EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4113140/2019 (V)

Hearing held remotely by CVP on 11 and 12 August 2020

Employment Judge M Whitcombe
Tribunal Member Mrs E A Farrell
Tribunal Member Mr J Burnett

Ms Aleksandra Zarzycka	**Claimant** **Represented by:** **Mr D Hutchison** **(Solicitor)**
B & M Sausages Limited	**Respondent** **Represented by:** **Mr M Stephen** **(Solicitor)**

JUDGMENT

The unanimous judgment of the Tribunal is as follows.

(1) The claim for unfair dismissal is conceded by the respondent and succeeds.

(2) The claim for direct sexual orientation discrimination fails and is dismissed.

(3) The claims for notice pay and holiday pay are both withdrawn and dismissed by consent.

(4) The claimant is entitled to compensation for unfair dismissal totalling £2,557.80.

(5) The Employment Protection (Recoupment of Benefits) Regulations 1996 apply. For those purposes the "monetary award" is £2,557.80, the "prescribed element" is £717.00 (including the 20% uplift), the prescribed element is attributable to the period from 17 August 2019 to 20 September 2019 and the monetary award exceeds the prescribed element by £1,840.80.

REASONS

Introduction and background

1. The claimant was formerly employed by the respondent from 18 December 2015 until 17 August 2019 as a Shop Assistant. The respondent manufactures sausages and also operates five Polish grocery shops. To a large extent the shops serve the Polish community and the majority of the respondent's workers are also Polish.

2. The claimant worked in the Motherwell shop. The claimant's duties involved opening and closing the shop, stocking shelves with merchandise in "use by" order and generally serving customers. The claimant is a woman and she is in a relationship with a woman. The respondent does not dispute the claimant's evidence that she is of homosexual sexual orientation.

3. The claimant was dismissed with notice following a meeting with Mr Urban, one of the respondent's directors, on 3 August 2019. The claimant was given 2 weeks' notice, effective from 17 August 2019 (the letter confirming dismissal erroneously referred to the same date in 2018). All of the claims arise from that dismissal.

4. The letter of dismissal said that the reason for termination was, "*lack of due diligence and commitment in the performance of employee duties, and exposing the company to additional costs caused by incorrect sorting of the assortment*". The latter phrase is a reference to an alleged failure properly to

arrange and discount stock approaching its sell-by date in order to ensure that stock was not wasted.

5. Although the claimant was dismissed with notice, the respondent described the reason as "*gross misconduct*" in further particulars of its response dated 30 April 2020. In that document the alleged gross misconduct was said to be, "*smoking on the premises, using her mobile telephone while serving customers, leaving her place of work early without authorisation, failing to carry out daily checks on food products and inappropriate behaviour towards customers in the form of telling inappropriate jokes, about which the customers complained.*"

Claims and issues

6. By the end of the hearing we were only concerned with the following two broad issues:
    a. whether the claimant's dismissal was an act of direct sexual orientation discrimination contrary to section 13 of the Equality Act 2010; and
    b. the assessment of compensation for an *admitted* unfair dismissal and compensation for discrimination if that claim were also upheld.

7. Anyone reading the claim and the response would see a rather different case, so we will explain how the issues became that narrow in the end.

Evolution of claims

8. The claim form (ET1) received by the Tribunal on 19 November 2019 raised the following claims:

    a. unfair dismissal;
    b. direct discrimination because of the claimant's sexual orientation contrary to section 13 of the Equality Act 2010;
    c. accrued but untaken holiday pay;

d. a slightly equivocal claim for a possible shortfall in notice pay.

9. In a response (ET3) received on 19 December 2019 the respondent resisted all of those claims. Further and better particulars dated 30 April 2020 also raised the following additional arguments in relation to compensation for unfair dismissal:

a. compensation should be reduced to reflect the fact that the claimant would have been dismissed if a fair procedure had been followed, referring to the well-known principles in ***Polkey*** [1987] UKHL 8;

b. by her conduct the claimant materially contributed to her own dismissal and any compensatory award should be reduced accordingly. No equivalent argument was made in relation to the basic award.

10. The issues were discussed and recorded at case management hearings conducted by EJ Doherty on 27 March 2020 and EJ Whitcombe on 29 May 2020. At the latter hearing it was agreed and ordered that this final hearing would take place remotely by video using the "Cloud Video Platform" ("CVP").

11. The claimant abandoned the claims for holiday pay and notice pay and it was agreed that they would be dismissed at this final hearing. The remaining claims were therefore limited to unfair dismissal and direct sexual orientation discrimination.

12. Prior to the final hearing the respondent admitted unfair dismissal but maintained its other arguments. By the time of closing submissions the respondent had also abandoned the arguments in relation to contributory fault and "***Polkey***" principles.

13. Both sides initially sought adjustments to compensation to reflect alleged unreasonable non-compliance by the other party with the ACAS Code of Practice. By the time of closing submissions the respondent had abandoned its argument that compensation should be reduced on that basis.

Evidence

14. We were provided with a small file of documents in electronic (pdf) format running to 44 pages. We also heard oral evidence from four witnesses. All of them gave their evidence on oath or affirmation and they gave their evidence in chief by reference to written witness statements. They gave their oral evidence in Polish through an interpreter and they were cross-examined

15. The only witness called by the claimant was the claimant herself. The respondent called:

    a. Ms Monika Ptak (the claimant's former friend and colleague, latterly the Manager of the Motherwell shop);
    b. Mr Maciej Lachowicz (a Director and shareholder of the respondent);
    c. Mr Bartlomiej Urban (a Director and shareholder of the respondent).

Findings of fact

16. In addition to the facts already set out above as part of the introduction and background, we made the following findings of fact. Our findings were made on the balance of probabilities where there was a dispute.

Background matters

17. We have already set out details of the respondent's business, the claimant's role and duties and the respondent's customers.

18. We do not accept some of the additional observations made by the claimant regarding the likely views of her Polish colleagues and managers. In her evidence she suggested that because her managers and many of the staff were Polish they therefore held deeply religious views and were for that reason opposed to homosexuality. The claimant stated that certain individuals were not happy working with homosexuals. However, she gave no details of any of the individuals involved and did not give any examples.

The claimant also reasoned that management would think that there would be a negative impact on the business if a homosexual person were known to be working in the shop.

19. We were not provided with any objective supporting evidence and it seemed to us that the claimant's evidence on this point entailed speculation, assumptions and generalisations regarding the religious and other beliefs of Polish people. We did not feel able to accept the claimant's evidence on this point given that it was flatly contradicted by each of the witnesses called by the respondent when the point was put to them in cross-examination. Those denials were not undermined by objective evidence suggesting the prejudices alleged by the claimant. Whatever the general position might be, so far as the respondent's three witnesses are concerned we are not satisfied on the balance of probabilities that they had any antipathy towards homosexual people or any reservations about homosexual people working within the business.

20. The claimant was not subject to any formal disciplinary procedures at any point prior to the termination of her employment. Although the respondent's evidence was that warnings were given on the phone and in staff meetings that certainly did not amount to anything formal or recorded and the claimant did not understand them to be disciplinary warnings. The respondent has a written disciplinary procedure but it was a matter of concern to us that the shop manager Ms Ptak had never previously seen it and that although we were assured that copies were also available in Polish those Polish versions were not included in the joint file of documents for this hearing.

21. While on the subject of disciplinary procedures, it is clear that the respondent failed to comply either with the ACAS Code of Practice or with its own written disciplinary procedure. The claimant was not given written notice of any of the allegations against her nor was she ever invited to a formal disciplinary hearing. She was not given the option of being accompanied by a trade union representative or fellow employee and she was not notified of any adverse disciplinary decisions in writing, save for her dismissal. The disciplinary

procedure envisaged written warnings and final written warnings but none were ever issued in this case. We set out the process leading to dismissal in more detail below.

22. The claimant also received occasional financial bonuses for good work. Bonuses were generally paid at Christmas and Easter. It was not suggested to us that there was any contractual *right* to such bonuses and we find that the payment of them indicated that the respondent regarded the claimant's performance as being at least satisfactory when those payments were made.

Events from April/May 2019 onwards

23. In about April or May 2019 the claimant disclosed to Ms Ptak that she was planning to move in with her partner and that her partner was a woman. The claimant had disclosed her sexual orientation to Ms Ptak about two years previously. The claimant's evidence was initially that Ms Ptak said that she had a problem with the fact that the claimant was in a relationship with a woman, but in cross-examination the claimant accepted that Ms Ptak had not said that directly. The claimant's evidence was then that she had gained that impression from Ms Ptak's subsequent criticism of the claimant's performance. We deal with that below. We prefer Ms Ptak's evidence that she was merely surprised or even a little shocked because in many years of regular socialising with the claimant she had always understood the claimant to have been in a relationship with a man. Ms Ptak had socialised with the claimant's husband for about ten years. We do not accept that Ms Ptak's surprise indicated or implied any disapproval of the fact that the claimant was in a relationship with a woman and was proposing to move in with her.

24. Ms Ptak's very firm evidence was that she did not inform anyone else within the respondent company of the disclosure that the claimant had made to her and that she wanted to maintain confidentiality as much as she could. Ms Ptak told members of her own family but that was because they knew the claimant socially. While the claimant asserted that Ms Ptak probably did tell members of management that is not our finding on the balance of

probabilities. The claimant had no personal knowledge of any occasion on which Ms Ptak had done so. Not only was Ms Ptak's denial both firm and credible, we also noted that she was a long-standing friend of the claimant's who had remained a friend right up until the claimant's dismissal. The claimant only stopped answering Ms Ptak's calls when she commenced these proceedings. We do not think it is likely that Ms Ptak would have betrayed her friend's confidence as suggested. In cross-examination the claimant described Ms Ptak as "very compassionate towards me". The other witnesses called by the respondent were also firm in their denials that they had learned of the claimant's sexual orientation from Ms Ptak or from any other source prior to the commencement of these proceedings.

25. The claimant's case was not advanced before us on the basis that any member of senior management might have guessed or suspected her sexual orientation – the claimant's case was that we should infer that they were informed of it directly by Ms Ptak. We are not prepared to make that finding on the balance of probabilities for the reasons set out above.

26. The claimant's evidence was that she had absolutely no problems with her employer from the start of her employment in December 2015 until about April or May 2019. She observes that the relationship with her employer only deteriorated once she disclosed to Ms Ptak that she was to move in with her female partner. The claimant invites us to find a link.

27. In general, we were impressed with Ms Ptak's evidence. She was clear and firm in her answers, she engaged fully with the questions asked of her and she was able to give ample further detail when requested. Further, that detail was consistent with additional detail elicited from other witnesses later in the hearing. We found Ms Ptak to be a credible and reliable witness. We accept Ms Ptak's evidence that the claimant's work performance and attitude deteriorated in about April or May 2019 and that the claimant appeared to have lost interest in her work and to be very unhappy at work. Further, we accept Ms Ptak's evidence that she received complaints from a number of

customers about the claimant, generally relating to her attitude which was sometimes considered unhelpful or rude. Ms Ptak did not take any action herself but reported those complaints on to Mr Lachowicz.

28. It was also in about April or May 2019 that Ms Ptak was promoted to the position of shop manager. Prior to that she had been a shop assistant like the claimant. Ms Ptak explained to us that upon her promotion to manager she felt a greater obligation to report shortcomings in the claimant's performance to more senior management. Previously, she had simply dealt with the claimant's mistakes by having a word with her as a colleague. As Ms Ptak put it, "[the claimant] was my friend and I simply tried to make sure she stayed in work as long as possible".

29. We also accept the respondent's evidence that the claimant made errors in the management of stock. Those errors led to the loss of stock which could no longer be sold because it was past its "sell by" date. Ms Ptak said that there were many such errors and we accept her evidence on that.

30. We accept Mr Lachowicz's evidence that he too received complaints about the claimant's behaviour and performance. Those complaints were of a similar nature to those already outlined. Sometimes they were relayed by members of staff including Ms Ptak and sometimes they came direct from customers. On or about 20 June 2019 Mr Lachowicz telephoned the claimant and said that she had a poor work attitude and that her performance would need to improve. The claimant felt that this conversation "came out of the blue" and did not understand why her performance was said to be poor. Mr Lachowicz indicated that the claimant's continued employment would be at risk if there was no improvement.

31. At some point in about July 2019 the claimant was once again telephoned by Mr Lachowicz to be told that she had incorrectly priced an item, and that "this was the last time".

32. There was also at least one occasion on which customers considered that the

claimant had engaged in inappropriately lewd humour. Ms Ptak advised Mr Urban of a customer complaint in that regard in July 2019.

33. Mr Urban's view was that there had been an intensification of complaints about the claimant after about April 2019. We accept that evidence. It fits with other evidence that we have already accepted. We think it is likely that Ms Ptak was reporting more concerns than had previously been the case. Ms Ptak thought not only that the claimant's performance had deteriorated around that time but also that she had a greater obligation to report it.

34. Mr Urban explained that he therefore decided to make an unannounced visit to the shop on 3 July 2019 to discuss matters with the claimant. We find that it went rather further than that: he decided to dismiss the claimant and travelled to the shop to inform the claimant that she would be dismissed on notice. He took with him a pre-prepared dismissal letter.

35. There was a disputed allegation that the claimant was discovered at about 6pm to be in the process of closing the shop about an hour early. We do not think it is necessary to resolve that dispute because it cannot have had much, if anything, to do with the claimant's dismissal. The dismissal letter had already been prepared and Mr Urban had it with him. Although he gave evidence that he would have been prepared to stop short of dismissing the claimant if she had satisfactorily explained herself, we did not find Mr Urban's evidence convincing on that point.

36. The claimant was dismissed on 2 weeks' notice. While that appears to be a week less than her statutory entitlement there is no longer any claim for notice pay before the Tribunal. The claimant's dismissal took effect on 17 August 2019.

37. We accept the respondent's evidence the decision to dismiss was taken jointly by both directors. They speak every day and it strikes us as inherently unlikely that one of them would have dismissed an employee without the knowledge and agreement of the other.

38. The dismissal letter did not remind the claimant of her right of appeal but she consulted a CAB and sent in a letter of appeal dated 19 August 2020. No appeal hearing was held. The respondent contends that the appeal was submitted out of time since the written disciplinary procedure set a time limit of 5 working days from the date of the relevant disciplinary decision.

Legal principles (liability)

39. There is no need for us to set out the law on unfair dismissal since liability for unfair dismissal is admitted.

Burden of Proof

40. The burden of proof in proceedings relating to a contravention of the Equality Act 2010 is governed by section 136 of that Act. The correct approach is set out in section 136(2) and (3). References to "the court" are defined so as to include an employment tribunal.

> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

41. The Court of Appeal has repeatedly stressed that judicial guidance on the burden of proof is no more than guidance and that it is no substitute for the statutory language.

42. We have taken into account the well-known guidance given by the Court of Appeal in ***Igen Ltd v Wong*** [2005] ICR 931 (sometimes referred to as "the revised ***Barton*** guidance"), which although concerned with predecessor legislation remains good law. It was approved by the Supreme Court in

Hewage v Grampian Health Board [2012] ICR 1054. ***Ayodele v Citylink Ltd*** [2018] ICR 748, CA confirmed that differences in the wording of the Equality Act 2010 have not changed the test or undermined the guidance in ***Igen Ltd v Wong***.

43. First, the claimant must prove certain essential facts and to that extent faces an initial burden of proof. The claimant must establish a "*prima facie*" or, in plainer English, a "first appearances" case of discrimination which needs to be answered. If the inference of discrimination *could* be drawn at the first stage of the enquiry then it *must* be drawn at the first stage of the enquiry, because at that stage the lack of an alternative explanation is assumed. The consequence is that the claimant will necessarily succeed *unless* the respondent can discharge the burden of proof at the second stage.

44. However, if the claimant fails to prove a "*prima facie*" or "first appearances" case in the first place then there is nothing for the respondent to address and nothing for the tribunal to assess. See ***Ayodele*** at paragraphs 92-93 and ***Hewage*** at paragraph 25.

45. At the first stage of the test, when determining whether the burden of proof has shifted to the Respondent, the question for the tribunal is not whether, on the basis of the facts found, it *would* determine that there has been discrimination, but rather whether it *could* properly do so.

46. The following principles can be derived from ***Igen Ltd v Wong*** (above), ***Laing v Manchester City Council*** [2006] ICR 1519 EAT, ***Madarassy v Nomura International plc*** [2007] ICR 867, CA and ***Ayodele v Citylink Ltd*** (above), which reviewed and analysed many other authorities.

    a. At the first stage a tribunal should consider all the evidence, from whatever source it has come. It is not confined to the evidence adduced by the claimant and it may also properly take into account evidence adduced by the respondent when deciding whether the claimant has established a *prima facie* case of discrimination. A

respondent may, for example, adduce evidence that the allegedly discriminatory acts did not occur at all, or that they did not amount to less favourable treatment, in which case the tribunal is entitled to have regard to that evidence.

b. There is a vital distinction between "facts" or evidence and the respondent's "explanation". While there is a relationship between facts and explanation, they are not to be confused. It is only the respondent's *explanation* which cannot be considered at the first stage of the analysis. The respondent's *explanation* becomes relevant if and when the burden of proof passes to the respondent.

c. It is insufficient to pass the burden of proof to the respondent for the claimant to prove no more than the relevant protected characteristic and a difference in treatment. That would only indicate the *possibility* of discrimination and a mere possibility is not enough. Something more is required. See paragraphs 54 to 56 of the judgment of Mummery LJ in ***Madarassy***.

47. However, it is not always necessary to adopt a rigid two stage approach. It is not necessarily an error of law for a tribunal to move straight to the second stage of its task under section 136 of the Equality Act 2010 (see for example ***Pnaiser v NHS England*** [2016] IRLR 170 EAT at paragraph 38) but it must then proceed on the assumption that the first stage has been satisfied. The claimant will not be disadvantaged by that approach since it effectively assumes in their favour that the first stage has been satisfied. The risk is to a respondent which then fails to discharge a burden which ought not to have been on it in the first place (see ***Laing v Manchester City Council*** [2006] ICR 1519 EAT at paragraphs 71 to 77, approved by the Court of Appeal in ***Madarassy***). Tribunals must remember that if and when they decide to proceed straight to the second stage.

48. It may also be appropriate to proceed straight to the second stage when the

claimant compares their treatment to that of a hypothetical comparator. Sometimes the reason for the treatment, and the question whether there is a *prima facie* or "first appearances" case of discrimination, will inevitably be intertwined with the question whether the claimant was treated less favourably than a comparator, especially a hypothetical comparator. In cases of that sort the decision on the "reason why" issue will also provide the answer on the "less favourable treatment" issue (see Lord Nicholls in ***Shamoon v Chief Constable of the RUC*** [2003] ICR 337 at paragraphs 7 to 12 and Elias LJ in ***Laing v Manchester City Council*** [2006] ICR 1519 EAT at paragraph 74).

49. In a similar vein, the Supreme Court in ***Hewage*** (above) observed that it was important not to make too much of the role of the burden of proof provisions. They required careful attention where there was room for doubt as to the facts necessary to establish discrimination but they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

The approach to evidence

50. When considering direct discrimination claims, tribunals must bear in mind the specific difficulties of proof that arise and be astute to the danger of self-serving explanations from employers or witnesses. Discrimination is rarely overt. That problem was alluded to in the well-known passage in ***King v Great Britain China Centre*** [1992] ICR 516, CA at pages 528f to 529c.

Direct Discrimination

51. Section 13 of the Equality Act 2010 defines direct discrimination as follows: a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

52. By virtue of section 23(1) of the Equality Act 2010 when carrying out that comparison there must be "no material difference" between the

circumstances relating to each case.

Reasoning and conclusion

53. As a result of case management directions, in an email dated 6 May 2020 the claimant identified an actual comparator called Alicja Stzer. No details of any hypothetical comparator were given in that email, and the claimant had been ordered to do so if any were relied on (see paragraph 7 of EJ Doherty's order).

54. Somewhat to our surprise, neither side gave any evidence at all regarding the circumstances of Ms Stzer and there was no evidence before us regarding her performance, her treatment or even her sexual orientation. In those circumstances we were quite unable to make findings as to whether the named comparator was one whose circumstances were the same or at least not materially different from those of the claimant, save for a difference of sexual orientation.

55. We will therefore consider the position of a hypothetical comparator, even though the claimant has not expressly relied on one. We think the appropriate comparator with which to test the allegation of discrimination in this case would be a heterosexual woman whose performance and conduct in the role of shop assistant was the same as, or broadly comparable to, that of the claimant. The hypothesis to be tested is that such a comparator would not have been dismissed and that the claimant was therefore less favourably treated.

56. Applying the burden of proof provisions and the principles derived from the relevant authorities (see above) we concluded that the burden of proof *did* pass to the respondent in this case for the following reasons.

a. The claimant's dismissal was not unfair merely because of some single procedural defect, it was grossly unfair as a result of a wholesale failure to comply either with the ACAS Code of Practice or the respondent's own disciplinary procedure. That is noteworthy, and

there was no evidence before us that heterosexual staff had received similar treatment in comparable circumstances.

b. There was an issue of timing, in that the claimant's performance began to be criticised from around the time that she disclosed to Ms Ptak her intention to move in with a female partner.

c. The circumstances *could* support an inference that Ms Ptak had somehow informed more senior management of the news the claimant had disclosed to her.

57. We regard those as amounting to the "***Madarassy*** factors" which are sufficient (when combined with less-favourable treatment and a protected characteristic) to pass the burden of proof to the respondent. Disregarding the respondent's *explanation* for treatment at this stage of the analysis, in our judgment they are *facts* from which we *could* conclude that sexual orientation was the reason for the treatment complained of.

58. Section 136(3) of the Equality Act 2010 therefore applies and the respondent has the burden of proving on the balance of probabilities that the claimant's sexual orientation formed no part whatsoever of the reason for dismissal. We unanimously find that the respondent has discharged that burden for the following reasons.

a. We accept the respondent's evidence regarding the claimant's deteriorating attitude and performance. We accept that the respondent genuinely and honestly held those concerns. While we would not necessarily agree that those issues amounted to *gross* misconduct, in our view the cumulative effect would be such as to cause most employers to take formal action in terms of discipline or performance management.

b. The respondent was, in our assessment, genuinely ignorant of the importance of compliance with disciplinary procedures. We formed that view following a close observation of management witnesses under cross-examination. We detected no *deliberate* disregard of

procedures, still less a deliberate failure to follow them in order to achieve an ulterior motive. While we do not condone or excuse the procedure adopted, we find that it was based on genuine ignorance of fair procedures and their importance. The seriously deficient procedure adopted is explained (though not excused) by that ignorance.

c. We accept the evidence of all three of the respondent's witnesses that Ms Ptak did *not* inform either of the Directors that the claimant was in a same sex relationship. Having made that finding the claim must fail for that reason alone, since we are concerned with the conscious or sub-conscious motivation of the decision makers. Ms Ptak was not one of the decision makers and the relevant knowledge went no further than her. There is no concept of corporate knowledge in these matters (see e.g. ***CLFIS v Reynolds*** [2015] EWCA Civ 439). Since neither Director knew that the claimant was in a relationship with a woman it cannot have been the reason for their treatment of her.

d. Further, the apparent coincidence of timing is sufficiently explained by Ms Ptak's promotion. Whereas previously she had been the claimant's friend and colleague, she assumed management responsibilities at around the time that the claimant disclosed her intention to move in with a female partner. Ms Ptak's change of role explains why perceived shortcomings in the claimant's performance began to be reported to senior management on a regular basis and why Mr Urban perceived an intensification of complaints about the claimant. Further, we have accepted evidence that the claimant's performance also deteriorated at around that time anyway.

59. We therefore conclude that the hypothetical comparator would have been treated no more favourably than the claimant. Sexual orientation played no part at all in the claimant's treatment not only because the relevant decision makers were unaware of it, but also because there were other lawful explanations for their actions which we accept. The claim for direct discrimination therefore fails.

Remedy

60. We are therefore concerned only with compensation for unfair dismissal. Much of the schedule of loss and many of the facts upon which it is based are agreed, so our reasons can be brief.

61. The respondent no longer argues for reductions in compensation for contributory fault, "***Polkey***" points or an unreasonable failure by the claimant to comply with the ACAS Code of Practice (by failing to appeal).

62. The basic award is **£1,134** (3 completed years of continuous service at the rate of 1.5 weeks' pay per year and a gross week's pay of £252).

63. Lost earnings of **£597.50** are agreed. There is no claim for ongoing loss of earnings after the date on which the claimant found a new job.

64. We award **£400** for loss of statutory rights.

65. It was accepted on behalf of the claimant that there cannot be a claim for repayable benefits susceptible to the recoupment legislation.

66. There cannot be any award of compensation for injury to feelings or interest since the discrimination claim has failed.

67. However, we do make an award of uplifted compensation under s.207A TULRCA 1992. Unfair dismissal is one of the jurisdictions listed in Schedule A2 to that Act. The analysis required by s.207A is as follows.

    a. This claim concerns a matter to which a relevant Code of Practice applied: the ACAS Code of Practice on Disciplinary and Grievance Procedures.
    b. It is clear that the respondent failed to comply with an applicable ACAS Code of Practice. There was no real investigation of the facts of the case, the claimant was not clearly informed of the nature of the

perceived problems or given an opportunity to explain her side of the story before action was taken and she was not given an opportunity to be accompanied.

c. We find that the respondent's failure was unreasonable. The respondent is a big enough operation to obtain suitable HR support when considering discipline or dismissal. There are many HR consultants and organisations catering to the needs of small to medium sized businesses. In our judgment there was no reasonable excuse for the very significant failures to follow the ACAS Code in this case.

68. We consider it just and equitable to increase the award of compensation for unfair dismissal because the respondent's failures denied the claimant the chance to understand the respondent's concerns and to challenge them (if appropriate) and in any event to learn, react, respond and improve. We would reserve the maximum uplift of 25% for the most serious and exceptional case we could imagine, which would probably involve a *deliberate* and extreme failure to follow any provision of the Code. In this case we have not found the default to be deliberate. We bear in mind principles of proportionality and the overall size of the resulting award (see e.g. ***Abbey National v Chagger*** [2010] ICR 397, CA). We think that an uplift of 20% would be just and equitable in all the circumstances.

69. The total award of compensation for unfair dismissal is therefore **£2,557.80**.

70. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply. For those purposes the "monetary award" is £2,557.80, the "prescribed element" is £717.00 (including the 20% uplift), the prescribed element is attributable to the period from 17 August 2019 to 20 September 2019 and the monetary award exceeds the prescribed element by £1,840.80.

Employment Judge: M Whitcombe
Date of Judgment: 21 August 2020
Entered in register: 28 August 2020
and copied to parties