**Case Number: 1601719/ 2019**

# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms M Roche**

**Respondent:** **Speedy Asset Services Limited**

**Heard at:** **Cardiff (by video)** **On: 13 January 2021**

**Before:** **Employment Judge R Harfield**

**Representation:**
Claimant: In person
Respondent: Ms Quigley (Counsel)

# RESERVED REMEDY JUDGMENT

It is the decision of the Employment Judge sitting alone that:

1. The claimant is awarded a basic award (after adjustment) of £995.20;
2. The claimant is awarded a compensatory award (after adjustments) of £4,915.88;
3. The total gross award is £5,991.08;
4. The award is subject to a recoupment order as set out below.

# REASONS

**Introduction**

1. A remedy hearing took place before me on 13 January 2021. The hearing took place by video in light of the ongoing Covid 19 pandemic. I had before me a joint bundle extending to 849 pages together with a further bundle from the respondent headed "additional mitigation bundle" extending to a further 713 pages. I received written witness statements from the claimant and her witnesses Mr Colbourne and Mr Hughes. For the respondent I had a witness statement from, and heard evidence from, Mr Jones. My liability decision can be

found at pages [1] to [27] of the main remedy bundle. It dealt with the remedy issues of a Polkey deduction of 30% and a deduction to the basic and compensatory award of 25% for contributory conduct. The remaining remedy issues were to be decided at the remedy hearing.

2. I also receiving closing comments from both parties. I have not summarised them in full here, but I have taken all submissions into account. I reserved my decision on outstanding remedy issues to be delivered in writing.

3. I should also record here that the claimant's schedule of loss appeared to incorporate within it a potential reconsideration application relating to some of the decisions reached in the reserved liability judgment, particularly that relating to contributory conduct. I explained to the claimant that any application for reconsideration should have been made within 14 days of the original reserved liability judgment and on the face of it I could not see that such an application had been made within time. The claimant accepted that was the case and stated that she simply wished to draw her observations to my attention. She acknowledged, however, that the remedy hearing and the remedy judgment would be dealing only with outstanding matters relating to the appropriate award for her successful unfair dismissal claim.

**Additional findings of fact and the additional evidence heard**

4. The claimant's original occupation was as an Accommodation Officer, in charge of 96 properties, their maintenance and Temporary Tenancy agreements for the homeless. At the time the claimant lived in Scotland and she did that job for over 19 years.

5. The claimant decided she wanted a new challenge and qualified as a class 1 and a class 2 HGV driver. She initially struggled to get work due to a lack of experience and so initially worked for a farmer. She then undertook some agency work as an HGV driver. The claimant subsequently secured a permanent job as an HGV driver with Dyce Carriers before moving to work for Craib on better terms and conditions. The claimant worked as an HGV driver for just under a year before she decided to get a bus driving licence. She did so and worked for a time as a bus driver.

6. The claimant then moved to Wales. In Wales she worked for Owens as an HGV driver for just short of 5 years. She left to clean trucks at RT Kidwells as she was planning on starting a truck cleaning business. But when working there she secured a job as transport co-ordinator. The claimant worked in that role for about 6 months before moving to work for the respondent. She left RT Kidwells because they lost a major contract with Tata Steel and were not able to keep the claimant on. The claimant worked for the respondent from 19 December 2016 until 21 May 2019. The liability judgment deals with what happened in that regard.

7. Following the claimant's dismissal she promptly looked for new work. She secured a job at MCL. The claimant said that this was via an agency. At [140] the claimant sets out the employment agencies she engaged with. I know from

Mr Hughes' evidence that he did not engage with the claimant until June 2019. There are no other agencies listed other than "Nicola @ Recruitment" and I therefore infer this was the agency involved. The interview arrangements were in place by 28 May 2019 [137] and the claimant attended the interview that same day. She was offered the job there and then, part way through the interview by the CEO. The claimant described the job as being a co-ordinator. She started work on 3 June 2019. The company delivers goods on pallets. Her role was to co-ordinate the sending of the Newport based products sent out on vans and HGVs.

8. The claimant in her witness statement describes the job as being a temporary one. At page [133] is a screenshot which is a partial extract of a job profile for a traffic planner. At page [102] of the remedy bundle the claimant refers to this screenshot as showing that her job at MCL was temporary. The job profile does say that the job is for maternity leave cover, whilst also referring to there being opportunities to progress within the company. The claimant also says she was not given a written contract or terms and conditions of employment for the job as she was told there was an ongoing assessment of her abilities and the company was looking to place her elsewhere in the organisation. She said that in interview a lot of promises were made to her about up and coming projects that never came to fruition. The claimant also agreed in cross examination that the job was an ongoing one and that she took up the post with a view to it being a long-term job but with the caveat that it was not necessarily in that job but perhaps other posts.

9. The claimant's evidence about this job was, at times, difficult to follow. Bearing in mind the terms of the job advert, I find it likely the claimant initially was given a role as maternity cover but that promises were made to her that there would be opportunities for her to be moved on and progress elsewhere. As no written contract or terms and conditions were ever produced it is likely there was never a definitive written fixed term contract that would expire on a defined date.

10. The claimant is an ambitious person. It can be seen from her career history that she has challenged herself in her working life to move on with her career. I find it is likely that at first blush the opportunities at MCL were therefore attractive to her. The claimant was also understandably glad at the time to have secured new employment so quickly having been dismissed by the respondent for what, in the respondent's view, was gross misconduct.

11. The claimant grew dissatisfied with her job at MCL. She did not receive a written contract. She was dissatisfied with the hours she was being expected to work. The claimant says that each day she was working from 4am until 3pm and then restarting work that evening from home at 9pm until 23:30pm sorting the next day's delivery schedules so that they were all in place for the workers to start at 4am. She would work this Monday to Friday with lone working every third Saturday. She said that on 26 June she had also experienced difficulties with not receiving the correct pay [104] and that she never received any payslips.

12. Nicola @ Recruitment was also still seeking work for the claimant, even whilst the claimant was still at MCL. On 10 July 2019 the agency contacted the claimant about an interview for a potential Account Manager role with FLS which the claimant attended. The claimant said in evidence that the feedback she had was that it was a good interview, and that the interviewer was potentially interested in the claimant for other things and wanted her to meet his business partner. A second interview was arranged for 17 July [139]. On the day of that planned second interview it was cancelled. The claimant was told by the agency that the employer had given the job to someone else that same day.

13. The claimant resigned from MCL on 26 July 2019 which the claimant says was due to the working conditions, there being no written contract in place, not being given the correct pay and no payslips. She also said that at the time, bearing in mind that the job market was buoyant and she had not had difficulties securing the MCL job, that she did not anticipate difficulties in securing replacement work. The claimant says she received 8 weeks gross pay in the time that she worked for MCL totalling £4333.00.

14. Whilst the claimant was still employed by MCL, sometime in the middle of June 2019, she happened to bump into Mr Hughes in Cwmbran. They knew each as when the claimant worked for the respondent, Mr Hughes was working for a recruitment agency, Driving Force, based in Newport. Mr Hughes would work with the claimant, when she was employed by the respondent, on placing drivers. By the time he bumped into the claimant in June 2019 Mr Hughes was working for different agency, Vibe Recruit. The claimant told Mr Hughes that she was working in a temporary position and that she would be moving to Llanelli. She asked Mr Hughes if he knew of anyone recruiting in the Llanelli or Swansea area. She told him that she could not say what had happened with Speedy. Mr Hughes said he would make some enquiries for the claimant.

15. Mr Hughes did not officially sign the claimant up to Vibe Recruit's books. He said this was because it would have been for temporary, agency work whereas he was initially trying to find the claimant full time, permanent work. There were no particular known vacancies that he put the claimant forward for, but he contacted companies that he was aware of mainly in the Cardiff and Newport areas to see if they had an interest in someone with the claimant's skillset. They were the regions where Mr Hughes had the most contacts. Mr Hughes did not have any particular contacts in Swansea and Llanelli. He did have some contacts in Bridgend which he tried but he said that the claimant told him that Bridgend was too far for her. In August 2019 Mr Hughes left Vibe Recruit and moved to work out of Avonmouth and he stopped looking for the claimant as his job was now focussed on a different geographical region.

16. Mr Hughes contacted the haulage companies where he had contacts such as Owens and Rhys Davies. He did not give the claimant's name (which is agency standard practice to stop the risk of being cut out of the recruitment relationship). He would ask the companies if they were interested in an experienced transport manager who had worked in Newport for a well-known hire company and that she was a time served HGV driver. Mr Hughes said he tried to get the claimant

in on driver work as well as the type of work she had done for Speedy, although I was less convinced by that aspect of Mr Hughes' evidence. He said that some contacts either said "no" straight away or said that they would let him know and get back to him, but they never did.

17. Mr Hughes says in his written statement that many clients deduced he was talking about the claimant and that he suspected there was a reason for their lack of enthusiasm. He did not know himself at the time the circumstances around the claimant's departure. Mr Hughes also acknowledged in evidence, as above, that these were speculative calls rather than being about known vacancies and there was also the possibility that the companies simply did not need someone; hence their response. He also said in oral evidence that no one had specifically identified the claimant and had said that they were not employing her. He also said in oral evidence that all vacancies would not necessarily come via a recruitment agency as some have a "no agencies" application process. Mr Hughes did not try to secure temporary, agency work for the claimant.

18. There are no specific vacancies identified that the claimant applied for in August 2019, other than possibly the trainee driving instructor role referred to below. The claimant said in evidence that she was taking her CV around companies that she had spoken to on the phone, speaking to HGV drivers and passing on her CV to anyone they knew. She did not give the details of the specific companies that she contacted or said that there was a specific vacancy she was applying for. The claimant signed up for 6 online job search companies set out at page [140] and she says that she would regularly check for vacancies. In terms of recruitment agencies there were also Mr Hughes and Nicola @ Recruitment already identified above.

19. I also have a letter from a Wendy Priestley dated 17 July 2020 [180] stating that the claimant contacted her in around July or August 2019 about work as a trainee driving instructor but that "due to the ongoing problems with her last employer we decided against employing her." Ms Priestley adds "I did recommend that she try a local haulage company for work as a long-distance trucker but they were wary about taking her on due to the unresolved problems with her dismissal." I do not know the identity of Ms Priestley's company or the haulage company.

20. On 5 September 2019 the claimant applied for Universal Credit. Sometime in September 2019 the claimant applied for a Transport Manager job at DJ Thomson Co, a Traffic Dispatcher at Reed and a Transport Planner at Bridgeton.

21. The claimant would also have regular contact with her Jobcentre representative and she had to record her job search activity. The records [157] show the claimant checking job websites for vacancies, checking recruitment agent sites, telephoning contacts to remind them she was available and advising contacts that she would be willing to relocate. The claimant's jobcentre contact would also send through potential job vacancies which the claimant applied for. It is difficult to decipher, but it may well be that some of these potential job vacancies are the same three vacancies referred to in the paragraph immediately above.

22. On 24 September 2019 the claimant recorded in her Jobcentre journal: “Sorry for my late journal entries, I have had some sort of bug and although I have still completed searches everyday I thought I would just catch up on my journal once I felt better.” There is also a record of the claimant receiving a call from Smart Solutions Agency on 30 September 2019 about an application for a role at Biffa Waste. It is not clear to me whether that was a further job application again or one of the above mentioned jobs.

23. On 11 October 2019 the claimant’s Universal Credit came into payment. In October 2019 the claimant underwent various investigations as it was feared that the cancer she had previously suffered from had returned. On 4 November 2019 the claimant was taken to hospital and had about 12 blood clots removed from her lungs. She was in intensive care for a time. The claimant left hospital on 12 November 2019.

24. In January 2020 the claimant moved from Pontypool to Llanelli. A friend in Llanelli has been able to provide the claimant with accommodation. The claimant was referred for a Universal Credit medical assessment which took place on 6 March 2020. It records the claimant’s history of pulmonary embolism and that the claimant had also been diagnosed with sticky blood syndrome/APS. It also records the claimant as suffering from anxiety and depression and says that it “has been building over the last year and she admits has been struggling to cope.” It records the claimant saying that the thought of driving her car made her extremely anxious so she had not driven recently and that the claimant would not go out and about on her own. It says: “she has looked at jobs online and does not apply for them as she knows even if she was called for interview she would be too anxious to go to the interview on her own and too anxious to go out.” The assessment concluded the claimant was likely to have significant disability in going out and coping socially. It says that the condition could improve with professional treatment and recommended re-referral in 18 months. The claimant has not applied for work since November 2019 due to her health. She told me that the physical effects from her pulmonary embolism, in terms of limiting her ability to work, lasted about 4 to 6 weeks. She said that her inability work is due to her poor mental health.

25. The claimant is considering retraining in the longer term and is considering self-employment. She said she had been doing some retraining in the beauty industry but at the current time with the Covid Pandemic it is not a viable option. I do not know when that training course was or specifically what it was for as the claimant’s evidence was vague and she produced no documents relating to it.

26. Mr Colbourne works for Tarmac Cement & Lime and previously worked as Logistics Compliance Manager for Owens Group. His view in his evidence was that if was recruiting he may be minded to exclude drivers who had any history of driving without a tachograph card inserted, whatever the reason. He referred to his previous experience of a public enquiry by the Traffic Commissioner for Wales against 6 drivers who had deliberately removed their cards when driving for their own benefit. He said the Traffic Commissioner had said that if a driver removed their card “then they have something to hide and cannot be trusted

under any circumstances" and that operators who had knowledge of such wrongdoing would run the risk of losing their operator's licence. He said that Owens then decided not to employ drivers who had in the past removed their driver's card. His view was that the claimant would therefore find it difficult to obtain employment as a vocational driver. As stated, Mr Colbourne now works at Tarmac Cement & Lime. The claimant had not applied for a job there.

## Discussion and Conclusions

27. Under section 118 Employment Rights Act (ERA) where the award sought in a successful unfair dismissal claim is compensation, the award must consist of a basic award and a compensatory award.

### Basic award

28. The basic award is calculated in accordance with sections 119 to 122 ERA. The the amount awarded depends on whole years length of service, age and a week's pay. A week's pay is in turn calculated by Part XIV Chapter 2 ERA.

29. The claimant in her schedule of loss claim's a week's pay at £479.17. However, if an employee is in fact earning less than the statutory cap on a week's pay then the real earnings figure is used. At the time of her dismissal the claimant was earning £23,000 gross pay a year (see pay slips at [73 – 82]). That equates to gross weekly pay of £442.31. The claimant had two years complete qualifying service. As she was over the age of 41 she is entitled to 1.5 weeks' pay for each year of service (1.5 x 2 = 3). This means she is entitled to 3 x £442.31 producing a basic award entitlement before adjustments of £1326.93. From that there is a 25% reduction for contributory conduct, producing an overall figure, as set out by the respondent in their counter schedule of loss, of **£995.20.**

### Compensatory award

30. The compensatory award is governed by sections 123 and 124 ERA. In particular section 123 says, where relevant:

*(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable and in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*

*(2) The loss referred to in subsection (1) shall be taken to include –*

*(a) Any expenses reasonably incurred by the complainant in consequence of the dismissal, and*
*(b) Subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal. …*

*(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales…*

*(6) Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*

Loss of earnings

31. As set out above, other than a period of employment with MCL between May and July 2019, the claimant has not to date secured further employment. In terms of the duty to mitigate I have to consider what steps were reasonable for the claimant to have to take in order to mitigate her loss, whether the claimant did take reasonable steps to mitigate loss and to what extent, if any, the claimant would actually have mitigated her loss if she had taken those steps. The burden of proof rests with the respondent. The respondent must show that the claimant has acted unreasonably in failing to mitigate (Cooper Contracting Ltd v Lindsey [2016] ICR D3).

32. The respondent argues that the claimant should only be awarded loss of earnings until she started working at MCL. The claimant was earning more there than she did when working for the respondent. The respondent submits that the claimant, in resigning her employment at MCL, broke the chain of causation in terms of her ongoing losses which cannot be said to be attributable to action taken by the respondent. Put another way, it is said that in resigning from MCL the claimant did not mitigate her loss.

33. In Dench v Flynn and Partners [1998] IRLR 653 the Court of Appeal held that it is not in every case that the obtaining of new employment at an equivalent salary or higher will stop a respondent being liable for losses suffered by an unfairly dismissed employee. This was followed by the Employment Appeal Tribunal in Cowen v Rentokil Initial Facility Services (UK) Ltd EAT 0473/07. There it was said this proposition may be particularly relevant where the new employment appears to be permanent when originally entered into but which, through no fault of the employee's, proves to be only of a short duration. It was said that in such a case the reason why the subsequent employment did not last will be an important consideration. It was further said that if the employee resigned for no good reason or was dismissed for incompetence or misconduct (for example), that it is likely a tribunal would take the view that losses subsequently suffered were attributable to the employee's own behaviour and not in consequence of the original unfair dismissal. In Cowen, for example, the claimant had taken on a very different role from his previous employment and had not been able to pass the probationary period in his new employment.

34. Here I do not find that the claimant's resignation with MCL broke the chain of causation. I find the claimant left because fundamentally the job was not turning

out to be the job that she was promised at interview. In particular, the main driving force were the long, antisocial hours the claimant was required to work. I accept these were unreasonable and not as described at the interview. This combined with an increasing sense by the claimant, bolstered by things such as a lack of written contract and payslips, that promises made in interview about covering a role temporarily before being moved on to other, better opportunities, may well not come to fruition. That the claimant was dissatisfied with MCL can be seen from the fact she was still engaging with recruitment agencies to find another job whilst working there. Indeed the claimant had the job interview at FLS.

35. I acknowledge it could be said that the conduct of MCL is not the fault of the respondent and that the claimant resigned from MCL ultimately without a job to go to. These are factors that I have taken into account. Likewise, however, it was the respondent's unfair dismissal which left the claimant out of work and placed the risk on the respondent that a dismissed employee, particularly one dismissed for alleged gross misconduct, will be keen to quickly take a job that is offered whilst running the risk it may not ultimately turn out to be a good or appropriate opportunity. I also accept that at the time the claimant resigned from MCL she did not appreciate there would be further difficulties again in finding employment. She had secured the job at MCL very quickly and had progressed far in the application process at FLS. I do not find it established that the claimant acted unreasonably in resigning from MCL in the particular circumstances in which she did.

36. After her resignation from MCL, I am satisfied that the claimant was actively seeking work in the field similar to her job with the respondent (and indeed the MCL job) in July to September 2019 via jobsite searches, agencies and word of mouth. I do not find it established that the claimant was looking for work as an HGV driver. Other than a brief statement to that effect by Mr Hughes, which I did not find him very clear about when questioned about it, (and who also said he had not put the claimant forward for any particular vacancies) and the written statement from Ms Priestley that I find equally vague in some respects, I do not have any specific evidence that the claimant looked for that kind of work. There is nothing that identifies a particular vacancy at a particular company or agency, or any documents that show an application for that work. However, I also do not find it unreasonable for the claimant to have limited her job search within that early period to have focussed on her main recent area of work and where her career aspirations lay.

37. However, once the claimant appreciated it was not in fact going to be easy to find that kind of employment, I consider it would have been reasonable for the claimant to have expanded her search to consider employment outside of that key field by looking for work as a driver, agency driver and making use of her wider organisational and logistical skills to look wider than the transport sector. The claimant has excellent transferrable skills to offer and her career history shows she can successfully move from one type of work to another. She has lots to offer an employer.

38. I do not find it established that the claimant has suffered stigma in terms of applying for jobs in the transport industry in the sense that rumours and gossip have been circulating to such an extent that no one was prepared to countenance considering the claimant for work. There is no clear evidence before me of that having happened. It appears to be largely based on supposition. However, I accept it is likely that during the application process it would come to light that the claimant had been dismissed and that the allegation related to the removal of a tachograph card. I accept that would be likely to make it more difficult for the claimant to secure work as a HGV driver or indeed in the type of role she was doing before as a transport co-ordinator, given the role is likely to involve dealing with tachograph compliance issues. I do not, however, find it would be an absolute bar to obtaining employment in the sector. This is demonstrated by the fact the claimant secured the job with MCL and made it through the first stage of the interview process with good feedback at FSL. The claimant would be able to explain the very particular circumstances in which she was driving, her views that it was not in the circumstances a regulatory breach and her mitigating factors. She had not been subject to sanction by the traffic commissioner and her circumstances are different to the example cited by Mr Colbourne. There has also been an increasing need for HGV drivers. But I do accept it would be an added obstacle in the transport sector. It is also far less of an obstacle outside of that type of work.

39. The claimant was earning an annual salary of £23,000 at the respondent. Placing to one side the claimant's health for a moment, and presuming she was fit for work, in my view it is likely the claimant would have been able to obtain replacement employment within a further 3 months from September 2019 i.e. by the end of December 2019. This would be whether as a driver, transport co-ordinator (or similar role) or roles outside of the mainstream transport industry such as, for example, warehouse manager or an office administration role earning an equivalent level of pay. The claimant says (contrary to what was said by Mr Hughes) she was prepared to travel/relocate and I am satisfied that that type of work would have been available. Whilst the job search information provided by the respondent does not directly relate to that period of time, in general terms it is still capable of providing some supporting evidence as to the type of work that is likely to be on the market and general earnings in those types of role at the time. The period of time we are concerned with pre-dates the Covid 19 pandemic.

40. In fact in the latter part of September 2019 the claimant started to become unwell. She initially thought she had a bug. She was then under investigation for a return of her cancer. Ultimately she collapsed and was diagnosed with a pulmonary embolism. Whilst the claimant expresses the viewpoint that blood clots can be caused by stress, there is no medical evidence before me that the claimant's physical ill health was attributable to her dismissal and I am unable to conclude it was.

41. By March 2020 the claimant had also been diagnosed with anxiety and depression. Whilst I have very little medical evidence to work from it appears

likely that this became particularly debilitating in the latter part of 2019. The claimant attributes this ill health and her inability to work to her dismissal by the respondent. However, again I have no medical evidence in support of this. The evidence available also shows the claimant being well enough to promptly look for work after her dismissal, and indeed successfully obtain work 8 days later in an interview. It also shows her being well enough to apply for work, look for work and work contacts over the summer months. I therefore do not find it established that the claimant's anxiety and depression and the claimant's consequent inability to work to be attributable to the claimant's dismissal by the respondent.

42. The claimant is therefore entitled to recover her losses in full until the end of September 2019 when she became unable to work due to ill health.

43. There is nothing before me to say that if the claimant had continued working for the respondent she would not have experienced the same degree of ill health and inability to work. The question therefore follows what would have happened to the claimant in those circumstances whilst working for the respondent (see Wood v Mitchell SA UKEAT/0018/10/CEA). In my judgement, the claimant would have gone on sick leave if she had remained working for the respondent. Looking at her contractual terms with the respondent the claimant would potentially be entitled to discretionary company sick pay of up to 4 weeks and then statutory sick pay. There is nothing before me to say that the respondent would not have granted the claimant 4 weeks discretionary sick pay. Thereafter the claimant would have received statutory sick pay of £94.25 a week. I am aware, and take judicial notice of the fact that statutory sick pay can be paid for up to 28 weeks and if the claimant had remained working for the respondent she would have received that sick pay each week until the end of the period of time I have identified ending at the end of December 2019. I do not find it likely that the respondent would have lawfully terminated the claimant's employment during that time by reason of her ill health. She had a period of ill health previously whilst working for the respondent which had been accommodated.

44. I therefore award the claimant her full losses for the period until end of September 2019. Thereafter for the period September 2019 to end of December 2019 I award the claimant her losses at the level of sick pay the claimant would have been entitled to if still working for the respondent.

45. I do not award the claimant any losses after 31 December 2019 on the basis that she would hypothetically by the end of that period have been able to full mitigate her losses but for her ill health, which is not attributable to the actions of the respondent. In my judgement, the above approach to evaluating the claimant's losses is just and equitable and accords with the approach taken in (once adjusted by the Employment Appeal Tribunal in respect of sick pay rates) in Avia Technique Ltd v Kalia UKEAT/0382/12/JQJ and the authorities reviewed therein.

46. In terms of the claimant's notional net earnings if she had continued working for the respondent, I use the figures set out in the respondent's counter schedule of loss as I do not find it established that the claimant would have been likely to have been given a pay increase whilst working for the respondent. Mr Jones'

evidence was that there were no across the board pay rises at that time for the respondent's employees.

47. In respect of net past loss of earnings my award is therefore as follows:

(a) Losses to 3 June 2019 (date of start with MCL)

- 11 days/ 1.57 weeks.
- The claimant's net weekly pay when working at the respondent was £357.03;
- 1.57 weeks x £357.03 = £560.40

(b) Losses for remainder of 1 month notice period (3 June to 21 June 2019) [53]

- 20 days/ 2.86 weeks x £357.03 = £1,021.11;
- Under the principle in Norton Tool v Tewson the claimant's earnings in her new employment in that period do not need to be offset in the notional notice period. As dealt with below, the sum equivalent to the claimant's notice pay period will need to be grossed up for taxation purposes.

(c)The remainder of the claimant's period of employment with MCL

- There is no loss during this period as the claimant earned more whilst employed with MCL

(d) The end of the claimant's employment with MCL (27 July 2019) until she became unwell by 30 September 2019

- 9.29 weeks x £357.03 = £3316.81

(e) 1 October 2019 to 29 October 2019 (period of full pay sick pay)

- 4 weeks x £357.03 = £1428.12

(f) 30 October to 31 December 2019 (period of statutory sick pay)

- 9 weeks x £94.25 = £848.25

(g) Total net loss of earnings **=£ 7174.69**

Pension contributions

48. The claimant has lost the value of the respondent's pension contributions at 3%. £7174.69 at 3% (adopting the approach of the respondent in their counter schedule) = **£215.24**

Job seeking expenses

49. The claimant seeks the sum of £60 to cover travel costs to the job centre, attending interviews, agency registration interviews, buying newspapers, a ream of paper, ink cartridges and stamps. I accept that some expenses will have been incurred, however, I have awarded losses for a limited period and also factor in

that much of the activity in job search is often taken digitally. I award the sum of **£30.**

Loss of statutory rights

50. I award the sum of **£500.**

Acas Uplift

51. Section 207A(2) TULR(C)A provides that: "*If in any proceedings to which this section applies, it appears to the employment tribunal that – (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) the failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent*."

52. Under section 124A ERA any adjustment only applies to the compensatory award.

53. In the liability judgment I found that the respondent had been unreasonably in breach of the Acas Code by not setting out fully in writing to the claimant the totality of the allegations that she was facing, in particular that she was being accused of deceit. I do consider it just and equitable to award an uplift. I also note that the breach was serious in the sense that a very serious allegation was being levelled at the claimant which she was not forewarned about. I do, however, also take into account that there is no evidence that the failure to comply with the procedures was deliberate and also that the respondent did generally follow a procedure that was largely compliant with the Code. There was, for example, an investigation phase, the disciplinary hearing conducted by a manager different to the investigating officer, and the right of appeal. I award an uplift of 10%.

Other matters in the claimant's schedule of loss

54. In respect of other matters set out in the claimant's schedule of loss I would comment as follows. The claimant makes a claim for lost paid annual leave. However, paid annual leave would already been within the salary figures used.

55. The claimant is also seeking what she says is the lost benefit of national insurance contributions and tax. However, what the claimant will have lost in her pocket is the net amount of her salary and benefits and the Tribunal therefore awards losses on a net basis except in respect of any element of the award that is likely to be subject to tax, which then needs to be grossed up for taxation purposes.

56. The claimant also says she has lost the value of her personal investment in obtaining her HGV licenses and bus licence totalling £7000. I do not find these are losses that the claimant has sustained or that they flow from her dismissal and I make no award I that regard.

57. As I explained to the claimant at the hearing, I am unable within a compensatory award to order a time preparation order or reimbursement of witness costs as those matters relate to the cost of the proceedings and not within the ambit of a compensatory award. As I also explained, a compensatory award only relates to financial losses and I am unable to make any award in respect of injury to feelings. I am also unable in an unfair dismissal claim to award interest on past losses. Interest on the Tribunal judgment itself is again outside the ambit of the compensatory award calculation. It is a separate matter.

Final calculations

58. Total past losses = £7919.93

*Adjustments*

- Less 30% Polkey reduction (see liability Judgment) = £5543.95
- Plus 10 % Acas uplift (554.40) = £6098.35
- Less 25% reduction for contributory fault (see liability Judgment) = £4574.76
- Total net compensatory award after adjustments = £4574.76

Grossing up notice pay

59. Whilst there is no separate notice pay claim, HMRC is likely to deem an amount equivalent to 4 weeks' pay from the compensatory award to amount to post employment notice pay and therefore be taxable. That amount therefore needs to be grossed up. The remainder of the award should not be taxable as it is likely to fall under the tax-free threshold and is awarded on a net basis.

60. 4 weeks gross pay = £1769.24

    4 weeks net pay = £1428.12

    Difference = £341.12

61. Total compensatory award after grossing up: **£4915.88**

**Total award**

62. Basic award £995.20

63. Compensatory award £4,915.88

64. Grand total (grossed up) £5,991.08

**Recoupment**

65. Pursuant to the Employment Protection (Recoupment of Benefits) Regulations 1996 the above calculations have been undertaken without regard to the claimant's receipt of Universal Credit which Jobcentre Plus may potentially recoup. The attached Annex explains the workings of the recoupment provisions.

66. The monetary award is £5,991.08.

67. The prescribed element is (after adjustments) £4143.38. (Loss of earnings of £7174.69 then subject to 30% Polkey reduction, 10% Acas uplift, 25% deduction for contributory fault).

68. The date of the period to which the prescribed element relates: 21/5/2019 to 31/12/2019.

69. The amount by which the monetary award exceeds the prescribed element £1847.70 (£5991.08 - £4143.38)

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Employment Judge R Harfield
Dated: 10 February 2021

JUDGMENT SENT TO THE PARTIES ON 11 February 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS