EMPLOYMENT TRIBUNALS

Claimant: Ms K Allen

Respondent: Fertile Frog Limited

HELD AT: Manchester **ON:** 11th December 2019

BEFORE: Employment Judge Howard
Members: Mrs AL Booth
Mr W Haydock

REPRESENTATION:

Claimant: In person
Respondent: Ms S Murphy, Solicitor

JUDGMENT ON REMEDY

The judgment of the Tribunal is as follows:

The first respondent is ordered to pay to the claimant the sum of **£16,817.65.**

The claimant's application for costs; being preparation time, is refused.

The award is constituted as follows:

1. Basic award
   (Subject to a 20% deduction for contributory fault): **£1,173.60**

2. Compensatory award
   52 weeks at agreed net pay, including pension contribution, of £428.72
   Subject to the following adjustments in the order laid out:
   - o deduction of 1 week's paid notice - £428.72
   - o deduction of income generated during the 52-week period - £2,400.00
   - o 'Polkey' reduction of 10%

- o Uplift of 5% to reflect unreasonable failure to comply with the ACAS Code of Practice on Disciplinary Procedures 2015
- o 20% deduction for contributory fault

Total compensatory award:	**£14,715.33**
3. Loss of Statutory Rights:	**£500.00**
4. Wrongful Dismissal (1 further week's notice pay)	**£428.72**
Total award:	**£16,817.65**

Recoupment:

The recoupment provisions apply to this award as follows:

1.	The Grand Total:	**£16,817.65**
4.2	Prescribed Element:	**£14,715.33**
4.3	Period of Prescribed Element:	**6-12-17 to 25-12-18**
4.4	Excess of Grand Total over Prescribed Element:	**£2,102.32**

REASONS

1. This judgment should be read alongside the judgment and reasons on liability; findings of fact which were made at liability stage and relied upon at remedy made be referred to in this judgment but not repeated in full.

2. At the outset of the hearing we identified the issues to be determined in this hearing to determine remedy for the claimant's successful claims of unfair and wrongful dismissal as follows:

   2.1 The parties agreed the award for wrongful dismissal being one week on an agreed figure of weekly net pay of £428.72.
   2.2 The basic award was agreed; a multiplier of 3 x the agreed figure for gross weekly pay of £489.00.
   2.3 The weekly amount of lost earnings; incorporating an element for pension loss was agreed as specified above.
   2.4 Over what period do the claimant's losses extend?
   2.5 Has the claimant taken reasonable steps to mitigate her loss?
   2.6 Do the 'Polkey' principles applied to limit any compensatory award?
   2.7 Did the respondent unreasonably fail to comply with the requirements of the ACAS code of Practice on Disciplinary Proceedings 2015; if so should any award be uplifted and by what percentage (to a maximum of 25%)?
   2.8 Did the claimant engage in blameworthy conduct? If so, is it just and equitable to reduce the basic award to reflect the claimant's blameworthy conduct?

2.9 Did the claimant contribute to her dismissal to any extent by her own blameworthy conduct and if so would it be just and equitable to reduce the compensatory award accordingly?

2.10 What amount of compensatory award does the Tribunal consider just and equitable in all the circumstances?

2.11 Applying Regulation 76 ETs(C&RoP) Regs 2013, Sch 1, should the Tribunal make a preparation time order in favour of the claimant?

3. We heard evidence from Ms Allen and from Mr Hayward and were referred to documents contained in a remedy bundle and additions.

4. As we found, Ms Allen was dismissed for breaching terms and conditions of suspension and bringing the company's name into disrepute.

5. Mitigation of loss: S123(4) ERA 1996 states that in assessing loss the Tribunal must apply the common law rules concerning the duty to mitigate loss. The onus of showing a failure to mitigate lies on the employer. The respondent argued that Ms Allen had failed to mitigate by concentrating on setting up her own business. As Ms Allen pointed out, her attempts to find alternative employment in her own field of expertise, website design, were severely hampered by the respondent's explicit threat, by letter of 30th January 2018, that they would enforce the post termination obligations and restrictions set out in her contract. The contract contained a provision; **'Restrictive Covenant'**, which Ms Allen had signed, agreeing **'not to undertake the provision of the same services/products as supplied by the company either from my own business, or in the employment of a competitor to the company for a period of two years, unless that is specifically agreed by the company..'**

6. Ms Allen gave detailed evidence of her attempts to find alternative employment and/or generate income. She explained that she could not provide a reference because of the circumstances and that she had to balance her health – which was deteriorating – with building a business that did not offend the restrictive covenant. She joined paid business groups to gain work and attended their events and networking; she attended many networking events to gain work and referrals; she was active in attempting to gain employment and win self-employed web jobs; she applied to the DWP and her local council for support and funding; she negotiated business premises, she spent months developing and building her company website; she developed contacts through social media; she trialled some work for HW Technologies however they decided that she did not have the skillset for the position and were concerned about the restrictive covenant applying to more suitable roles. Ms Allen had documentary evidence supporting all these efforts to mitigate her loss.

7. It was clear that Ms Allen had been proactive and determined in the steps she had taken to generate an income. Her approach in focusing on developing her own business rather than primarily seeking employment outside of her skills set and industry was appropriate and not unreasonable, particularly given the challenges she faced; her health and the physical limitations her

disability placed on her; her responsibilities towards her daughter and the threat of enforcement of the restrictive covenant.

8. We decided that the respondent had not shown a failure to mitigate by Ms Allen. We considered the period over which her ongoing losses should be attributable to her dismissal. We decided that it was reasonable to expect Ms Allen to have found alternative employment and/or developed her own business to the level of her earnings with Fertile Frog by 12 months, following her dismissal and so we limited her compensatory award to that 12 month period.

9. Ms Allen earnt some income from her business during this 12-month period which was deducted from the compensatory award.

10. **'Polkey'** reduction: Ms Allen explained that throughout her time with Fertile Frog, she was permitted to do freelance work for herself, friends and family and that Mr Hayward was fully aware of her activities and some were hosted on Fertile Frog company server. The websites included for a sports club, photography club, handyman maintenance site, a telephone directory website and her online business 'Letterbox Spice'. Mr Hayward had proof read and offered SEO advice for Letterbox Spice. She stated that a couple of days before her suspension, she had told Mr Hayward that she had registered two company names; Jungle Drums Websites and Letterbox and asked him if that was OK. He agreed so long as she did not share her activities with other staff members. Mr Hayward accepted that he had been aware of her spice business and that she set up websites for friends and family.

11. The disciplinary allegation brought against Ms Allen; that Ms Allen had set up her own business in direct competition, was not upheld and did not form part of the reason for dismissal and this supported our conclusion that Ms Allen's activities were known to and sanctioned by Mr Hayward and were not blameworthy.

12. It was clear from Ms Allen's own evidence and emails shown to us, where she stated that she intended to set up her own business and was doing freelance web work, that her aim was to gradually build up her own work and eventually set herself up in business. By late 2017, Ms Allen was facing financial and personal challenges; including caring for her daughter who was about to undergo major surgery and she was heavily reliant on her regular salary. It was clear to us that given her personal circumstances, she would not have chosen to be or been able to become, self-employed for some considerable time.

13. We applied the principles laid out by Mr Justice Elias in **Software 2000 Ltd v Andrews & others 2007 ICR 825** and asked ourselves how long Ms Allen would have remained in Fertile Frog's employ had she not been dismissed. The respondent argued that Ms Allen was actively engaged in setting up a business and that either; this would have been in direct competition with Fertile Frog, resulting in a fair dismissal or, that she would have left Fertile Frog within a short period to work.

14. Taking account of the various factors identified by the parties, which could have impacted upon the length of time Ms Allen remained with Fertile Frog, had she not been dismissed, and, recognising that the exercise involves a degree of speculation; doing the best we could from all the evidence before us; we decided that there was a 90% chance that Ms Allen would have remained in employment for a further year. By that time, her employment with Fertile Frog would have come to an end. We based this on our assessment that, in time, Ms Allen would have developed her own business interests to the extent that self-employment became a viable option for her. We considered that the possibility of her being fairly dismissed was remote and overly speculative and we did not accept this as a legitimate ground for applying a **'Polkey'** reduction.

15. Failure to comply with the ACAS Code: At both the disciplinary and appeal hearings, Ms Allen asked for details of the allegation that she had breached the terms of suspension and brought the company into disrepute. The notification and documentation sent to her provided no information or details of this allegation. As we found in the judgment on liability; Ms Lang, at disciplinary stage and Ms Satterley at appeal were unable to provide any specifics; Ms Satterley explained; **'I don't have evidence to show you'**. Paragraph 9 of the Code states that the notification of a disciplinary case to answer **'should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting'**. As Ms Allen put it at the appeal hearing; **'If there is no evidence I can't comment on it, can I?'**.

16. We found that Ms Allen was not provided with sufficient information as required by the Code, in breach of paragraph 9. Inadequate steps were taken by the respondent to provide information, despite Ms Allen asking for it. We decided that this amounted to an unreasonable failure to comply with the Code of Practice in that respect. We acknowledged that the Code was complied with in most respects and so awarded a modest uplift to reflect that specific unreasonable failure to comply, of 5%.

17. Contributory fault: The Tribunal accepted that Ms Allen had not breached the terms and conditions of her suspension; she had disclosed the fact of her suspension before being told what the terms of suspension were. The BNI Whatsapp group were discussing a recent BNI summit launch and Ms Allen stated; **'As I've been suspended from my job, I won't be attending any more BNI meetings. Good luck all. It was fun!'**. We found that this was not blameworthy conduct by Ms Allen. The content and tone was neutral and pleasant and not derogatory; she simply communicated the fact of her suspension.

18. Ms Allen had a separate Whatsapp exchange with a BNI member, Mikhela. It was in that exchange that Ms Allen was derogatory about Mr Haywood; accusing him of wanting **'all my glory to himself…simple as that'**. Mikhela was a business contact of Mr Haywood and that exchange was

unprofessional and derogatory in tone about him. Mr Haywood was aware that Ms Allen had made derogatory comments and this formed part of the respondent's decision to dismiss her. We found that Ms Allen's communication with Mikhela was blameworthy and that it had contributed to her dismissal.

19. We decided; applying S122(2) ERA 1996 that this conduct was such that it would be just and equitable to reduce the amount of the basic award by 20%.

20. We decided; applying S123(6) ERA 1996 that it would be just and equitable to reduce the amount of the compensatory award by 20% to reflect the extent to which Ms Allen's dismissal was contributed to by her blameworthy conduct.

21. When reaching our decision on remedy, we ensured that the compensatory award did not exceed the statutory cap provided by S124(1ZA) ERA 1996.

22. In all the circumstances, applying S123(1) ERA 1996, we decided that it would be just and equitable to limit the claimant's award to the amount specified in this judgment.

23. Preparation time: We refused Ms Allen's application for a preparation time order. We were mindful that Ms Allen's claims of disability and sex discrimination and harassment formed a substantial part of these proceedings and those claims failed. We did not accept Ms Allen's assertion that the respondent or its representatives had acted unreasonably in the way that the proceedings had been conducted. The respondent had defended the claims in a reasonable manner and had raised legitimately arguable issues at remedy stage; some of which the Tribunal had accepted in reducing and limiting Ms Allen's award.

Employment Judge Howard
13th January 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

16 January 2020

FOR THE SECRETARY OF THE TRIBUNALS

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