment at pp75-84.

9. From February 2015 until her dismissal, the Claimant was employed as a Compliance Officer.

10. We found that, as Mr. Taylor stated on more than one occasion in evidence and submissions, the Claimant was his longest serving employee when she was dismissed, and she was diligent, paid great attention to detail, and never made mistakes.

11. The Claimant's contract of employment did not refer to any redundancy procedure nor did we receive evidence of any procedure incorporated into the contract which included redundancy dismissals. Under "Disciplinary Appeals", at section 16, it stated:

> "*If you are dissatisfied with any disciplinary decision affecting you or any decision to dismiss you, you should raise this in writing with Lee Taylor giving the grounds for your appeal. The appeal must be lodged within 5 working days of the disciplinary decision or decision to dismiss you being confirmed to you in writing. In respect of any appeal you should always follow the Appeals Procedure set out in the Company's Dismissal and Disciplinary Procedure*."

12. The contract did include a power to dismiss with pay in lieu of notice: see clause 13.3.

Whether the Claimant was a disabled person due to impairments other than bowel cancer?

13. The Claimant was diagnosed with bowel cancer in 2014. It is admitted that the Respondent had actual knowledge of this diagnosis from 2014. At that time, the Claimant had a colostomy (or more accurately, an ileostomy according to the medical report to her GP at p.129) and a stoma was fitted. The ileostomy was closed in 2015. Since that time, however, the Claimant has had around 4-5 stomas fitted including a permanent stoma fitted in 2017.

14. During the long period of sickness absence in 2014, the Claimant was admitted to hospital again due to severe colitis. She was advised not to have further chemotherapy because these symptoms would get worse. Consequently, the Claimant was not to receive any more sessions of chemotherapy than the four that she had already had. The reasoning for this is set out in the letter to her GP from Dr. Propper, Consultant Oncologist, 11 November 2014 (p.132).

15. On 25 November 2014, Mr. Taylor went with the Claimant to an appointment with the Consultant because the Claimant did not understand why she would not be given the usual amount of chemotherapy sessions. It was considered by the Claimant that he would better understand the reasons for this.

16. We are satisfied that at this meeting, Mr. Taylor must have received actual notice of diverticulitis, and the symptoms and the effects of it suffered by the Claimant, because this was the reason why the chemotherapy had to stop.

17. From this point, the Respondent knew or reasonably ought to have known that the Claimant was a disabled person due to a bowel impairment (even if not referred to in this consultation as diverticulitis) as well as bowel cancer.

Diverticulitis

18. From the evidence we heard from the Claimant and read in the medical evidence, we found that the Claimant had diverticulitis from 2014. The medical evidence corroborated her oral evidence: see for example the report at p.100, 14 March 2017.

19. We found that it was causally linked to the bowel cancer; the Claimant had made no complaint of it before 2014.

20. When the diverticulitis flared up, the Claimant's bowel became infected, with infection going into the pockets. During such episodes, since 2014, she had been admitted to hospital for intravenous antibiotics until the colostomy in April 2017.

21. Abdominal pain was a symptom of the Claimant diverticulitis, which lasted a few hours at a time: see, for example, the letter to the GP from the Colorectal Services, 16 September 2016 (p121).

22. On 14 February 2017, the Claimant was seen in Clinic with abdominal pain. It was noted that part of the bowel was protruding through the hernia. She was referred to A&E for assessment, admitted, and provided with antibiotics whilst tests were carried out. The discharge summary from A&E of 18 February 2017 is at p.103, noting that she was to be followed up for consideration of further colorectal surgery.

23. The Claimant had further colorectal surgery, during her hospital admission between 29 March and 15 May 2017. According to the letter from Dr. Earl (SHO to the Consultant Mr. Ahmad), this included removal of part of the bowel and a colostomy on 6 April 2017 to address her diverticular disease and, by inference, the related diverticulitis, the symptoms of which caused the Claimant pain and loss of amenity described below. In addition, further surgery led to other procedures including the re-fitting of a permanent stoma and a hernia repair.

24. Even after the surgery in 2017, the pain caused to the Claimant by diverticulitis could be excruciating, even though she had not had further hospital admissions to treat it. Up to the date of this hearing, at times, the symptoms could only be coped with by pain relief (morphine). The Claimant manages to live with the condition by use of pain relief. We accepted her evidence as to how the diverticulitis has affected her normal day to day activities since 2014. Sometimes, she is unable to climb the stairs or get in the bath. Her

home was adapted with aids, such as a frame in the bathroom. During flare-ups of diverticulitis, she could not do so much as make a sandwich and had to receive help.

Hernia

25. The treatment for cancer and the ileostomy led to a hernia, which was first repaired in 2016 and again in 2017 during the Claimant's long period of sickness absence. The recurrent hernia did cause sickness absence and require further surgery as explained above. It did cause her back pain at all relevant times.

Other impairments

26. Although we accepted the Claimant's evidence about the other impairments listed in the list of issues, we found that these were not relevant to the issues in this case, because we neither heard nor read evidence as to what sickness absence had arisen in consequence of these other impairments specifically.

Period of absence 24 March to 30 October 2017

27. After the period of sickness absence due to surgery and treatment for bowel cancer, the Claimant returned to the role of Compliance Officer in February 2015. The Job Description is set out at p.86.

28. This role had been created by the Respondent for the Claimant (albeit that it existed in the companies of other franchisees of Caremark). We did not accept, however, that the role had been created for the reasons given by Mr. Taylor. The Respondent had, in effect, filled the Claimant's original role with a new Care Co-ordinator during the Claimant's long period of sickness absence ending in February 2015. However, the role of Compliance Officer was helpful to the Respondent in ensuring that it complied with various regulatory or contractual duties, which is why it existed in other franchises, and the Claimant was viewed as a capable employee.

29. The Claimant had various periods of sickness absence in 2016, arising from the hernia and the diverticulitis, both of which we found arose from the bowel cancer, which we explain further above.

30. The Claimant began a period of sickness absence on or about 24 March 2017, which extended until 30 October 2017. During this time, she had three operations. From the medical evidence, this period of sickness absence arose in consequence of her bowel cancer and especially her diverticulitis. These led to operations to remove a further part of the bowel, to install a permanent stoma, and a further hernia repair.

Return to work 30 October 2017

31. The Claimant was keen to return to work after her surgery and requested this in August and September 2017. During her sickness absence in 2017, she was in receipt of SSP for most of the period; during her absence in 2014-2015, she had been kept on full pay throughout.

32. The Claimant's evidence was that she had asked the Respondent if she could return to work in August 2017, but the Respondent made excuses and delayed her return. Mr. Taylor disputed this and relied on a Fit Note (p.151) which stated that she was not fit to work between 7 and 21 August 2017. The Tribunal accepted the Claimant's evidence. We found that the Respondent did delay the Claimant's return to work. We found that this was evidenced by the following:

32.1 In the Fit Note of 7 August 2017, the GP had ticked that although not fit for work, the Claimant would benefit from a phased return to work. The inference that we drew from this document was that the GP meant that the phased return could start at the end of the period of the Fit Note.

32.2 The Respondent had not previously sought advice from the Claimant's GP prior to her return to work. It did so in September 2017, but only some 4 weeks after the expiry of the Fit Note.

32.3 The Respondent had not previously held any return to work meeting with the Claimant. It insisted that the return to work meeting was with Ms. Rossi, who was on annual leave for one month around August 2017.

33. From all the evidence, we inferred that the reason for the delay was because:

33.1 The Respondent wanted to put off the Claimant's return to work, in order to save money, due to cash-flow concerns. As Mr. Taylor pointed out in evidence, the Claimant was on Statutory Sick Pay which cost the Respondent substantially less than her salary.

33.2 In her absence, the Respondent had realised that the Claimant was not essential to the business and that it could function without her, despite her qualities, by re-allocating her work and taking on zero hours staff to cover particular work.

34. On 15 September 2017, Sarah Rossi wrote to the Claimant's GP with a series of questions for medical advice and explained the type of work that the Claimant did. This included that the role required reliable attendance. This was the first time this process had been followed during the Claimant's employment.

35. The GP replied (p156), explaining that the Claimant had had three major operations in 6 months. The GP stated that any disability when the Claimant returned to work was "*not likely*"; but he also stated in answer to "How long is it likely to last?" that this was likely to last "*for good*". His opinion was that the Claimant was likely to be able to render regular and efficient service in future and recommended a gradual return to work.

36. On 25 October 2017, a return to work meeting was held. A return to work form was completed (p.152), which has no mention of the new software ("the PASSsystem"), that the Respondent intended to buy at this time. A summary of this is in the email sent to Aga Zebrzuzka and Mr. Taylor, on 1 November 2017 (p.163). This included:

36.1 Adam and Matthew had part-time roles, with brief explanation of what they did;

36.2 Ms Zebrzuzka and Ms. Rossi were planning to go part-time and job-share as Registered Care Manager;

36.3 The Respondent would be recruiting for a new Care Co-ordinator;

36.4 The Claimant made clear that she would not want to be Care Co-ordinator but would be happy to help out in emergencies.

37. The Tribunal found that there was no warning to the Claimant of any impending redundancy exercise, nor of the likely effect of the PASSsystem on the Claimant's role.

38. On 30 October 2017, the Claimant completed a Health Declaration for the Respondent. This listed that she had various impairments, including diverticulitis, lower back pain due to her stoma, and bowel cancer with appointments ongoing.

39. On the same date, Ms. Rossi and Ms. Zebrzuzka carried out a risk assessment, without the Claimant present but based on what the Claimant had told them on 25 October 2017 and stated in her Health Declaration. The stated purpose of this risk assessment (p.159) was to ensure C was capable of safely carrying out all required tasks and to make reasonable adjustments for her to remain safe at work. This listed the matters identified in the Health Declaration.

40. The Tribunal were satisfied that because of Mr. Lee's earlier visit to the Claimant's Consultant Oncologist in 2014, and because of the Health Declaration and the risk assessment process, the Respondent was on notice of those physical impairments causing her to be absent through sickness. Moreover, the Respondent was on notice that the bowel cancer and diverticulitis caused long-term, substantial adverse effects on her day-to-day activities.

41. In the alternative, the Tribunal were satisfied that the Respondent could reasonably have been expected to know that the diverticulitis and bowel cancer had that long-term and substantial adverse effect from November 2014 onwards. For example, under "*Permanent Stoma – needs access to toilet*", the risk assessment states: "*Sue needs access to the bathroom at all times*." The Respondent must either have known or could reasonably have been expected to know why this was the case given that team members were made aware that "*one toilet should always be kept available*".

42. In addition, the risk assessment recorded that the Claimant had ongoing medical appointments, which points to the existence of ongoing symptoms, or the need to review due to the risk of recurrence of symptoms, or the need for further treatment or the risk of potential treatment.

43. The Respondent agreed with the Claimant's request that she return to work part-time, working Monday, Wednesday and Friday for two months; this was to be flexible in order to "*meet Sue's needs*", which leads to the inference that the Respondent knew that the Claimant's impairments meant that sometimes her ability to attend work may be affected.

44. The Respondent revised the Claimant's Job Description, to one that was less demanding to reflect the temporary part-time working arrangement. The revised Job Description is at p.85.

8 November 2017 meeting

45. On 8 November 2017, the Claimant was called into a meeting with Ms. Rossi and Mr. Taylor, and others, without any warning as to its subject matter nor any agenda. By this point, there had been no warning of any risk of redundancy.

46. We accepted the Claimant's evidence about this meeting and her notes of what happened at the meeting (pp38-40 Additional Bundle). Although these were not made during the meeting, but later that day at home, we found that they were relevant because the notes were taken a few hours after the meeting. It was not put to the Claimant in cross-examination that the notes were fabricated. We found that they were not fabricated; although they were disclosed late, we accepted the Claimant's explanation that, at first, she did not realise that she could rely on notes that she had written herself. In any event, Mr. Taylor relied upon the truth of the contents of the notes in his submissions.

47. In contrast, Mr. Taylor's evidence was that Ms. Rossi made notes at this meeting. These were never disclosed nor produced in evidence, nor mentioned by Ms. Rossi in her witness statement. We found that no such notes were made by Ms. Rossi.

48. At the meeting on 8 November 2017, the Claimant was informed by Mr. Taylor that she was being made redundant with immediate effect. The Claimant was told that today would be her last day in the office because her role no longer existed. Mr. Taylor stated that this was one of the hardest things he had ever had to do, because the Claimant had been with him practically from "day one". He informed the Claimant that she would be paid for the next 7 weeks and would receive a redundancy payment of £3,000 to £5,000; he said he was just waiting for the finance manager to get back to him.

49. Towards the end of the meeting, and after the Claimant had already been dismissed, Mr. Taylor said that if the Claimant could think of another position, she could go back and discuss it. The potential alternative roles of care worker or team leader were raised with the Claimant, but Mr. Taylor accepted that she could not do these roles because of her back.

50. The Claimant asked if she could leave, because she was very upset, and asked when she could receive written confirmation of the decision. Ms. Rossi asked if the Claimant was happy to receive written confirmation after Ms. Rossi returned from her one week of leave that was due to start the following day. The Claimant agreed.

51. The following day, 9 November 2017, the Claimant messaged the Finance Manager. He told her that he was asked the day before the Claimant had returned to work how much she would receive if made redundant. He stated that he was not aware that she was in fact to be made redundant and that he thought that no one else had been made redundant. He was quite shocked.

52. The Claimant did not return to work for the Respondent. She received no calls or texts from the Respondent to ask where she was. Mr. Taylor alleged that the Claimant could have been disciplined for non-attendance. There was not a shred of documentary evidence to support this evidence of Mr. Taylor; we found the lack of documentation inconsistent with his oral evidence. Moreover, this evidence was wholly inconsistent with

our finding about what he had said at the meeting on 8 November. We rejected Mr. Taylor's evidence on this point as not credible. The Respondent never expected the Claimant to attend work again.

53. Moreover, Mr. Taylor alleged that Ms. Rossi had telephoned ACAS and taken advice on redundancy. We found that the marked lack of any redundancy procedure prior to the Claimant's dismissal demonstrated that any advice that Ms. Rossi took from ACAS had been very general, and either taken after the Claimant was dismissed or simply ignored by Mr. Taylor, the 90% shareholder of the business. The Tribunal found that the alleged advice from ACAS was an attempt at after the event justification of the manner and timing of the Claimant's dismissal. The Respondent did have access to Human Resources through the franchisor, but failed to use this service prior to the Claimant's dismissal.

54. By about November 2017, the Respondent had some financial difficulties, and was looking to cut costs and improve cash flow. The directors decided to look for cheaper office accommodation, to look for more cost-efficient ways of working, and to raise finance. This is corroborated by the fact that, on 15 November 2017, the Respondent took a loan of £53,000 (p.164).

55. Part of the efficiency savings included purchase of a new software package, the PASSsystem, the aim of which was to produce a paperless office. We found that when this system was fully operational it would reduce part of the Claimant's job, but that this was not the main reason for the Claimant's dismissal.

56. We found that the Claimant was dismissed mainly because the Respondent wanted to cut costs, including the cost of her salary. The Tribunal considered whether the Claimant's disabilities, her sickness absence generally, or her sickness absence from March to October 2017, played any part in the decision to dismiss. We were satisfied that none of these influenced the decision to dismiss. We noted that the Respondent made no attempt to carry out any sickness management hearings whilst the Claimant was absent sick, and did not warn her of dismissal for her absence. Indeed, the Tribunal found that Mr. Taylor was happy to continue to pay SSP whilst the Claimant was absent, which had a minimal effect on the cash situation of the company. After all, he knew that she was a long-serving and diligent member of staff.

57. Between 8 and 17 November 2017, the Claimant had no contact from the Respondent. The Tribunal accepted her clear evidence that she had no telephone call from Ms. Rossi nor any email. We found it unconvincing for Mr. Taylor to claim that such contact had taken place despite the lack of any oral or documentary evidence from Ms. Rossi to prove this.

58. On 17 November 2017, Ms. Rossi sent by email a letter (dated 15 November 2017, p.166) which included "…*I am writing to confirm to make position of Compliance Officer redundant*". The letter ended: "*Please contact me should you wish to arrange to meet and discuss things further*".

59. The letter made no mention of the right to an appeal, which we find was not discussed at the meeting.

60. Mr. Taylor's evidence was that clause 16 of the contract of employment showed that any appeal against any decision to dismiss, including for redundancy, had to made to him personally. The Tribunal found that this clause only related to disciplinary decisions, including decisions to dismiss. It was disingenuous of him to suggest that it applied to dismissal for redundancy and, in any event, the Claimant, not surprisingly, did not appreciate what clause 16 was alleged to mean. We heard no evidence about a separate Appeals Procedure.

61. On 22 November 2017, the Claimant emailed a response (p.172) to Ms. Rossi, which alleged that she had been unfairly selected for redundancy possibly due to her medical condition and absences in recent times. It stated that she was unable to work at care work or as a team leader for obvious reasons including back pain. The Claimant alleged that she should have been given the work of the two part-time staff taken on during her absence who were doing work which was previously part of her role; and that "last in first out" should have been adopted as the method of selection. The Claimant also stated that she was willing to work on a part-time basis. The letter ended: "*Should this be acceptable to you, I would like to meet with you to discuss further and other options you may have*."

62. The Tribunal concluded that any reasonable employer would have treated this email as an appeal. Moreover, it was sent within 5 working days of receipt of the written confirmation of dismissal; and we found that it was very likely to have been shared by Ms. Rossi with Mr. Taylor. Therefore, even if clause 16 did apply, we find that the Claimant largely satisfied its requirements.

63. On 24 November 2017, Ms. Rossi responded (p174) to state that the Claimant's redundancy was not related to her medical condition or absence. It referred to the new team structure and "automated system" (which we found to be a reference to the PASSsystem). The letter accepted that the Respondent knew of the Claimant's "*back pain limitations*" but that it wanted to give her every opportunity to stay part of the Respondent. The letter included:

> "*The two staff you are referring to are workers on zero hour/as and when basis. We are happy to consider having you employed on the same terms.*
>
> *However, with the introduction of the new system and structure, further changes are likely to affect the need for this type of role too. At this time we cannot confirm the need of additional part-time contracted staff.*
>
> *…*
>
> *We are happy to meet if you wish to discuss any of the above in person*."

64. The Claimant did not respond to this email. Mr. Taylor alleged that she had failed to engage in the redundancy process and sought to blame her for her dismissal. This allegation was misconceived. The Claimant had already been dismissed, without warning or consultation, on 8 November 2017. We accepted the Claimant's evidence as to why she did not respond. To the Claimant, from the whole of the response from Ms. Rossi, the Respondent was indicating that there was no prospect of the Claimant returning to work part-time.

65. On 9 February 2018, the Claimant requested an appeal. By email of 15 February 2018, the Respondent refused on the basis that the letter sent on 17 November had given the Claimant until 24 November 2017 to make contact and that, because that date had passed, no appeal could be accepted. This response is factually incorrect; an appeal was made on 22 November 2017.

66. The Claimant received a P45 stating her last day of service was 13 December 2019, which was the date used in the ET1. In oral evidence, the Claimant's evidence was that she was dismissed on 8 November 2017.

67. The Tribunal accepted the Claimant's evidence on this point. We found that she was dismissed at the meeting on 8 November 2017. Although the word "dismissal" was not used, Mr. Taylor dismissed the Claimant by the unambiguous language used, particularly that she was being made redundant with immediate effect and that it was her last day in the office, and by setting out what redundancy payment she would receive.

68. Despite Mr. Taylor's evidence that the Respondent had considered a pool for redundancy selection of four office employees (Adam, Luke, Donna the trainer, and the Care Co-ordinator), the Tribunal found that neither Mr. Taylor nor Ms. Rossi addressed their mind to whether there should be any pool for selection. If this had happened, there would have been some documentary evidence of it; and there was none.

69. The Tribunal also rejected Mr. Taylor's evidence about the alleged redundancies made at the same time as the Claimant.

70. Aga Zebrzuska, the Registered Care Manager, was not made redundant at the time. She was initially employed on a part-time basis, and then was made redundant in January 2018. However, she set up business as a consultant and was promptly engaged by the Respondent, evidenced by her being referred to as one of the two care managers in newsletters produced by the Respondent, including that of April 2018 (p.45 Additional Bundle). There were the same two care managers up to January 2018 as there was in April 2018. The inference we drew is that it was likely that there were financial reasons, probably related to tax or National Insurance, which meant that it suited both parties for Ms. Zebrzuska to be engaged as a consultant.

71. The casual "as and when", zero hours, employees, Adam and Matthew, were not made redundant. The Claimant knew this, because she knew their mother, who was the care co-ordinator. The elder one stopped work when he went off to university; the younger one continued to work for the Respondent. There was no documentary evidence to support the Respondent's claim that either of these were made redundant.

72. Moreover, the Tribunal found that the evidence of Mr. Taylor about an alleged pool for selection made no rational sense. It made no sense for the Claimant to be in a pool with the Registered Care Manager, which is an essential role this franchisee and because there is a CQC requirement to have a Registered Manager within any Care provider.

Who was responsible for the fine imposed on the Respondent in March 2018?

73. Mr. Taylor's evidence was that, although the Claimant paid great attention to detail and never made mistakes, she had made an error which had led to the Respondent receiving a fine of £10,000 in March 2018 for employing a care-worker who had no right to work in the UK. The Respondent's case was that, if she had not been made redundant, she would have been dismissed in any event in March 2018 for this misconduct.

74. Mr. Taylor made the allegation, but we found he could give no direct oral evidence linking the Claimant's alleged acts or omissions to the mistake. It was a serious allegation against the Claimant, yet it was made largely by assertion.

75. The Tribunal preferred the Claimant's evidence for several reasons.

76. Primarily, we accepted the Claimant's oral evidence She was subject to cross-examination, and she was patently honest and reliable in her responses.

77. Despite Mr. Taylor's assertions, there was no contemporaneous documentary evidence, nor any investigation documents, which pointed to the Claimant being to blame for this mistake.

78. In contrast, the Claimant's oral evidence was corroborated to some extent by the WhatsApp messages between the care worker and the Claimant (pp 86-89), which pointed to Ms. Rossi being the one who had made the mistake.

79. Furthermore, the Claimant's evidence was corroborated by Mr. Taylor's own evidence that the Claimant had great attention to detail and never made mistakes.

80. We concluded that, given her history of sickness absence, it was likely that the Claimant was not present in the office when the alleged mistake was made.

81. We found as a fact that although a fine was imposed, it was not due to any mistake by the Claimant, let alone any gross negligence.

Would the Claimant have been dismissed at some point after 8 November 2017?

82. The Tribunal accepted the Respondent's case that the PASSsystem meant that the Respondent's need for a Compliance Officer was likely to diminish when it was rolled out, because the system was designed to save costs by saving administration and time spent on paperwork. In addition, the use of casual, zero hour employees, doing tasks that had been part of the Claimant's role also reduced the Respondent's need for a Compliance Officer. The Claimant's dismissal was caused by that state of affairs.

When did the PASSsystem become fully operational?

83. We accepted the evidence of Ms. Smith. The Tribunal found that when the full roll-out of the PASSsystem took place this was not until April 2018, even if several care workers were on the system before this. We did not accept Mr. Taylor's account that it was quite as simple as he suggested for the switch over to a paperless system to be made. We considered that there would have to be a degree of trial and error and there

would need to be a degree of checking to ensure workers were doing the inputting correctly and using the system properly.

The Law

84. The starting point in any unfair dismissal claim has to be section 98 of the Employment Rights Act 1996 , which relevantly provides as follows:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it –
>
> …
>
> (c) is that the employee was redundant,
>
> …
>
> (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) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

85. In determining whether the dismissal is unfair, it is for the employer to show the reason for the dismissal is a potentially fair reason within s.98 ERA.

86. The definition of redundancy in section 139(1)(b) of the Employment Rights Act provides as follows:

> *"(b) the fact that the requirements of that business –*
>
> *(i) for employees to carry out work of a particular kind, or*
>
> *(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,*
>
> *have ceased or diminished or are expected to cease or diminish."*

87. The correct approach to determining what is a dismissal by reason of redundancy in terms of s.139(1)(b)(1)(i) is:

87.1 was the employee dismissed?

87.2 had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished?

87.3 if so, was the dismissal of the employee caused wholly or mainly by that state of affairs?

88. This is the approach set down in *Safeway Stores v Burrell* [1997] IRLR 200, upheld in *Murray v Foyle Meats* [2000] 1 AC 51.

Scope of the principles in Williams v Compair Maxam

89. Although it was impossible to set out detailed procedures which all reasonable employers would follow in all circumstances in a redundancy situation, in general, reasonable employers should act in accordance with the following principles, if circumstances permit:

89.1 The employer will seek to give as much warning as possible of impending redundancies;

89.2 Whether or not an agreement as to the criteria to be adopted has been agreed with a trade union or employees, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

89.3 The employer should seek to ensure that the selection is made fairly in accordance with these criteria.

89.4 The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

See *Williams v Compair Maxam* [1982] ICR 156.

The duty to consult

90. The summary of the law in *Mugford v Midland Bank* [1997] ICR 399, 406-407, is helpful:

"(1) Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the industrial tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.

(2) Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.

(3) It will be a question of fact and degree for the industrial tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy."

Choice of Selection Pool

91. The following summary of the law in respect of the choice of selection pool is taken *Fulcrum Pharma (Europe) v Bonassera* UKEAT/0198/10:

91.1 The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it, where the employer has genuinely applied his mind to the problem (citing with approval *Taymech Ltd v Ryan* [1994] UKEAT/663/94).

91.2 The pool should include all those employees carrying out work of that particular kind, but may be widened to include other employees such as those whose jobs are similar to or interchangeable with those employees. [Harvey on Employment Law, para 1685, cited with apparent approval]

Suitable alternative employment: whether "bumping" must be considered in every case?

92. The duty on the employer is only to take reasonable steps, not to take every conceivable step possible to find the employee alternative employment. The basic principles of fair handling of a redundancy case were set out in *Williams v Compair Maxam* and the normal expectation that 'the employer will seek to see whether instead of dismissing the employee he could offer him alternative employment' was included as the fifth factor.

93. There may also be cases where it might be reasonable to look for a vacancy that *might be created*, possibly at the expense of another employee. In *Lionel Leventhal* Ltd *v North UKEAT/0265/04* Bean J said that *'It can be unfair not to give consideration to alternative employment within a company for a redundant employee even in the absence of a vacancy*'.

94. In *Stroud RFC v Monkman* UKEAT 0314/13 pointed out that Bean J's judgment continues by stressing that it will always be a question of fact, not of legal obligation. This is consistent with the other authorities on this subject. In *Byrne v Arvin Meritor LUS (UK) Ltd UKEAT/0239/02,* Burton P explained:

> *"The obligation on an employer to act reasonably is not one which imposes absolute obligations, and certainly no absolute obligation to "bump", or even consider "bumping". The issue is what a reasonable employer would do in the*

circumstances, and, in particular, by way of consideration by the Tribunal, whether what the employer did do was within the reasonable band of responses of a reasonable employer?"

Test of Fairness

95. The Tribunal directed itself to section 98(4) of the Employment Rights Act 1996. The burden of proof on the issue of fairness is neutral. The principles which we must apply when applying section 98(4) are:

95.1 In applying section 98(4) the Employment Tribunal must consider the reasonableness of the employer's conduct.

95.2 The Employment Tribunal must not substitute its own view for that of the employer as to what was the right course to adopt for that employer.

95.3 On the issue of liability, the Tribunal must confine itself to the facts found by the employer at the time of the dismissal.

95.4 The employer should ask: did the employer's action fall within the band of reasonable responses open to an employer in those circumstances?

(See *Foley v Post Office and HSBC Bank plc v Madden* [2000] IRLR 3.)

96. Thus, the test the Tribunal was bound to apply was that of the range of reasonable responses of a reasonable employer in the relevant circumstances, which included the size and administrative resources of the employer; the Tribunal had to determine that question in accordance with equity and the substantial merits of the case.

97. Moreover, when considering an unfair dismissal claim, a Tribunal should have regard to the overall process, which includes any appeal, see *Taylor v OCS Group Ltd* , per Smith LJ, in particular paragraphs 47 to 48. At paragraph 48:

"*48. In saying this, it may appear that we are suggesting that ETs should consider procedural fairness separately from other issues arising. We are not; indeed, it is trite law that section 98(4) requires the ET to approach their task broadly as an industrial jury. That means that they should consider the procedural issues together with the reason for the dismissal, as they have found it to be. The two impact upon each other and the ET's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss. So for example, where the misconduct which founds the reason for the dismissal is serious, an ET might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct was of a less serious nature, so that the decision to dismiss was nearer to the borderline, the ET might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee. The dicta of Donaldson LJ in Union of Construction, Allied Trades and Technicians v Brain [1981] IRLR 224 at page 227 are worth repetition:*

> *"Whether someone acted reasonably is always a pure question of fact. Where parliament has directed a tribunal to have regard to equity - and that, of course, means common fairness and not a particular branch of the law - and to the substantial merits of the case, the tribunal's duty is really very plain. It has to look at the question in the round and without regard to a lawyer's technicalities. It has to look at it in an employment and industrial relations context and not in the context of the Temple and Chancery Lane*.""

98. In *West Midlands Co-Operative Society v Tipton [1986] ICR 192* , the House of Lords held that the failure to permit an employee to exercise a right of appeal may render an otherwise fair dismissal unfair. In *London Central Bus Company Ltd v Manning* UKEAT/ 0103/13, His Honour Judge Peter Clark expressed the point as follows:

> "16. *… Whilst the conduct of the internal appeal process is relevant to the overall question of fairness under s.98(4) , the question, as Morritt LJ formulated it in Westminster City Council v Cabaj [1996] IRLR 399 , paragraph 29 by reference to the House of Lords decision in Tipton v West Midlands Co-operative Society Ltd [1986] IRLR 112 and Polkey v A E Dayton Services Limited [1987] IRLR 503 itself, is whether the procedural defect denied to the Claimant employee an opportunity of showing that the employer's reason for dismissal, here capability, was an insufficient reason for the purpose of s.98(4)*."

Submissions

99. The Tribunal heard oral submissions from the parties and took all the submissions into account, even if we do not deal with each of them separately below.

Conclusions

100. Applying the findings of fact made and the law set out above to the list of issues, the Tribunal reached the following conclusions.

Issues 1 – 6: Disability

101. The Claimant was a disabled person within section 6 and Schedule 1 EQA at all relevant times in respect of bowel cancer.

102. In addition, the Claimant had the physical impairments listed within Issue 2. Of these impairments, from the evidence, only her diverticulitis and the hernia caused by the numerous stomas appear to be relevant to this case; we heard no evidence that the other impairments had caused any or any significant sickness absence.

103. For the reasons that we have set out in paragraphs 20-24 above, the Claimant's diverticulitis clearly had a more than minor effect on her ability to carry out day to day activities. The regular pain is an indication of this, but also the extreme episodes of pain during a flare-up. The Claimant only managed to continue with her life due to medication. Her evidence indicated that if pain relief was removed, there would be a great effect on her ability to do daily activities.

104. The symptoms of diverticulitis meant that, by 24 March 2017, the Claimant was unable to go to work at all. She required surgery.

105. We recognised that the colostomy in April 2017, and the permanent stoma inserted, were a direct consequence of the diverticulitis.

106. The substantial adverse effect of the diverticulitis was clearly long-term. It commenced in about 2014 and was ongoing at the date of the dismissal of the Claimant.

107. The hernia also had a substantial adverse effect on the Claimant's normal day to day activities. We repeat the findings of fact set out above, especially at paragraph 25. This impairment also required surgery in 2016 and 2017. It was a further impairment which stopped the Claimant from working at all. By the date of her dismissal, it meant that she was restricted to lifting only relatively light loads.

108. Mr. Taylor did not appear to understand that the test for disability within section 6 EQA is not based on whether the person can work, or can do certain things, or can do most things most of the time. The statutory test focusses on what day to day activities a person cannot do, or can only do with difficulty, whether episodically or all the time. The fact that a person, like the Claimant, chooses to get on with her work despite those impairments is not relevant. The Respondent's case appeared to be based on an idea that the threshold for whether a person was disabled was very high.

109. Mr. Taylor relied on a statement by the GP taken out of context. In any event, the question whether a person is disabled is mainly a question of fact; it is not a question of medical or personal opinion.

110. The Tribunal concluded that the Claimant was a disabled person because of each her diverticulitis and her hernia, in addition to her bowel cancer.

Knowledge

111. As explained in the findings of fact, at the time of the Claimant's dismissal, Mr. Taylor and Ms. Rossi knew or could reasonably have been expected to know that the Claimant's diverticulitis and hernia had a substantial adverse effect on her ability to carry out daily activities. Ms. Rossi could reasonably be expected to know that the Claimant's diverticulitis and hernia had long-term effects on her daily activities, which were more than minor, because of the return to work interview, Health Declaration, and risk assessment.

112. The Claimant provided evidence to the Respondent about her impairments and their effects which, had they actually considered the definition within section 6 EQA and Schedule 1 EQA, was more than sufficient for them to be reasonably expected to know that she was a disabled person. The Respondent must have understood that the Claimant's ability to do day to day activities was impaired, because it recognised that she had to have a toilet available to her and it permitted her to return to work part-time.

113. There is no requirement for an employee, or their doctor, to specify that they are a disabled person before the protection of the EQA applies.

Issues 7 – 12: Disability discrimination under section 15 EQA

114. The Claimant's sickness absence over 2014 - 2015 arose in consequence of her bowel cancer.

115. The Claimant's sickness absence from February 2015 until dismissal arose in consequence of her diverticulitis and her hernia.

116. In any event, in the alternative, the causation test in section 15 is wide enough for the Tribunal to find that the absences arose in consequence of her bowel cancer. The hernia arose due to the need for her to have an ileostomy to address the bowel cancer. The inference from all the medical evidence is that the diverticulitis arose due to the bowel cancer or the chemotherapy treatment for it, or a combination of the two.

117. However, for the reasons set out above, especially at paragraphs 54-56, the Tribunal concluded that the dismissal of the Claimant was not influenced by her sickness absence. Ironically, Mr. Taylor preferred the period of sickness absence from a costs perspective, because the Claimant was on SSP; in short, it was cheaper for the Respondent to remain on sickness absence than to attend and be entitled to a salary. It was not her sickness absence but the cost to the business of her return to work that led to the decision to dismiss

Issues 17-20: Unfair dismissal

118. The reason for dismissal was redundancy. Applying section 139(1)(b) and *Murray v Foyle Meats*, by the time of her dismissal, the requirements of the employer's business for an employee to carry out the Compliance officer work had diminished due to its need reduce costs, and due to the proposed introduction of the PASSsystem and the recruitment of the two zero hours casual workers fulfilling part of the Compliance officer role. The dismissal of the Claimant was caused by that state of affairs.

Procedural fairness

119. The dismissal was unfair in procedural terms for a number of reasons. In particular:

119.1 There was no warning of the proposed redundancy.

119.2 The lack of warning was compounded by the lack of any consultation, whether at the formative stage of the proposal to cut costs by making the Compliance Officer role redundant, or at any other point prior to dismissal. The "*quick chat*" at which the Claimant was dismissed was not consultation; it was to notify the Claimant of her dismissal due to redundancy.

119.3 As for suitable alternative employment, none was offered to the Claimant before her dismissal. In fact, no specific suitable alternative role was offered or considered by the Respondent at any time. The Claimant was not, in fact, offered a specific role of care worker or team leader, whether adjusted to remove lifting, or otherwise. Mr. Taylor's attempts to blame the Claimant for this were extremely unattractive. There was no duty on her to propose a role, not least because the decision to dismiss had been made before any such discussion was even suggested as a possibility.

119.4 The Claimant was denied the opportunity to appeal. The Tribunal found, as an industrial jury, that her email of 22 November 2017 amounted to a request for an appeal. The Respondent should have treated it as such and arranged a hearing.

119.5 By failing to hold an appeal, the Respondent could not cure the procedural defects of lack of warning and consultation. The Claimant was denied the opportunity to show that redundancy was not sufficient reason for dismissal.

120. For the avoidance of doubt, and although not strictly relevant to fairness, the Respondent did not take any advice prior to the dismissal. We have found that the Respondent did not take advice from ACAS; but, if we are wrong about this, any advice taken was taken after the event and it must have been basic, rather than specific.

What was the percentage chance that the Claimant would have been dismissed in any event after 8 November 2017 had a fair procedure been adopted?

121. The Tribunal considered the guidance in *Andrews v Software 2000 Limited* [2007] IRLR 568. In assessing compensation, the Tribunal had to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. We recognise that this is a matter of impression and judgment for us to make. Although a degree of uncertainty is inevitable with this exercise, from all the relevant evidence we concluded that it was 100% likely that the Claimant would have been dismissed at the end of April 2018, but that she would have continued to work part-time until her dismissal.

122. Our reasons are as follows:

122.1 Proper consultation with the Claimant, when the proposals were at a formative stage, would have allowed the Claimant to raise the points made in her email of 22 November 2017.

122.2 Proper consultation was likely to have taken a period of around 4 weeks, given the size and resources of this employer.

122.3 During consultation, the Respondent would have considered whether it could stop giving work to the zero hour workers Matthew and Adam, who had been doing part of the Claimant's former role and one of whom remained working in the office. We concluded that had this been considered, any reasonable employer would have looked to retain the Claimant instead on a part-time basis, given her experience, attention to detail and her long-service. After all, as Mr. Taylor said, everyone went to the Claimant for advice.

122.4 During consultation, the Respondent could then have considered whether it preferred to retain the Claimant for the period up until the PASSsystem was both fully in force and used by all care workers, and after it had been in operation for some weeks by the majority of care workers.

122.5 Given the respect and value placed by Mr. Taylor on the Claimant as an employee, we concluded it was likely that the Respondent would have been retained until the PASSsystem was fully in force.

122.6 Drawing on our broad experience as an industrial jury, we concluded that the Claimant would have continued to work part-time until the end of April 2018.

Summary

123. The complaint under section 15 EQA is dismissed.

124. The complaint of unfair dismissal is upheld.

125. A remedy hearing will now be fixed from dates to be obtained from the parties. This will consider, amongst other matters, the Claimant's loss of earnings from part-time employment until the end of April 2018.

126. With the above findings, the parties can value the likely award of compensation with some degree of accuracy. Moreover, the parties had a very good working relationship up to dismissal: before us, the Respondent recognised the value of the Claimant to its business from its inception until the PASSsystem was introduced; and the Claimant recognised Mr. Taylor's assistance to her in the past.

127. The Tribunal hope and expect that the parties will not need a further hearing.

Employment Judge Ross

Date 23 December 2019

APPENDIX 1

FINAL AGREED LIST OF ISSUES

(28 November 2019)

Disability

1. Was the Claimant a disabled person in accordance with the Equality Act 2010 ("EA") at all relevant times? Under Paragraph 6 of Sch 1 EA, cancer is a disability. The Respondent admits that the Claimant had bowel cancer in 2014 (which it alleges in now in remission). The Respondent admits that the Claimant was a disabled person at all material times where the impairment relied upon is cancer. The remaining issues are as follows under this heading:

2. Did the Claimant have a physical or mental impairment? The Claimant relies on the following conditions (in addition to bowel cancer) taken separately or together: Diverticulitis; Heart disease; Hernia; Stroke; Osteoarthritis; Asthma; Sleep apnoea.

   The Respondent denies that the Claimant is a disabled person where these impairments are relied upon.

3. Did any of the above impairments (other than bowel cancer) have an adverse effect on the Claimant's ability to carry out normal day to day activities?

   The Respondent's case is that no impairments had an effect on the Claimant's abilities.

4. Was the adverse effect substantial?

5. Was the substantial adverse effect long-term as defined in Sch 1 EA?

6. The Respondent denies that:

   6.1. the Claimant was a disabled person at the relevant times (save that it admits that she was a disabled person because of bowel cancer); and

   6.2. it had knowledge of the Claimant's disability, if not based on bowel cancer, at the relevant times.

   The Respondent's case is that:

   a) it did not know of the alleged hernia, heart disease or stent being fitted.

   b) the Claimant did say to the Respondent that she may have had a stroke, after a day at work where she left hospital early by ambulance, but no evidence was presented to the Respondent;

   c) the Respondent knew that she has asthma through general conversation because she was a heavy smoker;

   d) the Respondent does not admit that it knew that she had osteoarthritis.

   Section 15 EQA: discrimination arising from disability

7. Did the following "somethings" arise in consequence of the Claimant's disability:

7.1. The Claimant's sickness-related absence generally from 2014; [The Respondent admits that this absence was something arising from the Claimant's bowel cancer]

7.2. The Claimant's sickness-related absence between 27 March 2017 and 30 October 2017. [The Claimant contends that this arose in consequence of her bowel cancer (including her stoma, diverticulitis and colostomy). The Respondent denies that this absence arose because of any disability].

8. It is admitted that the Respondent treated the Claimant unfavourably by dismissing the Claimant.

9. The Respondent relies on:

9.1. It contacted the Claimant's GP for an occupational health request which stated that the Claimant has no disability.

9.2. The Claimant signed a health declaration that she has no disability.

9.3. The Claimant has not provided evidence of notifying the Respondent of their disability.

9.4. The Claimant failed to mention that she considered herself disabled.

9.5. The Respondent offered support to the Claimant by offering part-time employment.

10. Did the Respondent treat the Claimant unfavourably or dismiss the Claimant because of any of those things in paragraph 7 above? The Respondent denies causation.

11. The Respondent does not defend on the ground of proportionality.

12. Did the Respondent not know and could it not reasonably have been expected to know that the Claimant was a disabled person because of the impairments listed in paragraph 2 above? Knowledge is admitted in respect of bowel cancer from 2014.

Section 13 EQA: direct discrimination because of age

13. Did the Respondent subject the Claimant to the following treatment:

13.1. removing part of her role of compliance officer when she was absent sick; and giving those responsibilities to two younger employees;

13.2. selecting the Claimant for redundancy.

14. Was that treatment "*less favourable treatment*", i.e. did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The Claimant relies on the two younger employees as comparators or a hypothetical comparator. The

Claimant contends that a younger comparator would not have been treated in this way.

15. If so, was this because of the Claimant's age and/or because of the protected characteristic of age more generally? The Claimant contends that

15.1. The roles that the Claimant was employed for were removed and given to two younger members of staff;

15.2. There was no reason for tasks to be removed from the Claimant.

The Respondent disputes both the above because:

a) The needs of the company changed, resulting in the Claimant's responsibilities reducing;

b) The two younger staff were zero hours employees.

16. The Respondent does not rely on proportionality as a defence. Its case is that age and disability related reasons had nothing to do with the selection and dismissal of the Claimant

Unfair dismissal

17. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The Respondent asserts that the reason was redundancy.

18. If so, was the dismissal procedurally fair? The Claimant contends that it was procedurally unfair because:

18.1. There was no redundancy situation. At the same time as dismissal, the Respondent revoked an advert from Indeed's website for a role that the Claimant would have been able to carry out.

18.2. There was no meaningful consultation regarding dismissal.

18.3. No suitable alternative jobs were offered.

18.4. No proper route of appeal was provided.

The Respondent disputes any procedural unfairness because:

a) There was a genuine redundancy situation. The role was made redundant as there was no need for the role of Compliance Officer any more due to the implementation of new software.

b) The consultation meeting was on 8 November 2017.

c) The Respondent followed ACAS guidelines on redundancy.

d) The Respondent was going through financial difficulties. Four out of six office based staff were dismissed or left.

e) The Claimant was the Compliance Officer; she was aware of the appeal process.

19. If procedurally fair, did the Respondent act reasonably by treating that reason as sufficient reason for dismissal, i.e. was the decision to dismiss within the band of reasonable responses open to the employer?

20. If procedurally unfair, what was the percentage chance that the Claimant would have been dismissed in any event had a fair procedure been adopted? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825

Remedy

21. If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the Claimant is awarded compensation, will decide how much should be awarded.

22. The Respondent contends that the Claimant would have been dismissed (100% likely) for a conduct related matter which resulted in the company receiving a £10,000 fine from Immigration Enforcement on 21 March 2018.