



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Nevenka Veselinova

Fala Limited

Heard at: Watford by CVP

On: 26 February 2021

Before: Employment Judge Allen sitting alone

Appearances

For the Claimant: In person
For the Respondent: Hugh Grime, Solicitor

JUDGMENT

1. The claim for unfair dismissal for an unfair reason is not well founded and is dismissed.

The claim for failing to provide a written statement of particulars of employment contrary to Section 1 of the Employment Rights Act 1996 is not well founded and is dismissed.

The claims for unfair dismissal by an unfair process and for wrongful dismissal in breach of contract are well founded and upheld.

REASONS

2. At the beginning of the hearing the claimant made 2 applications:
 - 2.1. To adjourn the matter for an interpreter; and
 - 2.2. To introduce an additional statement from Faical Badreddine.

3. Interpreter - it is apparent from the court file that the issue of an interpreter does not appear in the case management orders or the pamphlet on attending court provided to the claimant. In the circumstances no criticism is made of the claimant in respect of this last-minute application. English is not the claimant's first language which is Macedonian (or Serbian). Having said that she expressed herself very well in English when she made this application.

4. Bearing in mind the overriding objective at Rule 2 The Employment Tribunals Rules of Procedure 2013 (as subsequently amended up to 8th October 2020) particularly as regards ensuring that the parties are on an equal footing [R2(a)]; avoiding delay [R2(d)], so far as compatible with proper consideration of the issues; and saving expense [R2(e)] (so far as an adjourned hearing is concerned; not the cost of an interpreter). The Judge concluded the hearing should proceed without an interpreter with the proviso that should it become clear the claimant was unable to pursue her claim without such assistance the matter would be adjourned for one to be arranged.

5. Statement of Faical Badreddine - Application to introduce this statement was not made until 25 February (day before the hearing). The respondent objects to the introduction of this additional statement. Whilst the witness observed the 6 September argument, he did not speak the language it was conducted in. His statement does contain additional information covered by other witnesses I.e.
 - Claimant was never disciplined during her employment with the respondent – not disputed;
 - witness SM did not complain to him about the claimant - SM was to give live evidence and be cross examined;
 - On an unspecified day the claimant was assigned to the repair team - there is no explanation as to where he obtained that information or why it should be accepted by the tribunal.

Other witnesses were present to speak to these issues; in the circumstances the Judge concluded this statement added nothing and will not be admitted at this late stage.

The Claim

6. In her claim, filed on 28 January 2020, the claimant alleges:
 - 6.1. She returned from certified sick leave on 7 November and without warning was told to clear her desk and report to the manager's office.
 - 6.2. She was then handed a letter of dismissal terminating her employment with immediate effect.
 - 6.3. The letter of dismissal cited the reason as 2 unauthorised absences. The claimant asserts both absences were authorised.
 - 6.4. The letter did not alert her to her right of appeal.
 - 6.5. The letter was ready prepared indicating the decision to dismiss had already been decided.
 - 6.6. The respondent did not follow the ACAS Code of Practice in dismissing her or follow any disciplinary procedure.
 - 6.7. She lodged an appeal which the respondent failed to deal with.
 - 6.8. She received no payment in lieu of notice.
 - 6.9. She received no written contract or schedule of employment.

Findings of Fact

7. The Claimant, her husband and the managing director/owner of the company were known to each other in Macedonia before coming to the United Kingdom.
8. The Claimant and her husband were both employed by the respondent between 1 June 2017 and 7 November 2019. A period of 2 years and 7 months.
9. There is a dispute between the parties as to the actual start date which the claimant stated as 1 March 2017 in her ET1. Supported as it is by a tenancy reference dated 1 June 2017 and two letters (dated 2018 & 2019) verifying the claimant's employment with the company and all giving a start date of 1 June 2017; the claimant's start date is 1 June 2017.

Contract of employment

10. The contract of employment is referred to in the HR manager's statement [Ms Roger's (PR)] email of 1 October 2019. There was an employee handbook of which a copy is included in the bundle, there is no copy of a signed contract between the claimant and the respondent.
11. An internal email dated 25 September 2018 from Operations Director, Mr Robert Wilkins (RW) asks PR if she would like to issue the 'new working rules' (employee handbook) to 5 named members of staff; 1 of whom was the claimant. From this and in the absence of evidence to the contrary from the claimant she was issued with a copy of the 'working rules' (employee handbook).

Bullying

12. There were issues arising from the claimant's relationships with colleagues. The respondent's witness Ms Sandra Mansieva (SM) gave evidence about being subjected to such bullying by the claimant that she was driven to taking anti-depressant medication. She has recovered and no longer needs these since the claimant's departure from the company. SM reported how the claimant never took the blame for anything and always blamed the engineers for any mistakes, especially SM, belittling them and making a big fuss in front of everyone. The claimant criticised SM's clothing, told staff SM was a part-time prostitute and spread rumours around the company about SM's family.
13. SM had been with the company longer than the claimant but had joined the claimant's team later and needed training. The claimant denied she had any issues with SM. The evidence of the production manager, Mr Alexandar Iliev (AI) and the colleague SM, is preferred. These witnesses are consistent with each other and describe bullying behaviour by the claimant. AI described the claimant refusing to train SM saying it was not in her contract. AI made several attempts to resolve the issue informally before moving the claimant and SM to opposite ends of the workshop. His evidence is preferred on this point given the claimant's assertions today that SM was with the company longer, was more experienced and didn't need training. It is significant that SM's performance improved following the claimant's departure in November 2019. Nevertheless, the manager took no disciplinary action against the claimant in respect of this. AI also gave evidence that the claimant failed to follow instructions which impacted on the respondent's ability to meet orders.

6 September 2019 unauthorised absence

14. The claimant was present when MV asked the manager AI for approval for them both to deal with a personal matter during working hours on Friday 6 September 2019. AI gave approval for MV to go but refused it for the claimant citing pressure of work.
15. Notwithstanding AI's decision that the claimant could not be spared on Friday 6 September 2019 she left the premises with MV and did not return until the afternoon. The claimant did not challenge the witness on this point notwithstanding that it is set out in her claim that her subsequent absence to attend this errand was authorised.
16. Upon her return AI challenged the claimant about her absence. The only possible reason that AI might challenge her is because he had refused her request to go with her husband. It appears MV took exception to this and started shouting at AI. The managing director, Mr Cvetkov (DC) came to see what was going on. This occurred in an open area of the premises and was witnessed by a number of staff who were subsequently interviewed by PR about it however, only AI and DC are

identified as witnesses. Witnesses describe the ferocity of the aggression MV showed in this argument.

17. The claimant and MV left the premises. SM says that MV told the claimant to go and get her things and that he was very aggressive. MV said they no longer wished to work for the company. There is no evidence that the claimant took an active part in this.
18. If the manager was the aggressor as alleged by the claimant the logical step would have been for DC to tell him to leave. DC did not ask the manager to leave but neither did he ask the claimant to leave as she asserts. The claimant and MV left of their own accord.
19. The claimant has not explained what was so important that it needed both of them to deal with it.

Events immediately following the claimant's departure

20. On Sunday 8 September 2019 the claimant sent a message to PR asking to meet. PR responded that she would check her schedule (Page 49 of the bundle).
21. At 10:57hrs Monday 9 September PR further responded that she could meet with the claimant at 10am on Tuesday 10 September.
22. She also enquired why the claimant was not at work and informed her that without an explanation the day would be treated as an unauthorised absence. At this stage PR was unaware of the events of the preceding Friday.
23. At 11:31hrs, 9 September the claimant responded '*We must see you now. Be there in 10 min*' (page 50 of the bundle). The claimant and her husband arrived at 11:48.
24. There are no notes of the 9 September meeting. Present at the meeting were the claimant, MV, PR and the operations manager, RW. During the meeting the claimant and MV stated
 - they had been treated unfairly;
 - their holiday had been refused;
 - they had purchased airline tickets and intended to use them;
 - they would not work with manager, AI anymore;
 - they wanted to move to another team; and

- they would not come into work until the investigation of their complaints had been completed.

PR explained that

- they must come in to work whilst PR's investigations were on going;
- she was unaware of any problems (with leave *sic*);
- leave must be approved by a manager;
- She would investigate the leave situation and update them the following day;
- she would find out if it was possible for them both to move to another team.

25. Following this meeting PR spoke with DC and AI. She was told about a meeting the week before when the claimant's leave was granted but her husband MV's was not (para 28 below).

26. At 20:29hrs on 9 September 2019 PR relayed to the claimant her conversation with DC about the leave situation [page 51 of the bundle].

27. A second meeting took place on 10 September 2019, again there are no notes. PR challenged the claimant on her account of the leave request. The claimant:

- insisted that she and MV both, had been refused leave;
- MV stated he was going on holiday anyway and would not be returning to work for the company;
- The claimant stated she wanted to return to work but only if she could work on another team.

PR explained the claimant could only join another team if the business could accommodate it and would investigate.

28. Later that day PR confirmed to the claimant that she had 10 days leave outstanding with a return-to-work date of 25 September 2019 if she chose to take it all. (Page 51 of the bundle).

29. When PR investigated the possibility of the claimant moving to another team, she was told because of the claimant's disruptive behaviour (see paras 12 & 13 above) other staff would leave. DC repeated this to the claimant when they met on 7 November (para 40 below).

Application to take leave commencing 11 September 2019

30. Page 5 of the employee handbook (Page 26 hearing bundle) deals with Holidays:

'Every employee is entitled to 20 days' holiday, plus the statutory holidays each year (bank holidays).

'Make sure you have your holiday time approved before booking anything, to avoid disappointment. Requests will not be (un sic) reasonably refused but may be denied to meet the needs of the business. In certain circumstances Fala may need to schedule your holiday for you, to fit in with annual shutdowns, peaks and troughs due to seasonal requirements. If this is the case, we will give you twice the holiday length notice, in writing.'

31. How this leave was dealt with is disputed between the parties. The messages of 20:29hrs on 9 September 2019 refer to the approval of the claimant's leave but refusal for MV's application and is consistent with the respondent witnesses' evidence.
- DC doesn't mention the meeting in his statement; but
 - Both PR and AI do refer to it;
 - AI reports that the claimant was refused leave.
 - PR was herself on leave at the time of the meeting and heard of it from DC on 9 September. He told her he had approved the claimant's leave but refused MV's.

32. The manager who dealt with the leave applications, namely DC, is more likely to recall the decision he made so that AI's recollection that both the claimant and her husband were refused their leave does not undermine DC's evidence. That DC doesn't mention the meeting at all in his statement is conversely reassuring and that the respondent's witnesses have slightly differing recollections demonstrates they have not conspired to present a false narrative of these events.

Events after 25 September 2019

33. The claimant left the premises after the meeting on 10 September to commence her leave on 11 September and returned on 25 September. When the claimant returned on 25 September, she was handed a letter of dismissal. The letter stated she should have returned from leave on 23 September. Given PR's written confirmation to the claimant that she was expected to return to work on 25 September the letter was incorrect and properly withdrawn.
34. DC met with the claimant on 26 September and asked why she wanted to return at all. She explained that she didn't agree with her husband's decision to leave but didn't want to be managed by AI anymore. DC told her to consider what she wanted to do and agreed to consider another role for her if the business could accommodate it.

35. That day the claimant obtained a fit note from her doctor which covered a sickness absence commencing 26 September and later a second fit note covering a continuous period until 7 November.
36. On 1 October the claimant requested a copy of her contract of employment from PR. (See paras 6 & 7 above). This would suggest that during her sickness leave she was considering her options. She has provided evidence that she sought advice about her position as early as 30 September.
37. The claimant returned to work on 7 November. Upon arrival she took up a seat in a different department but did not make her presence known to the management team.
38. At 10:11hrs that day DC sent an email to RW and PR instructing them to give the claimant a letter of dismissal on the grounds *'her employment finished on that day when she walked out'*.
39. The claimant was invited into a meeting with PR and RW (again no notes have been produced) and handed a dismissal notice. PR and RW tried to explain the reasons for her dismissal but she refused to listen and insisted she would be returning to work after speaking with DC. The claimant disputes this account and says she tried to speak with them but they wouldn't listen to her. Given that she went on to meet with DC as PR and RW said she would their account is to be preferred. The dismissal notice gives the grounds for dismissal as
- 'You had x2 unauthorised absences (Friday 6th September and Monday 9th September). Unauthorised absences are not something Fala Limited tolerates and so your contract was effectively broken at that time.'*
- 39.1. The letter makes no reference to a notice period and obliquely states that the implied term of mutual trust and confidence was broken by the claimant at the time of the unauthorised absences. From this it is apparent the claimant was dismissed without notice.
- 39.2. The letter does not comply with the ACAS sample letters in that it does not remind the claimant of her right to appeal, who she should write to or by what deadline.

40. DC spoke with the claimant after the meeting and explained that he did not have a position for her in the department of her choice. He also explained that staff had threatened to leave if she came back.

Disciplinary Procedures

41. The employee handbook sets out the disciplinary procedures in unnumbered paragraphs (page 33 of the hearing bundle). Under 'Purpose and Scope', it states:

No formal disciplinary action will be taken until the matter has been fully investigated.

At any disciplinary hearing you will have the opportunity to hear the case against you, state your case and you may be accompanied by a fellow employee or trade union official (who is certified by the union to act as a worker's companion at disciplinary hearings).

You will not ordinarily be dismissed for a first conduct offence, other than in cases of gross misconduct or where the trust and confidence necessary for the relationship of employer and employee is damaged.

Under Investigation, it states:

You and any relevant witnesses will be interviewed and written notes of any interview will be kept.

Under Disciplinary hearing, it states:

Before any disciplinary action is taken by the company, a disciplinary hearing will be held at which you will be given the opportunity to comment on the complaints against you. Written notice of the date, time and location of the disciplinary hearing will be sent in advance to you setting out details of your alleged conduct or performance.

Under Disciplinary sanctions, it states:

Stage 4, Dismissal

If your conduct is sufficiently serious or if conduct or performance is still unsatisfactory you will normally be dismissed. The decision will be taken by a member of senior management and may be with or without notice.

It does not list the type of misconduct likely to result in dismissal without notice.

42. Investigation – PR was the investigating officer. PR was on holiday on 6 September, she prepared an undated investigation report about the 6 September 2019 incident (page 69 of the bundle). It does not identify the witnesses spoken to and describes them as '*most of the production workshop staff*'.

It includes a summary of the incident and notes that

Mr Veselinov was told on 5 September that he would have to deal with the personal matter (sic) alone on 6 September.

It also notes

'he accepted this after complaining that he worked hard enough and should be able to take 2 hours off. On 6 September the complainant went as well. Upon their return when they were challenged (sic) Mr Veselinov became annoyed and decided he wanted to leave. The claimant went with him.'

43. PR had 2 meetings with the claimant on 9 & 10 September; also attended by RW and MV. It is apparent from the limited information available that these meetings dealt primarily with the claimant's complaints and did not address in any meaningful way the issues the respondent had with the claimant's conduct.

44. Invitation to disciplinary hearing – The respondent accepts there was no invitation to a disciplinary hearing and no disciplinary hearing was held nor did it follow the procedures recommended in the ACAS Code of Practice.

45. The dismissing manager was RW. RW signed the dismissal notice citing the reason as unauthorised absences on 6 & 9 September 2019.

Termination of Contract

46. Having left with MV on 6 September; on 10 September the claimant stated she would like to return but only if she could move to a different department.

Appeal

47. The Appeals procedure states

'If you feel you have been unjustly dismissed or disciplined, you may appeal against the decision to the HR manager. You should give written notice of your desire to appeal, setting out the grounds on which the appeal is based. The notice should be received by the senior management team within three working days of the date of written confirmation of the dismissal or imposition of a disciplinary sanction.'

48. On 25 November the claimant wrote to RW stating she considered her dismissal to be unfair and wished to appeal. She also requested a copy of the appeals procedure.

49. On 2 December the claimant chased a response to her letter of 25 November 2019 and attached a copy.

50. On 3 December 2019 PR sent the claimant a pdf of the appeal procedure.

51. It is apparent from today's evidence the claimant considered her letter of 25 November 2019 to be her notice of appeal consequently she did not write further to the HR manager setting out the grounds of her appeal.

52. The Employee handbook makes it plain an appeal must be lodged within 3 working days; consequently, the claimant did not raise an appeal in accordance with the procedures set out in the employee handbook.

Other Matters

53. On 19 November the respondent company transferred the sum of £1,300 to the claimant's bank account. DC described it as for the notice period.

Summary of Findings regarding the specific issues raised in the claimants claim:

54. She returned from certified sick leave on 7 November, was told to clear her desk and report to the manager's office.

This is not disputed by the Respondent.

55. She was then handed a letter of dismissal terminating her employment immediately.

This is not disputed by the Respondent.

56. The letter of dismissal cited the reason as 2 unauthorised absences. The claimant asserts both absences were authorised.

The absences were not authorised as asserted by the claimant.

The manager AI had given approval for the claimant's husband to be absent on 6 September not the claimant. The claimant went any way.

On 9 September the claimant did not attend work as usual but instead demanded a meeting with PR for which she arrived at the premises at 11:48 hrs and left again immediately the meeting finished. PR told the claimant she had to come to work during the investigation into the events of 6 September; the claimant refused.

57. The letter did not alert her to her right of appeal.

That is correct the letter did not comply with the ACAS sample dismissal letter which does remind the employee of their right to appeal.

58. The letter was ready prepared indicating the decision to dismiss had already been decided.

No evidence was offered as to when the letter was prepared.

59. The respondent did not follow the ACAS Code of Practice in dismissing her or follow any disciplinary procedure.

The respondent's witness DC accepts that no disciplinary procedure was followed.

60. She lodged an appeal which the respondent failed to deal with.

The claimant wrote stating she wished to appeal and requesting a copy of the appeal procedure. She had to chase a response before on 3 December she was sent a copy of the appeal procedure.

The procedure requires that any appeal is lodged within 3 working days; given that she was dismissed on Thursday 7 November her appeal should have been provided to the respondent by the end of Tuesday 12 November.

Whilst the claimant stated in her letter of 25 November that she believed her dismissal was unfair and she wished to appeal she did not set out what might be described as grounds of appeal.

The respondent might reasonably conclude that the claimant had not complied with the requirements of the appeal procedure in terms of timing and/or content. There is no evidence any member of the respondent's officers made any such decision.

Having sent the claimant the appeals procedure on 3 December 2019 none of the respondent's officers wrote further rejecting it.

Other than advising that appeals are dealt with promptly ACAS does not recommend a suitable period within which an appeal should be lodged or accepted.

61. She received no payment in lieu of notice.

On 19 November the respondent transferred £1,300 into the claimant's bank account; a sum corresponding to 2 weeks salary; in lieu of notice.

62. She received no written contract or schedule of employment.

Whilst this is set out in her claim the claimant did not ask any questions about it. None of the respondent's witnesses have addressed it in their statements. Consequently, there is insufficient evidence on which to draw a conclusion.

CONCLUSIONS

Who terminated the contract?

63. On the face of it the claimant endorsed her husband's words of resignation by following him from the premises. However, the Court of Appeal in *Sovereign House Security Services Ltd v Savage 1989 IRLR 115, CA*, ruled that, while unambiguous words of resignation should normally be taken at face value, in *special circumstances* the tribunal would be entitled to decide that there was no resignation, despite appearances to the contrary.

64. The claimant was in a difficult position. Her husband had sprung to her defence in the altercation with the manager AI and then announced for them both that they no longer wished to work for the company. Whilst it was entirely feasible for her to speak up and tell her husband he didn't speak for her it would in practice have been very difficult for her to do so. Witnesses attest to the ferocity of the aggression MV showed in the altercation so it is reasonable to suppose that if the claimant had spoken up his aggression might have been turned on her. It is also plain considering her subsequent actions that she did not wish to terminate her contract and said as much on 10 September 2019. In accordance with the decision in *Sovereign House Security Services Ltd* above it is reasonable to treat these as special circumstances in which despite appearances to the contrary the claimant had not resigned.
65. The claimant's employment was terminated without notice by the employer on 7 November 2019.

What were the grounds for dismissal?

66. The notice of dismissal on 7 November 2019 cites the reason as 2 unauthorised absences on 6 & 9 September 2019. This was therefore a dismissal for conduct. Dismissal for conduct is a potentially fair reason for dismissal and it is for the respondent to show that it was fair in this case.
67. Where dismissal was based on belief of an employee's misconduct, tribunals should continue to apply the approach followed in *British Home Stores Ltd v Burchell* [1980] I.C.R. 303, [1978] 7 WLUK 138 as approved in *W Weddel & Co Ltd v Tepper* [1980] I.C.R. 286, [1979] 12 WLUK 185, namely, to determine if an employer had reasonable grounds to sustain a belief of misconduct and whether that employer had carried out as much investigation as was reasonable in the circumstances.
68. The fact of the employer's belief of misconduct. The letter of dismissal states the grounds for dismissal are unauthorised absences. There were two letters of dismissal. The letter of 25 September (subsequently withdrawn) states the grounds were for unauthorised absences on different dates. The earlier letter does not in my view undermine the employer's belief in the misconduct by unauthorised absences on 6 & 9 September.
69. Reasonable grounds to sustain the belief; There is clear evidence both absences were unauthorised in that on 5 September authorisation for absence on 6 September was sought and refused. During the meeting with PR and RW on 9 September the claimant made it plain she would not come in to work whilst PR carried out her investigation even though PR told her that was not an option. In the circumstances the respondent had reasonable grounds to sustain its belief in the

claimant's unauthorised absences on these 2 days and consequently in her misconduct.

70. That the respondent had carried out as much investigation as was reasonable in the circumstances. Notwithstanding the failure to comply with the respondent's own disciplinary procedures or those contained in the ACAS Code of Practice the respondent did carry out as 'much investigation as was reasonable' in the circumstances regarding the events of 6 September. PR carried out an investigation and created a record of it. Witness details were not recorded however the altercation on that day was very public witnessed as it was by the managing director and other staff. Whilst there is some dispute between the parties as to how these events concluded the fact of them is not. No investigation was carried out in respect of the 9 September absence however that it happened is not disputed and was witnessed by the HR manager and operations manager. In the circumstances such investigation as was reasonable was carried out.

71. Was the decision to dismiss within the range of reasonable responses? The correct approach is set out in *Iceland Frozen Foods Ltd v Jones 1983 ICR 17, EAT*: once the employer has established the reason for dismissal (conduct in this instance) if it was a fair reason for dismissal will depend on whether the employer acted reasonably in treating it as such. This will depend on the range of reasonable responses open to the employer on which one employer might reasonably take one view, another quite reasonably take another; If the dismissal falls within the band, it is fair: if the dismissal falls outside the band, it is unfair. In this instance the conduct as set out above was unauthorised absences on 2 days, the first in clear disregard of management decision to refuse permission. In the absence of any justification by the claimant for this move there can only be one conclusion namely that this amounted to misconduct so serious that dismissal was within the range of reasonable responses. The claimant then went on to compound the situation by refusing to return to work during the investigation notwithstanding that PR informed the claimant that she must. In the circumstances the respondent's decision to dismiss was within the range of reasonable responses.

Unfair Dismissal -

72. The size and resources of an employer must be taken into account when deciding on relevant cases and it may sometimes not be practical for all employers to take all of the steps set out in the code of practice. In this instance the respondent is large enough to have a dedicated human resources staff to advise it on its statutory and contractual obligations.

73. The claimant was unfairly dismissed on the respondent's failure to comply with the ACAS Code of Practice in that the investigation did not include interviewing the claimant and/or her husband for their accounts, if any such discussion took place

in the meetings on 9 and 10 September it is not mentioned in the investigation record; no disciplinary hearing was arranged to allow the claimant to answer the allegations against her and the dismissal letter of 7 November did not comply with the ACAS sample letter in that it made no mention of notice status nor did it remind the claimant of her right to appeal her dismissal, the deadline by which it should be lodged and with whom. Since the respondent company provides for such procedures in its own employee handbook (see below) this failure is not reasonable. The respondent company took the view things could not be progressed whilst the claimant was on 6 weeks sick leave but that does not justify going straight to dismissal upon her return.

Wrongful Dismissal -

74. The employee handbook sets out the disciplinary procedures to be followed in these circumstances (para 41 above). The claimant was wrongfully dismissed in breach of contract in that the respondent failed to follow its own disciplinary procedure:

74.1. the claimant was not interviewed and no notes have been produced by the respondent of witness interviews or meetings with the claimant as required by its own disciplinary procedure.

74.2. The respondent accepts a disciplinary hearing was not held. None of the meetings held on 9,10 September and 7 November 2019 satisfy the ACAS Code of Practice as possible disciplinary hearings in how they were arranged and conducted.

74.3. Following her dismissal, the claimant went on to lodge an appeal on 25 November 2019. The employee handbook requires the appeal should be lodged within 3 working days of the date of the dismissal (or 12 November 2019). She was out of time, consequently the respondent was not obliged to consider it. Having said that the respondent made no attempt to respond to the appeal other than to send a pdf of the appeal procedure.

Damages

75. In awarding what is just and equitable I must have regard to the loss sustained by the complainant.

76. The respondent paid the claimant £1,300 in lieu of notice on 19 November 2019 and the company bank statement showing that payment was made has been produced (final page of the hearing bundle).

77. That staff threatened to strike if the claimant returned and joined is irrelevant to the employer's obligation to follow a fair procedure and comply with its contractual obligations.

78. Notwithstanding the claimant's misconduct she also refused to return to work for the same manager but the business could not accommodate her in the department of her choice. Accordingly, had the Respondent carried out a fair procedure the outcome would have been the same. This is relevant to the Basic Award at paragraph 79 and Compensatory Award at paragraph 81 below.
79. Basic award, S122(2)ERA provides that: *where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.* Given the conclusion at paragraph 78 above the claimant's conduct was wholly responsible for her dismissal and the basic award is reduced by 100%.
80. S.207A of the Trade Union and Labour Relations Act 1992 allows for the compensatory award to be increased or reduced by up to 25 per cent for any failure by the employer or the employee to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures. Given that there was no attempt to follow the Code beyond the investigation the appropriate sum to be applied is a 25 per cent uplift on the award of any damages.
81. Compensatory award, Following *Polkey v AE Dayton Services Ltd* [1987] UKHL 8, in a procedurally unfair dismissal, a Tribunal must consider whether the respondent could and would have dismissed the claimant fairly if it had followed a fair procedure. The leading case remains *Software 2000 Limited v Andrews and others* (EAT/0533/06) and the approach was set out by the then President, Elias P. The EAT explains that a Tribunal should look to reconstruct what might have been. However, it must not embark upon a 'sea of speculation'. It must base its determination as to what might have been on the evidence before it. Given the conclusion at paragraph 78 above the respondent could and would have dismissed the claimant fairly if it had followed a fair procedure and the compensatory award is accordingly reduced by 100%.

Employment Judge Allen

Date:11.5.2021.....

Sent to the parties on: 17.5.2021.....

.....THY.....

For the Tribunal Office

