EMPLOYMENT TRIBUNALS

Claimant: Miss L Duggan

Respondent: Beechdale Care Limited

Heard at: Midlands (East) Employment Tribunal **On: 13 May 2021**

Before: Employment Judge Rachel Broughton (sitting alone)

Representatives

Claimant: In Person
Respondent: No attendance

JUDGMENT: REMEDY

The Judgment of the Employment Tribunal following the remedy hearing is that the Tribunal has awarded compensation payable by the Respondent to the Claimant for unfair dismissal as follows:

1. Basic Award: **£1290** (gross)
2. Compensatory award (including sum for loss of statutory rights of £500): £913.18 plus £500: **£1,413.18** (net)
3. Acas uplift on the compensatory award of **£211.97** (net)
4. The Recoupment Regulation apply (see annexe explanation for their effect);

   I. The Prescribed period: 28 March 2019 to 17 June 2019

   ii Prescribed Element: **£1,125.15** (compensatory award less sum for loss of statutory rights)

   iii. Grand Total: **£2,915.16**

   iv Balance**: £1,790** (the amount by which the monetary awards exceed the Prescribed Element)

REASONS: ACAS Uplift

Background

1. Following a reserved judgement on liability on 24 November 2020 which found in the claimant's favour in respect of the unfair dismissal claim, the case was listed for a remedy hearing on 4 February 2021.

2. On the 27 January 2021 the respondent wrote stating that it was prepared to agree the claimant's losses as claimed with her schedule of loss and withdraw its costs application.

3. The claimant requested an adjournment of the hearing to permit her time to take legal advice. The remedy hearing was relisted to 13 May 2021.

4. The respondent wrote on the 5 May 2021 to the Tribunal submitting written representations and a remedy bundle. The respondent again confirmed that it was prepared to agree the claimant's losses as claimed within her schedule of loss and withdraw its outstanding costs application.

5. On 6 May 2021 the claimant wrote to the Tribunal copying in the respondent within which, after taking advice and on receipt of the reserved judgement, referred to having undervalued her claims. The claimant put the respondent on notice prior to the hearing on 13 May 2021, of her intention to apply for a sum for loss of her statutory rights and potentially an Acas uplift.

6. The respondent did not attend the remedy hearing.

7. The claimant at the remedy hearing, gave oral evidence under oath with respect to her financial losses and made submissions including for a payment for loss of statutory rights and an Acas uplift pursuant to section 207A (2) TULR(C)A ("**Acas Uplift**") with reference to the findings in the reserved judgement.

8. The Tribunal made a determination at the remedy hearing on the claimant's entitlement to; a basic award, compensatory amount, and an award of loss of statutory rights. The reasons for its decision were provided orally at the hearing. Although the respondent was arguably put on notice of the intention by the claimant to apply for a Acas Uplift and elected not to attend the remedy hearing, because the Acas Uplift was not claimed in the original schedule of loss and the claimant's email of the 12 May 2021 to the Tribunal, the Tribunal considered in this regard was not entirely clear, the Tribunal considered it in the interests of fairness and justice to allow the respondent an opportunity to make written representations on the claimant's application for an uplift of 25%. The Tribunal therefore reserved its decision on the application for an Acas Uplift on the compensatory amount only, pending submissions from the respondent.

9. This judgment is concerned only with the Tribunal's decision on the Acas Uplift.

Facts – findings on liability

Paragraph 5

10. There was no investigatory meeting with the claimant prior to the disciplinary hearing. Mr Kay – Warner, the disciplining officer, arranged for statements to be taken from witnesses but did not hold an investigation meeting with the claimant, despite the seriousness of the allegations of gross misconduct. The statement Mr Kay – Warner himself provided for the investigation, was not only extremely brief it was inadequate and included material omissions. Further, as provided for in paragraph 158 of the liability judgement, Mr Kay-Warner, despite stating during the disciplinary hearing that he would conduct further investigations, did not do so.

11. The findings on the inadequacy of the investigation are set out in paragraphs 272 to 274 of the written judgement on liability.

12. At paragraph 286 of the liability judgment, the Tribunal found that the respondent had failed to carry out as much investigation into the matter as was reasonable in all the circumstances and there was no reasonable explanation for that failing. The Tribunal concluded that the disciplinary process was fundamentally flawed and the fact that 'necessary investigations' were not carried out, contributed to a significant extent to that conclusion.

Paragraph 6

13. The same person, namely Mr Kay-Warner, had carried out both the investigation and disciplinary hearing. The Tribunal found that were others who could have carried out the investigation including the team leader or clinical lead and there was no good reason for not making alternative arrangements. The liability judgement addresses the extent of the impact this had on the fairness of the process within paragraphs 275 to 295

14. The conclusion of the Tribunal was that taking into account the size of the respondent and the limited management team, it was outside the band of reasonable responses for Mr Kay – Warner to conduct both the investigation and disciplinary hearing in circumstances where he was also a witness . The Tribunal also found that he had failed to act with impartiality and that he approached the disciplinary hearing with a 'closed mind' and the intention of dismissing the claimant, as set out in the liability judgment at paragraphs 294 and 295.

Paragraph 9

15. At the liability hearing the claimant did not allege within her evidence in chief or put it to any of the respondent's witnesses, that she had not been provided with the witness statements before the disciplinary hearing and therefore this was not a finding made by the Tribunal in its liability judgement

Paragraph 11

16. That the claimant was not given enough time to prepare her case or there was unreasonable delay in holding the disciplinary meeting, was not a finding of the Tribunal at the liability hearing.

Paragraph 17:

17. The Tribunal's findings as recorded at paragraph 284 of the liability judgement, is that the claimant's companion at the disciplinary hearing did address the hearing and put forward important evidence on the claimant's behalf about what happened in practice at the Home. However, although permitted to address the hearing, the companion's evidence was not taken into account by the respondent and further, the notes of the hearing did not record her comments. There was no reasonable explanation for this behaviour by the respondent.

Paragraph 22:

18. The Tribunal concluded that Mr Kay-Warner only made the decision to dismiss after discussing and receiving approval from Mr Khatkar. This undermined the fairness in that Mr Kay- Warner the Tribunal found, went into the disciplinary hearing with a closed mind.

19. The Tribunal did not make a finding however that Mr Kay-Warner did not actually have the authority to dismiss but that he discussed the decision and sought the approval from Mr Khatkar to do so, that is not the same as Mr Kay -Warner not having the authority to dismiss should he have wished to do so, only that on this occasion he discussed it in advance with Mr Khatkar and sought his approval.

Paragraph 27:

20. The Tribunal commented in the liability judgment that one possibility as an alternative to Mr Kay- Warner conducting both the disciplinary and appeal hearing, was that Mr Khatkar, being more removed from the events, could have conducted the disciplinary and appeal, that was mentioned as a possible alternative in circumstances where Mr Kay- Warner had undertaken the investigation. However, there were other possible alternatives mentioned in the judgment which were not considered by the respondent, namely that the team leader and clinical lead carry out the investigation. The key requirement of paragraph 27 of the Code however, is the impartiality of an appeal and for the reasons set out in the liability judgement, the Tribunal concluded that Mr Khatkar did not conduct the appeal impartially and that it was nothing more than a 'rubber stamping' of the original decision and conducted outside the band of reasonable responses. The relevant paragraph is 298 of the liability judgment.

21. Mr Khatkar therefore had not only had prior involvement in the case, he had crucially, failed to carry out the appeal process impartially and there was no reasonable explanation for that failure.

Submissions

22. The claimant submits that the findings at the liability hearing, support a claim for an Acas Uplift of 25% and made oral submissions at the remedy hearing that the Acas Code had been breached in the following ways (references are to the Statutory Code);

    Para 5:
    There was no investigatory meeting with the claimant prior to the disciplinary hearing

    The claimant was suspended with no opportunity to state her case

    Necessary investigations were not carried out without unreasonable delay

    The claimant had raised concerns about staffing, and nothing had been done to investigate those concerns

    Para 6:

    The same person (Mr Kay Warner) had carried out both the investigation and disciplinary hearing

    Para 9

    The claimant was not presented with the witness statements during the disciplinary hearing

    Para 11;
    The claimant was not given reasonable time to prepare her case and she was not permitted to speak with staff during her suspension.

    Para 17:

    The claimant's companion was told she could not speak, and the respondent did not record what her companion had said in the notes of the disciplinary hearing.

    Para 22:

    Mr Kay-Warner had to obtain authority from Mr Khatkar to dismiss.

    Para 27:

    The appeal was not dealt with impartially. Mr Khatkar had been involved in the decision to dismiss.

23. The respondent's in its written submissions of the 21 May 2021 set out their response to the claimant's submissions, which are summarised as follows;

    Para 5

It is accepted there was no investigatory meeting but this they submit, is not a requirement of the code

There is no requirement in respect of suspension of the claimant, for her to be permitted to state her case

There was no unreasonable delay in that the incident which lead to the dismissal occurred on 19 March and the disciplinary hearing took place on the 27th of March 2019.

There is no reference in paragraph 5 of the Code to investigating concerns raised by the individual prior to a disciplinary hearing, in any event, those concerns had been addressed by the respondent although it is accepted that the claimant did not accept what the respondent had told her.

paragraph 6

The respondent is a small company with a limited management structure and it was not deemed practicable at the time for both the investigation and disciplinary to be undertaken by different individuals although it is accepted that the Tribunals found that the investigation and disciplinary hearing could have been conducted by different individuals

paragraph 9

It is accepted as per the Code that it would normally be appropriate to provide witness statements prior to any hearing. It is also accepted that this did not occur. The evidence provided by witnesses was discussed however at the disciplinary hearing and copies were provided

paragraph 11

The Code requires that the disciplinary hearing be held without unreasonable delay and the period of time given to the claimant was entirely reasonable

paragraph 17

As will be noted from the records of the hearing, the claimants companion did speak during the hearing. The claimant was advised that a companion could not answer for her although she was permitted to speak.

paragraph 22

The decision to dismiss was taken by a manager who had authority to do so in accordance with the Code. The Tribunal concluded that this decision was taken after discussions with Mr Khatkar however it is submitted that it would not in any way be unusual for a decision to dismiss to require approval or consent from another party and this does not mean that the manager concerned did not have authority to make that decision

paragraph 27

The Tribunal observed in its own judgement that it would have been acceptable for Mr Khatkar to undertake both the disciplinary hearing and the appeal. In such circumstances Mr Khatkar would have taken the decision to dismiss rather than as found by the Tribunal, having simply been involved in the decision to dismiss

In summary the respondent is of the view that should the Tribunal to be minded toward an uplift it should be the lower end rather than the 25% suggested.

Legal Principles

24. Pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A), Employment Tribunals have the power to increase or decrease awards for compensation by up to 25 per cent in cases where there has been an unreasonable failure, by either party, to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures ('Code');

(2): '*If, in the case of 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) that 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.'*

25. The Employment Tribunal's power to adjust compensation is engaged only where the employee's or employer's failure to comply with the Code is 'unreasonable'

26. Section 207A (2) and (3) allows for an adjustment if the Tribunal considers it 'just and equitable in all the circumstances.

27. .By virtue of S.124A ERA, any adjustment made in accordance with S.207A only applies to the compensatory award. The adjustment does not apply to the basic award.

28. In **Lawless v Print Plus EAT 0333/09** Mr Justice Underhill, then President of the EAT, gave guidance that although the phrase 'just and equitable in all the circumstances' connoted a broad discretion, the relevant circumstances were confined to those which were related in some way to the failure to comply with the statutory procedures and the relevant circumstances to be taken into account by Tribunals when considering whether and what uplift to award should always include the following:

- whether the procedures were applied to some extent or were ignored altogether
- whether the failure to comply with the procedures was deliberate or inadvertent, and

- whether there were circumstances that mitigated the blameworthiness of the failure to comply.

29. Furthermore, the size and resources of the employer are capable of amounting to a relevant factor but it should not be thought that failures by small businesses were always to be regarded as *"venial".*

30. In **McKindless Group v McLaughlin 2008 IRLR 678, EAT**, : one important factor in determining the level is the degree of culpability on the part of the defaulting party.

31. Elias LJ in **Wardle v Crédit Agricole Corporate and Investment Bank 2011 ICR 1290, CA,**: the maximum uplift should be '*very exceptional indeed'* and should apply only in the most serious cases.

The Acas Code

32. The relevant paragraphs relied upon are;

Paragraph 5

33. *It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases, this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing.*

Paragraph 6

34. *In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.*

Paragraph 9

35. *It is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain enough information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.*

Para 11

36. *The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.*

Para 17

37. *The companion should be allowed to address the hearing to put and sum up the worker's case, respond on behalf of the worker to any views expressed at the meeting and confer with the worker during the hearing. The companion does not, however have the right to answer questioning the worker's behalf. Address the hearing if the worker does not wish it or prevent the employer from explaining their case.*

Para 22

38. *A decision to dismiss should only be taken by a manager who has the authority to do so. The employee should be informed as soon as possible of the reasons of the dismissal, the date on which the employment contract will end, the appropriate period of notice and their right of appeal.*

    Para 27

39. *The appeal should be dealt with impartially and wherever possible by a manger who has not previously been involved in the case.*

Conclusions

40. The respondent was in breach of **paragraph 5** of the Code in that it failed to carry out '*necessary investigations'* to establish the facts of the case. As set out in the findings at paragraphs 10 to 12 above. This breach was unreasonable, the respondent was found to have no good reason for failing to carry out 'necessary' investigations.

41. The respondent was in breach of **paragraph 6** of the Code in that the same person carried out the investigation and the disciplinary hearing. The respondent argues that it is a small company with a limited management structure and it was not deemed practicable at the time for different people to carry out the investigation and disciplinary process however, the findings of the Tribunal was that there were alternatives and the Tribunal was not satisfied with the respondent's explanation behind the failure to separate out the processes, particularly in the circumstances of this case, where the person who carried out both the investigation and the disciplinary was also a principal witness . The impact on the fairness of the disciplinary is detailed in the liability judgment including that Mr Kay-Warner approached the disciplinary hearing with a 'closed mind' and the intention of dismissing. The breach was not reasonable. There was no adequate explanation for this breach. This is addressed in paragraphs 13 and 14 above in the findings.

42. With respect to **paragraph 9** of the Code, although in its submissions the respondent accepts that it did not provide the claimant with the witness statements prior to the disciplinary hearing, this finding did not form part of the judgment on liability and therefore is not taken into consideration by the Tribunal in the application for an Acas Uplift.

43. The Tribunal do not find that there was a breach of **paragraph 11** of the Code for the reasons set out in paraph 16 above in the findings.

44. With respect to the alleged breach of **paragraph 17** of the Code, the respondent submits that the claimant's companion did deal during the hearing as recorded in the notes of the hearing however, while on the face of it there was compliance with paragraph 17 of the Code, in that the claimant's companion could speak and address the hearing, the provisions of paragraph 17 are otiose unless the employer not only allows the companion to make representations but considers them where relevant. If those representations are removed from the record of a hearing and ignored, the purpose of paragraph 17 is not met. The overarching purpose of the provisions of the Code are to ensure that disciplinary and grievance

procedures are conducted fairly. For the reasons set out in paragraph 17 above, the Tribunal find this paragraph was breached. This breach was unreasonable, no satisfactory explanation was put forward by the respondent for this treatment of the companion's representations and it had a material impact on the fairness of the disciplinary process.

45. In respect of **paragraph 22** of the Code, the Tribunal has not for the reasons set out in paragraphs 18 and 19 above found a breach of paragraph 22 of the Code.

46. With regards to **paragraph 27** of the Code, as set out in paragraph 20 and 21 above, Mr Khatkar did not conduct the appeal impartially. The Tribunal concluded in its findings on liability, that he not only had prior involvement in the case, more fundamentally he did not deal with the appeal impartially. This breach was unreasonable, no satisfactory explanation was put forward and indeed it was asserted by the respondent that he had conducted the process impartially which was not consistent with the findings of this Tribunal.

Uplift - amount

47. The breaches of the Code as set out above were serious and numerous. The Acas Code was however applied to some extent, in that the claimant was aware of the charges against her, there was an investigation (albeit not adequate), there was a disciplinary hearing and an appeal hearing.

48. The failings as detailed in the liability judgment, were deliberate. The respondent did not concede at the liability hearing, that there had been any failure in process but continued to defend the fairness and impartially of the disciplinary and appeal. The respondent was in receipt of legal advice during these Tribunal proceedings and represented by counsel at the hearing, where the respondent continued to maintain that it had carried out a fair process.

49. There is no particular mitigation pleaded other than the size of the respondent and its limited management structure however, the breaches of the Code are matters which would not have occurred had the respondent approached the case with an open mind and a willingness to treat the claimant fairly. These were not breaches arising from a lack of understanding of the correct process in circumstances where the intention was nonetheless to treat the individual fairly and where the essential ingredients of impartiality and an open mind were present, these were basic issues of fairness and the allegations of misconduct were serious and potentially career ending for the claimant, it was incumbent on the respondent therefore to approach this process with the seriousness and fairness it deserved. There was a disregard for fairness as evidenced in; the inadequate investigation, the failure to carry out further investigation following the disciplinary hearing (despite the disciplining officer informing the claimant he would do so), the disregard for relevant evidence provided by the claimant's companion and the disciplining and appeal officer's 'closed mind' during the disciplinary and appeal hearing. These were serious and unreasonable breaches of the Code.

50. The Tribunal has however considered that there was not a complete failure to comply with the Code and it has limited its consideration of the amount of the Acas Uplift to the breaches of the Code, which it is required to do, rather than consider the respondent's conduct outside of those breaches in terms of the broader issues of fairness.

51. In the circumstances the Tribunal conclude that an award of **15 %** is an appropriate Acas Uplift, to reflect the degree of default, the deliberateness of it, the size of the respondent's organisation and the partial compliance with the provisions of the Code. This award not a reflection on the impact the dismissal had on the claimant, the claimant's hurt and distress was evident during her oral evidence at the liability hearing. The award is a reflection only of the extent of the breaches of the specific provisions of the Acas Code and the claimant should not see a less than maximum Acas Uplift as a reflection of the seriousness of the respondent's broader actions and default in terms of the fairness of the dismissal. As the claimant is aware, the Tribunal has no powers to award compensation for injury to feelings in respect of a successful claim of 'ordinary' unfair dismissal, otherwise in this case, it would have done so.

_____

Employment Judge Broughton

Date: 3 July 2021

JUDGMENT SENT TO THE PARTIES ON

9 July 2021

FOR THE TRIBUNAL OFFICE