EMPLOYMENT TRIBUNALS

Claimant:	Mr Ceesay	
Respondent:	City Facilities Management Ltd	
Employment Judge:	E P Morgan QC	
Members:	Mr Taj Mr Pearse	
Hearing:	**By CVP**	16 March 2021
Representation:		
Claimant: Respondent:	In Person Mr Brown (Solicitor)	

JUDGMENT

1. The Respondent is ordered to pay to the Claimant the sum of **£7429.50** by way of compensation in respect of the claim of unfair dismissal.

2. The Employment Protection (Recoupment of Benefit) Regulations 1996 do not apply to this award.

REASONS

1. By its judgement issued to the parties on 11 January 2021, the Tribunal dismissed the claims of raised Race Discrimination and automatic unfair dismissal. However, the claim of unfair dismissal contrary to section 98 (4) of the Employment Rights Act 1996 was upheld.

2. This hearing has been held to determine the issue of remedy. For this purpose, the Tribunal has been provided with a bundle of additional documents [**93 pages**]. The tribunal has also received additional oral evidence from the Claimant. It has also had the benefit of evidence from Miss Dunbar, People's Director with the Respondent company.

3. At the outset of the hearing, the parties confirmed that the documentation provided to the Tribunal was available to them. There were no other preliminary matters.

Further Findings of fact

4. Within the course of its earlier judgement, the tribunal detailed a number of principal findings of fact. Those findings are, to be treated as repeated and adopted within the course of this Judgment.

5. Having received the additional documentation and evidence, the Tribunal makes the following further findings upon the balance of probabilities:

   5.1 At the time of his induction with this Respondent, and annually thereafter, the Claimant was given access to his own copy of the "Colleague Handbook" adopted by the Respondent. This document details the principal policies and procedures relied upon by the Respondent insofar as they relate to hourly paid employees. It was the evidence of Miss Dunbar, which the Tribunal accepts, that revisions of this document prompted the circulation of up-to-date copies to Depot Managers, for onward transmission to each individual employee;

   5.2 The Colleague Handbook contains "standards of conduct". The opening paragraph of that document states:

   "Not attending work places additional workload on other colleagues and reduces our opportunity to deliver great service. Absence from work can however sometimes be unavoidable. City therefore strictly monitors absence to ensure those who generally need time off are supported and those whose absence becomes a problem are dealt with in a fair and consistent manner."

   5.3 Thereafter, detailed guidance is given as to the step to be taken by those who are absent from work and the obligation to maintain direct communication with their "Line Manager" during absence;

   5.4 Within the same section of the Handbook there is specific mention of "Absence without leave". It provides:

   *"Failure to follow City's absence reporting procedure will result in you being classed as absent without leave (AWOL). Under our absence policy, where we are unable to make contact with colleagues, the absence is unauthorised, classified as gross misconduct and could lead to your dismissal." [**P64**]*

   5.5 In connection with disciplinary and grievance procedures, the same document records:

   "There are types of behaviour and conduct which are taken very seriously by the Business and can result in disciplinary action or even dismissal. In order to ensure that our actions are consistent and fair, we have a procedure to deal with misconduct and breaches of our rules. Although we hope you will never be involved in disciplinary action, this procedure allows for counselling, warnings and, for continuing lapses, dismissal with notice. Gross misconduct may result in summary dismissal. These procedures do not form part of your contract of employment but give details of what to do if you wish to appeal against a disciplinary decision or if you wish to raise a grievance."

   5.6 The Respondent has adopted what it terms as "Family Friendly Policies." These include reference to compassionate leave and absence to aid dependents. With regard to "time off for dependents" certain key pointers are provided by way of

guidance. These include a statement to the effect that such absence is "unpaid". It also provides:

"The right is to a reasonable amount of time off-normally a day or two but this will depend on individual circumstances.
The right to time off is to deal with emergencies involving a dependent.
A dependent is someone who depends on a colleague for care.…
*The colleague must tell is as soon as possible the reason for the absence and how long they expect to be absent." [**P87**]*

5.7 In connection with compassionate leave, the handbook provides the following:

"All colleagues will be able to take compassionate leave of up to 5 days with pay in the event of the death of a husband, wife, living partner, civil partner, child, parent, grandparent, brother or sister.…"

5.8 As indicated in the course of the Tribunal's previous judgement, the Claimant did not at any time seek to invoke these policies. The approach which he made to Mr Brownridge was and remained a request for extended leave. In the view of the Tribunal, this is hardly surprising. As the evidence of Miss Dunbar confirmed, non-management employees would be unaware of any wider managerial discretion in the event of extenuating family circumstances or the need for other urgent requests not specifically addressed within the course of the policies promulgated by the Respondent.

5.9 In fact, contrary to the evidence given to the Tribunal by the Respondent's managers at the previous hearing, the policies do not in fact provide for compassionate leave in circumstances where there is no bereavement. Similarly, the express terms of the policy concerning dependent relatives are directed to those who are in the care of the relevant employee. Neither appear to have any application to the Claimant. The Claimant does not suggest otherwise. Miss Dunbar confirmed that the circumstance in which the Claimant found himself in March 2019 would not have given rise to any entitlement under either of those policies;

5.10 As noted in the previous findings made by the Tribunal, it is the Claimant's case that he was confronted with a dilemma, namely: the need to travel urgently to The Gambia in order to support his mother in the pre-operative stage of medical treatment (i.e. before scheduled surgery was to take place). In the events, he was able to arrive in The Gambia on 2 April 2019. The surgery in question was not scheduled to take place until 12 April;

5.11 Whilst in The Gambia, the Claimant had access to various forms of electronic and telephonic communication which enabled him to make contact with the Respondent should he wish to have done so;

5.12 Within the disciplinary procedure which culminated in the Claimant's dismissal, there was no mention made of any discretion being enjoyed on the part of the relevant disciplining or appeal officer. Indeed, Mr Constable indicated to the Tribunal that he considered his "hands were tied". This was on account of the fact that the Claimant was already the subject of a disciplinary sanction in the form of a final warning; such warning having been imposed on 23 July 2018 [**P91**]. That sanction had not been the subject of appeal and was therefore operative at the time of the events which culminated in the Claimant's dismissal;

5.13 Having embarked upon his leave, the Claimant was clear in his own mind that he would not be returning to the workplace until 18 April 2019.

5.14 During the course of his absence, the Claimant's wife received a letter indicating that the Respondent considered the Claimant to be absent without leave. It is the Claimant's evidence to the Tribunal that he made an attempt to telephone managers, but was unable to make contact with them. In the view of the Tribunal, this was an isolated attempt. There were other avenues of communication available to the Claimant. These included email, WhatsApp messaging or texts. Indeed, given the Claimant had received communication from his wife following correspondence received from the Respondent, it is clear that he had both the means and the opportunity to communicate with his employer should he have wished to do so;

5.15 In the view of the Tribunal, there is an important distinction to be made between the demands which were operating upon the Claimant at the time of his interaction with Mr Brownridge and his ability to communicate with his employer having embarked upon the leave in question. In the former, the Claimant considered that the position was "time critical". Whether on account of cultural tradition or otherwise, as the eldest of his family, there was an expectation upon him to return to The Gambia to support, guide and advise his mother in preparation for her scheduled surgery. However, having secured his attendance at the family home, it was possible for him to assess circumstances and, in the view of the Tribunal, to reconsider both the duration of his stay and the reasons for it. It was open to him thereafter to communicate more directly with his employer his own position and to do so in greater detail than that which may been available to the time of dealing with Mr Brownridge;

5.16 At no stage during the course of the disciplinary or appeal procedure was any mention made of the discretion enjoyed by managers with regard to those eventualities which were not expressly catered for in the Respondent's policies;

5.17 Following the Claimant's dismissal he made several applications for alternative employment. Happily, within the period of three weeks he secured a position. He remains in that same employment as at the date of the remedy hearing;

5.18 The Claimant has since that time made some modest attempts to find further employment. In total these are said to be limited to somewhere in the order of 10 applications. The Tribunal was not provided with any documentation evidencing these applications. The Claimant's evidence on this issue was far from precise. Whatever the exact position, the Claimant has remained in his new employment since and has worked entirely day shifts. He has given evidence the Tribunal, which the Tribunal accepts that he has suffered a loss in income of £80 per week gross; his gross pay in his new employment is £18,738 per annum. His average gross weekly income is £360 per week as against £440 per week earned with the Respondent. The Claimant does not receive any additional benefits in kind as part of that arrangement; and

5.19 In his search for alternative employment, the Claimant was required to take into consideration the fact that he does not himself drive, with the result that he was limited in his search for employment within a reasonable travelling distance from his home.

Issues

6. As confirmed by the parties, there are four issues which require resolution by the Tribunal. These comprise: the compensatory loss sustained by the Claimant; the extent to which any such losses should be reduced to reflect the prospect of the Claimant having been dismissed in the event of a fair procedure being adopted (the *Polkey* question); the issue of contributory conduct and the application of any statutory uplift.

Submissions

7. The submissions made by the Claimant may be shortly stated. He denies that there was a prospect of a fair dismissal; with the result that he invites the Tribunal to conclude that should be no *Polkey* reduction. He denies also that his conduct at any time could or should have contributed to the risk of dismissal. With regard to the statutory uplift, the Claimant invites the Tribunal to make a full uplift of 25% of the compensation awarded.

8. On behalf of the Respondent, Mr Brown submitted:

   8.1 The Claimant has failed to mitigate his losses;

   8.2 There was a significant prospect of the Claimant being dismissed in the event of a fair procedure been followed; and

   8.3 There is no legitimate basis upon which the Tribunal could or should make an award by way of statutory uplift.

9. Before dealing with the resolution of those matters, the Tribunal also notes that it was the Claimant's admission that he was also entitled to a total of 21 days accrued unpaid holiday pay. This claim did not feature in the original claim form. The tribunal has not heard any evidence in support of it. The tribunal therefore has no difficulty in dismissing that submission and/or any claim to which it relates.

Discussion and Conclusions

10. **Section 123 of the Employment Rights Act 1996** requires the Tribunal to determine the question of compensation having regard to what it considers to be “just and equitable. The first step in the formulation of its answer to that question is to identify the losses sustained by the Claimant.

Claimant’s Loss

11. In this respect, the Tribunal concludes as follows:

    11.1 As a result of his dismissal, the Claimant has suffered immediate losses of three weeks pay. This translates to the sum of £1320; and

    11.2 For reasons identified earlier in the course of this judgment, the Claimant has suffered continuing loss of £80 per week. This, of course, takes into account the sum of £360 per week from his substitute employment.

12. Where it is asserted that there has been a failure to mitigate, the burden of proof is upon the Respondent. The Tribunal is satisfied that the burden of proof has not been discharged. In reaching this conclusion it bears in mind that the Claimant had been

summarily dismissed. On any view, this would initially at least, impede the Claimant's ability to secure alternative employment. However, the Tribunal is also satisfied that having gained such employment, it was then open for the Claimant to enhance the terms upon which he was employed by means of alternative employment within a period of six months. Whilst not a finding of a failure to mitigate, it is a factor of relevance to the Tribunal's assessment of what it considers to be just and equitable for the purposes of section 123 of ERA.

Polkey

13. Following *Polkey* v *Daynton Services* it is incumbent upon the Tribunal to consider and evaluate the prospect of a dismissal in the event a fair procedure had been adopted. In approaching this question, the Tribunal must exercise caution so as to avoid the risk of substitution. It is clear that, contrary to the evidence received by the Tribunal on the last occasion, the employer's policies would not have covered the circumstances in which the Claimant found himself. However, the matter does not end there. As the evidence of Miss Dunbar confirms, managers were invested with a discretion. Miss Dunbar accepted that it was possible for a manager to conclude that the issue of "cost" relative to the return to The Gambia might be a factor as to why the Claimant's absence may have been justified. She did not go so far to suggest that this factor would – taken in isolation-serve to exonerate the Claimant or otherwise liberate him from the potential for disciplinary action. By contrast, the Claimant suggests that the appropriate outcome ought to be in the imposition of counselling and nothing more.

14. The Tribunal is unable to accept the Claimant's submission on this point. The reality is that the employer was confronted with two matters: (i) an employee identified and considered to be absent without leave; and (ii) evidence to suggest that such absence had been both deliberately pursued and maintained in disregard of the employer's absence policy. In the view of the Tribunal, a reasonable employer would entertain some doubt as to whether or not this was a wilful departure from the demands of the absence policy insofar as there was no attempt to report to management following the return to The Gambia (i.e. when the time-critical nature of the previous request had been overcome).

15. Accordingly, whilst the Tribunal accepts there was no policy available to the Claimant which might otherwise provide exemption for the absence or his failure to report it, it is clear that management did enjoy a residual discretion as to how to engage with those issues. In this respect, it cannot be overlooked that the Claimant was already on a final warning which was live at the relevant time.

16. Taking these matters into consideration, the Tribunal is satisfied that there was a prospect of the Claimant being fairly dismissed following a fair procedure. The Tribunal assesses the chances of such dismissal in the order of 50%.

Contribution

17. Section 122 (2) and section 123 (3) of ERA permit the Tribunal to reduce the basic and compensatory awards on the basis of contributory conduct. In the case of section 123(6) ERA, the Tribunal must be satisfied that the conduct in question caused or contributed to the act of dismissal. For this purpose, the Tribunal's focus is upon the conduct of the Claimant alone. The Tribunal is satisfied that there was contributory conduct on the part of the Claimant in his failure to make any meaningful attempt to communicate with management on his arrival in The Gambia; especially when being alerted by his wife to the correspondence which had been received. The Tribunal is further satisfied that this did in fact contribute to the decision to dismiss and fuelled the Respondent's view that the Claimant was intentionally disregarding the reporting

obligations under its absence policy. In the view of the Tribunal, it is therefore appropriate to making a finding of contribution of 10% and the basic and compensatory award will be accordingly reduced.

Statutory Uplift

18. Where the Tribunal is satisfied that there has been material non-compliance with the ACAS Code applicable to disciplinary procedures, it has the power to award an uplift of compensation of up to 25%. The Claimant has submitted that an award should be made. His submission was founded upon his own view that the dismissal was fundamentally unfair. However, the threshold for the making of such an award is non-compliance with the ACAS Code. The Tribunal has no hesitation in concluding that there should be no uplift award in this case. In reaching this conclusion, it is borne in mind that the deficiency identified in the previous judgment was one of deliberation; not process. There was no issue of non-compliance with the ACAS Code.

Award of Compensation

19. In the light of these conclusions, the calculation of the award payable to the Claimant is calculable as follows:

Agreed calculation of basic award			£6380
Less 10% pursuant to section 122 ERA (£638)			
Basic Award:			**£5742**
Loss of earnings			
3 weeks	(3 x 440)		£1320
6 months	(26 x 80)		£2080
Loss of statutory Rights			£350
			£3750
Polkey Reduction 50%		(£1875)	
			£1875
Less 10% pursuant to section 123(6) ERA (£187.50)			
Total Compensatory Award			**£1687.50**

20. Accordingly, the total award payable by the Respondent to the Claimant is £7429.50 and judgment is entered accordingly.

Employment Judge Morgan

Date: 17 March 2021