EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs S Sparks	**AND**	DB Cleaners and Launderers Ltd

HELD AT Cardiff **ON** 19 February 2020

Employment Judge N W Beard (Sitting Alone)

Representation
For the claimant: In person
For the Respondent: Mr T Goldup (Consultant)

JUDGMENT

1. The claimant's claim of unfair dismissal is well founded.

2. The respondent is ordered to pay to the claimant the sum of £12,897.95, as calculated below, in compensation.

3. The recoupment provisions apply

Basic Award	9 weeks @ £432.69 per week	£ 3,894.21
Compensatory Award		
(a) 39 weeks net salary @ £359.25 per week		£14,010.75
(b) Pension Loss 9 months @ £27.44 per month		£ 246.96
(c) loss of statutory rights		£ 400.00
(d) 10% reduction		£ 1,465.77
Less sums received		(£4,188.20)

Total **£12,897.95**

REASONS

THE CLAIM

1. Mrs Sparks brings a claim of unfair dismissal the respondent conceded a wage claim which has been dealt with in an earlier judgment. The respondent denies his claim. The claimant represented herself and the respondent was represented by Mr Goldup.

2. I heard oral evidence from the claimant, and she called Mr M Fear to give evidence; he was general manager at the respondent's premises in Cardiff up to late 2018. For the respondent I heard evidence from Mr T Little, the general manager at the time the claimant's employment came to an end and from Mr J Steed the area manager.

3. I was also provided with a bundle of documents of 171 pages. The issues were identified as:
   - 3.1. Was the claimant dismissed or did she resign as part of an agreement?
   - 3.2. If the claimant resigned was that a dismissal within the meaning of section 95(1)(c) of the Employment Rights Act 1996 and, in particular:
     - 3.2.1. Was there a breach of the implied term of mutual trust and confidence?
     - 3.2.2. Did the claimant resign in response to the breach?
   - 3.3. If the claimant was dismissed what was the reason for her dismissal and was it for some other substantial reason within the meaning of section 98(1)(b) of the Employment Rights Act 1996?
   - 3.4. If the reason for dismissal was some other substantial reason, was the dismissal fair within the meaning of section 98(4) of the Employment Rights Act 1996?
   - 3.5. If the dismissal was not a fair dismissal what was the prospect that the claimant would have been dismissed had a fair procedure been followed?
   - 3.6. Did the claimant contribute to her dismissal?
   - 3.7. Has the claimant proved losses arising from dismissal?
   - 3.8. Has the respondent proved that the claimant failed to mitigate her loss?
   - 3.9. Should any compensation payable to the claimant be reduced because she failed to appeal dismissal?

THE FACTS

4. I have, overall, preferred the evidence of the claimant and Mr Fear to that of the respondent's witnesses. Where there are particular points of

dispute I deal with them in the relevant part of the facts. However, I should deal with one issue raised as an attempt to undermine their credibility generally. Mr Goldup suggested to the claimant and Mr Fear that they were in a relationship. Both denied this and told me they were just friends. The respondent's witnesses gave no evidence that the claimant and Mr Fear were in a relationship. There was nothing in the respondent's pleaded case which set out this alleged relationship or its relevance to the claimant's claims. In my judgement there is no basis to say that their relationship was anything above friendship. I do not find that the credibility of their evidence was in anyway impacted by this issue.

5. The respondent is a local laundry business that was bought and became wholly owned by another company (hereinafter "Priory") in 2015. The claimant was employed as an administrator at the respondent from 1 October 2012. Mr Fear was the general manager of the respondent at the time of the purchase. Mr Steed was an employee of Priory and was, at the relevant time, acting as an area manager with responsibility for the respondent. Mr Lone was a director of Priory with responsibility for the respondent. Mr Little was employed by the respondent from the beginning of December 2018 in the role of general manager.

6. The claimant and Mr Fear gave evidence that in 2015 when the respondent was purchased by Priory there was a conversation with Mr Lone. The respondent did not call Mr Lone as a witness and so there was no evidence to contradict that of the claimant and Mr Fear as to the conversation. Mr Fear and the claimant were told to carry on running the respondent as they had been because Mr Lone was based in Worcester. All parties accepted that the general policy of Priory, which presumably was then to become the policy of the respondent, was that only directors could have 100% discount for cleaning. Mr Lone had unilaterally reduced the claimant's annual salary by £3000. Mr Fear was told this and informed the claimant that she could, as compensation for that loss, have all her cleaning at the laundry for free. The claimant had done so from that time onwards. Mr Goldup suggested to Mr Fear that he did not have the authority to permit this, Mr Fear told me he did. Nothing was done to stop the claimant using this facility between 2015 and 2018. Any examination of the records would have demonstrated that the claimant was discounting her laundry by 100% throughout that time.

7. Mr Goldup suggested that the claimant was dishonestly obtaining the free laundry service. He suggested to the claimant that she knew Mr Fear did not have the authority to grant this concession. The claimant denied this. Mr Fear was the general manager with the authority to run the respondent's operation in Cardiff on a day to day basis. In my judgment it is very unlikely that, if he did not have the authority to authorise a discount, it would not have been picked up by Priory in that three-year period. However, in any event, I have concluded that the claimant, having heard Mr Lone's instruction to Mr Fear,

would not have known he did not have such authority. In my judgment the claimant, in accepting this concession, was neither dishonest nor, further, did she even suspect that there was any difficulty with Mr Fear granting her that concession given what she had heard Mr Lone say in granting Mr Fear authority.

8. The claimant complains that Mr Little broke into a petty cash box for which she had responsibility. The claimant was suspicious about this because of events which had occurred prior to the arrival of Mr Little. The claimant accepted that: she had control of the key to the petty cash box; that she did not work weekends and in her absence the key would not be available; that good practice was to use petty cash rather than to use money from takings for expenditure. Mr Little's evidence was that he wanted to ensure good practice did not have a key and was new in the business and so broke into the box. There was no indication from anyone that the claimant was being blamed for anything after this. In my judgement the claimant has read too much into this incident. The claimant. In my judgment has considered this incident when drawing up her grievance in April 2019, and retrospectively attributed an inappropriate motive to Mr Little. I do not consider that Mr Little was in any way trying to undermine or incriminate the claimant in opening the petty cash box.

9. The claimant complains that in January 2019 Mr Little began a disciplinary investigation into the claimant's use of free laundry. Although in a contemporaneous document Mr Little wrote that he had been asked to investigate this issue he was unable to answer who had made that request of him. I concluded that Mr Little, who had only just joined the respondent, did not initiate this of his own accord. Mr Fear's employment had recently come to an end and Mr Little had taken over. In my judgment somebody at Priory asked Mr Little to look at this issue at that time. Mr Little, following the investigation, decided not to take the matter to a disciplinary. The claimant speculates that he did not do so because she raised the issue of others using the discount. Mr Little told me his decision was because he was not aware of the situation prior to December 2018, his start date, and thought it better to issue a new instruction from thereon. I was concerned with the reason advanced by Mr Little. There was witness evidence that the claimant had used another's pin to access the till which the claimant had denied. His investigation revealed that there was no document which supported the claimant's account that she had been given permission. In those circumstances I would expect a reasonable employer to continue the investigation. I might have been able to accept Mr Little's explanation were it not for my findings as to later events, however, I do not consider he abandoned this process for the reasons he gave. Whatever the real reasons were, I consider they were related to a concern that the claimant could not be dismissed by this means without risk.

10. After this investigation the claimant, without any prior consultation, had significant aspects of her responsibilities removed and given to others. She approached Mr Steed to enquire why this had been done and what her position was he informed her that he would find out. Mr Steed told me that he spoke to Mr Lone who told him he was considering moving the respondent's administration from Cardiff to Worcester and that he should discuss those matters with the claimant. Mr Steed approached ACAS at this point for advice. From his answers it was obvious to me that he was concerned about the employment law risks in what he was being asked to do.

11. Mr Steed held a meeting with the claimant on 14 February 2019.Mr Steed fairly admits that he informed the claimant that meeting was about giving her answers about the issues she raised. In this way the meeting was to some extent held under false pretences. It is clear to me that Mr Steed was simply a conduit at that meeting to communicate Mr Lone's offers to the claimant. There are disputes about what was said by Mr Steed at the meeting but the following is not in dispute, Mr Steed required the claimant to sign a document prior to giving her any information. I have seen the document in question, it his headed "without prejudice negotiations". The document appears to me to be a model document into which details should be added, the claimant's name and address, a date and the claimant's signature have been added by pen rather than details altered in type.

12. The claimant contends that, after asking him whether signing would be detrimental to her job, Mr Steed told her it would not. Mr Steed, when asked, said he could not recall. I prefer the claimant's version. Mr Steed was attempting to protect the respondent's position, but he was not doing so fairly. He should not have told the claimant that signing such a document was not detrimental in circumstances where, even on the respondent's case, it was considering redundancy. The claimant, in any event, disputes that she was told that the respondent was "considering" moving administration to Worcester. Her contention is that she was told that this was going to happen and that Mr Steed had expressed concern for his own job. Mr Steed admitted that he had expressed that concern. In my judgment it is highly unlikely that he would have told the claimant that if the respondent was only in the speculative stages of a redundancy process. I have heard no evidence from Mr Lone, Mr Steed was unable to give me any insight into why Mr Lone would suddenly want to negotiate the removal of a middle ranking employee by negotiation. In my judgment it is highly likely that the respondent was aware of the significant cost of a redundancy for the claimant and wished to avoid as much of that cost as was possible.

13. At the meeting Mr Steed asked the claimant how much money it would require for the claimant to leave her job. The claimant contends that she was asked this on a number of occasions Mr Steed was equivocal in his response, save that he said he was not bullying the claimant. In my judgment Mr Steed was pressing the claimant for a response. In the circumstances,

whether or not this is considered bullying, the claimant had been misled as to the purpose of the meeting. In addition, the claimant was subject to a consistent request for her to provide a figure. This treatment was bound to bring undue pressure upon the claimant, and Mr Steed would or ought to have known that. The claimant told Mr Steed that she did not know how much she was entitled to under redundancy provisions. Between the both of them, but with the claimant making the suggestion, a google search was undertaken and a figure of £3800 was calculated. The claimant still told Mr Steed that she did not want to leave her job but Mr Steed pressed on eventually offering the claimant £1500 plus her wages to the end of the month to leave. The claimant was given overnight to consider the offer. The claimant refused the offer indicating that she considered it an insult given she was entitled to £3,800 on redundancy. Mr Goldup suggested to the claimant that she was freely entering into negotiations with the respondent; in my judgment nothing could be further from the truth. The claimant had attended a meeting for one purpose and found it was to be for a different purpose, she had been misled into signing a document on the basis her employment was not affected and found that her employment was the core reason for the meeting, and she was pressured into looking into figures despite indicating that she did not want to leave.

14. On the Monday, the claimant having rejected the offer on the Friday, was once again spoken to by Mr Steed this time by telephone. This time he said Mr Lone had offered £2000. There is a dispute between the parties as to what was said next. The claimant's account is that Mr Steed told her that the offer was only on the table for that day and that she should take it as it would be withdrawn and that the claimant would end up with nothing as Mr Lone would find some other way of getting rid of her. Mr Steed denies that he said this. I found the claimant to be a straightforward witness who was prepared to concede points in cross examination, even to her disadvantage, she was immovable on this point. Mr Steed, in contrast, was equivocal in some of his answers and would use the phrase "I cannot recall" with some difficult points. There was no-one else present and there is no documentation in support of either account. On the balance of probabilities, I prefer the evidence of the claimant. Her account fits more with the general approach taken by the respondent up to that point. In my judgment Mr Steed was fully aware that the respondent, in the person of Mr Lone, wished the claimant's employment to end. I am clear that Mr Steed was aware that earlier, another means had been used in an attempt to do this, I have no doubt that Mr Steed was simply explaining what he foresaw in the light of Mr Lone's approach and the likely next steps when telling the claimant that another means of ending her employment would be found. Whatever his intent the objective effect was to tell the claimant take the money or some way would be found to dismiss her without any compensation.

15. Mr Little spoke to the claimant that day. There is a significant dispute about what was said. Mr Little contends he simply asked the claimant what was wrong because she appeared to be out of sorts, when the claimant told him what the discussions had been about, he simply said that was her decision and left her. The claimant told me that Mr Little asked her what was going on in the meetings with Mr Steed, because as general manager she needed to know. She says that Mr Little then left the room. The claimant contends that Mr Little then made telephone calls and came back to her. At this stage the claimant states that Mr Little came back in to her room and said that if Mr Lone wanted to get rid of the claimant he would do so and she should take the offer of £2000 and leave otherwise the claimant would leave with nothing. In particular the claimant indicated that he said they will "try to set you up as before". Once again there is no evidence beyond that of the witnesses' oral evidence. In my judgment there is an inherent implausibility in Mr Little's account. It appears to me improbable that having asked the claimant for information which he considered crucial to his role as general manager he would then simply leave the matter. If he was unaware of the potential for redundancies I would expect him to explore that further with Mr Lone. It appears to me that what the claimant describes, him leaving the room to make a telephone call, was a very likely step upon that discovery. Therefore, I reject Mr Little's account and accept that given by the claimant. The use of the phrase by Mr Little about the claimant being set up lends weight to my decision (above) that this was the purpose of the investigation. The claimant resigned at that stage accepting the sum of £2,000. The claimant received no advice from any union or legal adviser prior to accepting this. At the end of her employment the claimant was paid the sum of £2000, notice pay at £1,438.20 and £750 salary for the remainder of February.

16. The claimant wrote to the respondent some six weeks later indicating that she wished to raise a grievance and referring to her "dismissal". The respondent, through Mr Little. Wrote to the claimant rejecting her grievance.

17. Although the respondent did not move all administration from Cardiff, which had been the basis for the issue of redundancy to be discussed, the respondent did make changes. As indicated above the respondent had distributed some aspects of the claimant's role to others. In addition to this the respondent employed someone to carry out some of the claimant's functions on a part time basis. On any analysis there was a significant restructuring of the administration work in Cardiff at tis time.

18. The claimant has told me that she has not worked since her dismissal. She indicated that she had been in receipt of universal credit. Mr Goldup suggested that she had provided no evidence to demonstrate that she was on benefits and had not had employment. I considered that the claimant, in documents which indicated that she had been sending information to the universal credit department and in her oral evidence, had proved on the

balance of probabilities that she had received benefits because she had not worked.

19. The claimant's gross weekly wage when working for the respondent was £432.69 and the claimant's net weekly wage was £359.25. The claimant told me, and I accept, that she has been seeking work since her dismissal. She has concentrated that search on administration/reception work, she specifically told me that she had not sought retail or other avenues of employment.

20. The respondent contends that the claimant contributed to her dismissal. Mr Steed gave no evidence that the claimant's conduct was in any way blameworthy. Mr Little indicated that he considered that the claimant was inflexible in that she would only carry out tasks connected with her role and would not "muck in". When asked if he had ever asked the claimant to be flexible he said that he could not recall.

THE LAW

21. I have to examine whether the claimant was dismissed. The burden of proof falls on the claimant to establish dismissal. I have considered the case of **East Sussex County Council v. Walker [1972] 7 ITR 280** and take account of Sir John Brightman's words at 281

> *"In our judgment, if an employee is told that she is no longer required in her employment and is expressly invited to resign, a court of law is entitled to come to the conclusion that, as a matter of common sense, the employee was dismissed"*

22. I also have ask myself whether the reason for the claimant's dismissal was one of the potentially fair reasons set out in section 98 of the Employment Rights Act 1996, on the facts of this case the fair reasons were, potentially, redundancy, conduct or some other substantial reason. If any of these was the reason for dismissal I must then examine the fairness of dismissing the claimant both in terms of process and substance.

23. Section 139 of the Employment Rights Act 1996 provides that

> *(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—*
> *(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*

24. Dealing with the issue of remedy the claimant must prove loss; the respondent must establish any failure to mitigate loss. In ***Scope v. Thornett [2007] IRLR 155 the Court of Appeal*** reminds the tribunal of its need to engage in a certain amount of speculation in the appropriate circumstances in the words of Pill LJ at paragraph 34

> *"The employment tribunal's task, when deciding what compensation is just and equitable for future loss of earnings will almost inevitably involve a consideration of uncertainties. There may be cases in which evidence to the contrary is so sparse that a tribunal should approach the question on the basis that loss of earnings in the employment would have continued indefinitely but, where there is evidence that it may not have been so, that evidence must be taken into account."*

And at paragraph 36

> *"The EAT appear to regard the presence of a need to speculate as disqualifying an employment tribunal from carrying out its statutory duty to assess what is just and equitable by way of compensatory award. Any assessment of a future loss, including one that the employment will continue indefinitely, is by way of prediction and inevitably involves a speculative element. Judges and tribunals are very familiar with making predictions based on the evidence they have heard. The tribunal's statutory duty may involve making such predictions and tribunals cannot be expected, or even allowed, to opt out of that duty because their task is a difficult one and may involve speculation."*

25. The decision in **Software 2000 Ltd v Andrews and others [2007]** IRLR 568 indicates that the following principles apply when considering so called **Polkey** deductions:

25.1. When an Employment Tribunal assesses compensation for dismissal, this involves a consideration of how long employment would have continued but for the dismissal

25.2. If the employer claims that dismissal was inevitable even if the correct procedures had been followed, then it is up to the employer to provide evidence to support this. If it does so, then the Tribunal must consider it; and

25.3. The Tribunal may consider the employer's evidence to be so speculative and 'riddled with uncertainty' that it is impossible to assess how long employment would have continued. However, an element of speculation by the Tribunal is not sufficient reason for disregarding such evidence.

26. I am required to consider whether the claimant's conduct caused or contributed to her dismissal. We must consider whether there is blameworthy and causative behaviour. Blameworthy in this sense can encompass behaving perversely, foolishly or in a bloody-minded manner. It must however be improper behaviour and not simply unreasonable.

27. In **Wilding v British Telecom PLC [2002]** EWCA Civ 349 Potter LJ said that five elements were to be considered in respect of the reasonableness of mitigation:

> (*i) It was the duty of Mr Wilding to act in mitigation of his loss as a reasonable man unaffected by the hope of compensation from BT as his former employer; (ii) the onus was on BT as the wrongdoer to show that Mr Wilding had failed in his duty to mitigate his loss by unreasonably refusing the offer of re-employment; (iii) the test of unreasonableness is an objective one based on the totality of the evidence; (iv) in applying that test, the circumstances in which the offer was made and refused, the attitude of BT, the way in which Mr Wilding had been treated and all the surrounding circumstances should be taken into account; and (v) the court or tribunal deciding the issue must not be too stringent in its expectations of the injured party. I would add under (iv) that the circumstances to be taken into account included the state of mind of Mr Wilding.*

ANALYSIS

28. I asked at the preliminary hearing whether the respondent was relying on section 111A of the Employment Rights Act 1996, I was told it did not. Neither was that argument raised before me today. However, even if such an argument had been raised I consider that it would be defeated by Section 111A(4). In my judgment this was a deliberate attempt by the respondent to avoid the potential cost of a redundancy if that decision was implemented.

29. In my judgement the claimant was given the equivalent of an ultimatum to resign or be dismissed, albeit for a sum of money. Mr Steed arranged a meeting where he misled the claimant as to the purpose of the meeting and the signing of a negotiating document. He pressurised the

claimant with requests for the claimant to provide him with a figure despite the claimant indicating that she did not want to leave her employment. Even when the claimant showed the redundancy figure to him he persisted by offering the sum of £1500 to the claimant. On Monday the 18 February Mr Steed added to the pressure by increasing the offer to £2000 and indicating that if it were not accepted the claimant's employment would be brought to an end without any payment this was an ultimatum. There is no doubt in my mind that Mr Steed in placing the claimant in this position, was placing the claimant in the situation envisaged in **Walker** above. Even if I was wrong about that the addition of the pressure of Mr Little's intervention adds to the words used by Mr Steed and the ultimatum is made clear and explicitly indicates that fair or foul means would be used to achieve the dismissal. In those circumstances I have no hesitation in concluding that the claimant was dismissed by the respondent.

30. I am unable to say with any degree of clarity what was, respectively, in Mr Steed or Mr Little's mind when they spoke to the claimant. However, the other facts point to the potential that the dismissal was by reason of redundancy. There was the removal of aspects of the claimant's role. There was the potential of all administration tasks carried out by the claimant being undertaken elsewhere than Cardiff. There was employment of an individual on a part time basis and distribution of tasks. Whilst I cannot see the reasoning of the individuals it appears clear to me that the organisation was contemplating a dismissal which would be mainly attributable the fact that the requirements of the respondent for the claimant to carry out administration work in Cardiff because the need for that work were expected to cease or diminish. On that basis I consider that the reason for dismissal was redundancy.

31. In my judgment dismissal for redundancy was substantively unfair when the respondent uses a method which is intended to avoid statutory redundancy payments to be made. This, I judge, was the situation here.

32. I do not consider that redundancy was a sufficient for the reasonable employer to dismiss the claimant at the time the respondent dismissed the claimant. The restructuring was in the earliest stages of contemplation. No specific proposals as to the re-organisation were in place.

33. I consider that the decision to dismiss was procedurally unfair. No consultation had been entered into. The claimant was not afforded the opportunity of input into the process.

34. In my judgment the claimant was unfairly dismissed.

35. The claimant has not committed a blameworthy act. There is no basis that a generalised lack of flexibility could be considered improper even if there

were specific examples where the claimant insisted on only working to the terms of her contract. This submission was totally without merit.

36. I have come to the conclusion that in the circumstances the respondent might have made the claimant redundant in any event. However, in the absence of consultation with the claimant I consider that there is only a 10% chance of that happening as the claimant might have put forward other solutions which would have achieved the outcome, particularly as the respondent has not transferred the administrative function to Worcester. In addition, the claimant may have been willing to accept a different working pattern or structure.

37. I do not consider that the respondent has demonstrated that the claimant was failing to search for roles by indicating that there were, recently, a number of administrative roles for which she could have applied. I accepted the claimant's evidence that she was seeking work throughout. I also consider that the claimant was reasonable in limiting her applications for employment to administrative and reception jobs initially. However, I do not consider it was reasonable for her to continue to do so after a period of three months when it became clear she was not successful in obtaining such roles. In my judgment the claimant was likely to be successful in obtaining employment with some role with similar pay in Cardiff within nine months of being dismissed.

38. 20 In my judgement the claimant is entitled to a basic award of £3,894.21 based on 6 completed years of service over the age of 41 and one and a half weeks pay for each year at the gross weekly wage figure of £432.69. The claimant is entitled to a compensatory award of amounting to 9 months net weekly wage amounting to 39 weeks at £359.25, a total of £14,010.75. The claimant has also lost the benefits of the respondent's pension contributions of £27.44 per month amounting to £246.96. I have also awarded the claimant the sum of £400 for loss of statutory rights. This means that there is a total of 14,657.71 in compensatory award. From that figure a reduction of 10% reflects the risk that the claimant would have been made redundant in any event a sum of £1,465.77 result5ing in a figure of £13,191.94. From this figure deduct the sums of £4,188.20 received by the claimant from the respondent at the end of her employment. This amounts to the sum of £9,003.74 as the final compensatory award. This is to be added to the basic award making the total award £12,897.95 which I order the respondent to pay to the claimant.

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Employment Judge Beard
Dated: 26 February 2020

Judgment sent to Parties on
17 March 2020