EMPLOYMENT TRIBUNALS

Claimant: **Mrs. T Oakes**

Respondent: **Streamline Press Limited**

Heard at: **Via Cloud Video Platform**

On: **24th May 2021**

Before: **Employment Judge Heap**

Representation
Claimant: **Mr. M Gordon – Counsel**
Respondent: **Ms. C Thompson – Solicitor**

COVID-19 Statement

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was V – fully remote. A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The Respondent is Ordered to pay to the Claimant the sum of **£13,571.19** in respect of the complaint of constructive unfair dismissal made up as follows:

(a) A basic award of:	£ 1,477.75
(b) Loss of earnings of:	£11,650.20
(c) Loss of notional employment rights:	£ 200.00
(d) Loss of healthcare provision:	£ 120.00
(e) Pension loss:	£ 123.24

2. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply to this award:

   The total monetary award payable to the Claimant in respect of her unfair constructive dismissal is **£13,571.19**.

   The prescribed element is **£11,650.20**.

The period of the prescribed element is from **31st July 2019 to 24th May 2021**.

The amount by which the total monetary award for unfair dismissal exceeds the prescribed element is **£1,920.99**.

3. The Respondent is also Ordered to pay to the Claimant the sum of **£4,000.00** in respect of injury to feelings in respect of the complaints of unlawful detriment contrary to Section 45 Employment Rights Act 1996.

4. A declaration has already been made in respect of the complaint of a breach of Regulation 12 Working Time Regulations 1998. No award of compensation is made in respect of that complaint.

REASONS

BACKGROUND & THE ISSUES

1. Following a hearing which took place between 18th and 20th January 2021 I determined that the complaints of constructive unfair dismissal, detriment contrary to Section 45A Employment Rights Act 1996 and a breach of Regulation 12 Working Time Regulations 1998 were all well founded and succeeded. That was by way of a Reserved Judgment and this remedy hearing was therefore listed to determine the compensation that should be Ordered to be paid to the Claimant by the Respondent.

THE CLAIMANT'S POSITION

2. There have been a number of incarnations of the Claimant's schedule of loss but the last of those was prepared and submitted by Mr. Gordon during the course of the hearing. I say more about the various heads of loss claimed below.

3. Having explained to the Claimant the remedies available in respect of the complaint of unfair dismissal it was confirmed that she seeks compensation only. That is an obviously sensible position and I do not consider that either reinstatement or re-engagement would be appropriate in these circumstances. Compensation is therefore the appropriate Order to make.

4. The sums claimed are set out in the revised schedule of loss and that schedule applies the statutory cap of one years salary. The overall sum claimed within that schedule was £17,076.48, although during closing submissions Mr. Gordon confirmed that no future loss past the date of this hearing was now being claimed by the Claimant.

5. Mr. Gordon accepts, given the decision of the Court of Appeal in **Santos Gomes v Higher Level Care Ltd [2018] IRLR 440 CA** that no compensation can be awarded in respect of the successful complaint regarding a breach of the Working Time Regulations because there is no financial loss nor any suggestion that the Claimant has been occasioned personal injury.

6. Insofar as the complaints of detriment are concerned, it is accepted by Mr. Gordon that there are no financial losses arising from the acts complained of and

all that is claimed is compensation for injury to feelings. The Claimant contends that this case falls within the middle range of the middle **Vento** bands and that an award of £15,000.00 is appropriate.

7. An adjustment to compensation is claimed under Section 207A Trade Union & Labour Relations (Consolidation) Act 1992 on the basis that it is said that the Respondent failed to comply with the ACAS Code on Grievance and Disciplinary Procedures.

8. The Claimant also contends that a sum for aggravated damages is appropriate on the basis that witness evidence was deployed by the Respondent that was either unreliable or untruthful and that has caused her additional upset.

THE RESPONDENT'S POSITION

9. The Respondent had prepared a counter schedule of loss. In short, their position is that the Claimant has failed to mitigate her loss and that even had she remained in employment with the Respondent she would have been made redundant (by January 2020) and/or placed on furlough. The Respondent therefore contends that any losses should be curtailed on that basis.

10. The witness evidence adduced by the Respondent also set out financial difficulties that the company has experienced as a result of the Covid-19 pandemic and contends that any award of compensation would need to be made subject to payments of £500.00 per month. Ms. Thompson accepts that I have no power to set any such payment by instalments and that would be a matter for the County Court should enforcement action have to be taken.

11. The financial circumstances of the Respondent are also not a consideration when taking into account what is just and equitable to award the Claimant. In all events, however, I have seen no evidence of the Respondent's financial position and so would not have taken that into account even if it was a relevant consideration.

12. It is denied by the Respondent that there should be any adjustment to compensation under Section 207A Trade Union & Labour Relations (Consolidation) Act 1992 or that there should be any award of aggravated damages. Insofar as compensation for injury to feelings is concerned in respect of the detriment complaints, the Respondent's position is that any award should fall within the lower band of the **Vento** guidelines and be a modest one of around £1,000.00.

THE HEARING

13. This hearing, like the liability hearing, was conducted by entirely remote means via Cloud Video Platform. I am satisfied that we were able to have an effective hearing.

14. I apologise to the parties for the delay in promulgating this Judgment which has been caused by a mixture of other judicial work, a period of leave taken and unforeseen circumstances. I am grateful to both parties for their patience in awaiting this Judgment.

WITNESSES

15. During the course of hearing, I heard evidence from the Claimant on her own behalf. On behalf of the Respondent I heard from Mark Lockley, the managing director of the Respondent company. Mr. Lockley had not given evidence at the earlier liability hearing and whilst I had found a number of the Respondent's witnesses to lack credibility at that hearing, I have of course considered Mr. Lockley's evidence completely afresh.

16. In addition to the witness evidence that I have heard, I have also paid careful reference to the documentation to which I have been taken during the course of the proceedings and also to the very helpful oral and written submissions made by Mr. Gordon on behalf the Claimant and Ms. Thompson on behalf of the Respondent.

THE LAW

17. Before turning to my findings of fact, I remind myself of the law which I am required to apply to those facts as I have found them to be.

Constructive Unfair Dismissal

18. Remedies for unfair dismissal are provided for by Sections 118 to 126 Employment Rights Act 1996. The provisions relevant to this claim are contained within Sections 123 and 124 Employment Rights Act 1996 which provide as follows:

> ***Section 123 Compensatory award***
>
> *(1)Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*
>
> *(2)The loss referred to in subsection (1) shall be taken to include—*
>
> *(a)any expenses reasonably incurred by the complainant in consequence of the dismissal, and*
>
> *(b)subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.*
>
> *(3)The loss referred to in subsection (1) shall be taken to include in respect of any loss of—*
>
> *(a)any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or*
>
> *(b)any expectation of such a payment,*

only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal.

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

(5)In determining, for the purposes of subsection (1), how far any loss sustained by the complainant was attributable to action taken by the employer, no account shall be taken of any pressure which by—

(a)calling, organising, procuring or financing a strike or other industrial action, or

(b)threatening to do so,

was exercised on the employer to dismiss the employee; and that question shall be determined as if no such pressure had been exercised.

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

(6A)Where—

(a)the reason (or principal reason) for the dismissal is that the complainant made a protected disclosure, and

(b)it appears to the tribunal that the disclosure was not made in good faith,

the tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the complainant by no more than 25%.

(7)If the amount of any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy (whether in pursuance of Part XI or otherwise) exceeds the amount of the basic award which would be payable but for section 122(4), that excess goes to reduce the amount of the compensatory award.

(8)Where the amount of the compensatory award falls to be calculated for the purposes of an award under section 117(3)(a), there shall be deducted from the compensatory award any award made under section 112(5) at the time of the order under section 113.

124 Limit of compensatory award etc.

(1)The amount of—

(a)any compensation awarded to a person under section 117(1) and (2), or

(b)a compensatory award to a person calculated in accordance with section 123,

shall not exceed the amount specified in subsection (1ZA).

(1ZA)The amount specified in this subsection is the lower of—

(a) £83,682, and

(b)52 multiplied by a week's pay of the person concerned.

(1A)Subsection (1) shall not apply to compensation awarded, or a compensatory award made, to a person in a case where he is regarded as unfairly dismissed by virtue of section 100, 103A, 105(3) or 105(6A).

(2). . . . . .

(3)In the case of compensation awarded to a person under section 117(1) and (2), the limit imposed by this section may be exceeded to the extent necessary to enable the award fully to reflect the amount specified as payable under section 114(2)(a) or section 115(2)(d).

(4)Where—

(a)a compensatory award is an award under paragraph (a) of subsection (3) of section 117, and

(b)an additional award falls to be made under paragraph (b) of that subsection,

the limit imposed by this section on the compensatory award may be exceeded to the extent necessary to enable the aggregate of the compensatory and additional awards fully to reflect the amount specified as payable under section 114(2)(a) or section 115(2)(d).

(5)The limit imposed by this section applies to the amount which the employment tribunal would, apart from this section, award in respect of the subject matter of the complaint after taking into account—

(a)any payment made by the respondent to the complainant in respect of that matter, and

(b)any reduction in the amount of the award required by any enactment or rule of law.

Detriment complaints

19. Compensation for acts of unlawful detriment are provided for by Section 49 Employment Rights Act 1996, the relevant parts of which say this:

"Where an employment tribunal finds a complaint under section 48(1), (1XA), (1ZA), (1A) or (1B) well-founded, the tribunal—

(a)shall make a declaration to that effect, and

(b)may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates.

(1A) Where an employment tribunal finds a complaint under section 48(1AA) well-founded, the tribunal—

(a)shall make a declaration to that effect, and

(b)may make an award of compensation to be paid by the temporary work agency or (as the case may be) the hirer to the complainant in respect of the act or failure to act to which the complaint relates.

(2)Subject to subsections (5ZA), (5A) and (6) the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to—

(a)the infringement to which the complaint relates, and

(b)any loss which is attributable to the act, or failure to act, which infringed the complainant's right.

(3)The loss shall be taken to include—

(a)any expenses reasonably incurred by the complainant in consequence of the act, or failure to act, to which the complaint relates, and

(b)loss of any benefit which he might reasonably be expected to have had but for that act or failure to act."

20. It is common ground that an Order for compensation for detriment can include compensation for injury to feelings. The claim was presented on 2nd October 2019 and the joint Presidential Guidance which was issued on 25th March 2019 is applicable to the award and the relevant part says this:

> *"…in respect of claims presented on or after 6 April 2019, the Vento bands shall be as follows: a lower band of £900 to £8,800 (less serious cases); a middle band of £8,800 to £26,300 (cases that do not merit an award in the upper band); and an upper band of £26,300 to £44,000 (the most serious cases), with the most exceptional cases capable of exceeding £44,000."*

Aggravated damages

21. Guidance in respect of when an award of aggravated damages is appropriate is given by the Employment Appeal Tribunal in **Commissioner of the Police of the Metropolis v Shaw [2012] IRLR 291**, the relevant extracts of which are as follows:

> *"Aggravated damages are thus not, conceptually, a different creature from "injury to feelings": rather, they refer to the aggravation – etymologically, the making more serious – of the injury to feelings caused by the wrongful act as a result of some additional element. Indeed if this were not so, the fact that Scots law does not recognise aggravated damages as such would mean that*

substantially different remedies were available in identical cases north and south of the border, which is a state of affairs to be avoided if at all possible. As it is, however, as Judge Clark observed in ***Tchoula****,* loc. cit.*, whether a tribunal makes a single award for injury to feelings, reflecting any aggravating features, or splits out aggravated damages as a separate head should be a matter of form rather than substance.*

Criteria. The circumstances attracting an award of aggravated damages fall into the three categories helpfully identified by the Law Commission: see para. 16 (2) above. Reviewing them briefly:

(a) The manner in which the wrong was committed. The basic concept here is of course that the distress caused by an act of discrimination may be made worse by it being done in an exceptionally upsetting way. In this context the phrase "high-handed, malicious, insulting or oppressive" is often referred to (as it was by the Tribunal in this case). It derives from the speech of Lord Reid in ***Broome v Cassell & Co. Ltd.*** *[1972] AC 1027 (see at p. 1087G), though it has it roots in earlier authorities. It is there used to describe conduct which would justify a jury in a defamation case in making an award at "the top of the bracket". It came into the discrimination case-law by being referred to by May LJ in* ***Alexander*** *as an example of the kind of conduct which might attract an award of aggravated damages. It gives a good general idea of the territory we are in, but it should not be treated as an exhaustive definition of the kind of behaviour which may justify an award of aggravated damages. As the Law Commission makes clear, an award can be made in the case of any exceptional (or contumelious) conduct which has the effect of seriously increasing the claimant's distress.*

(b) Motive. It is unnecessary to say much about this. Discriminatory conduct which is evidently based on prejudice or animosity or which is spiteful or vindictive or intended to wound is, as a matter of common sense and common experience, likely to cause more distress than the same acts would cause if evidently done without such a motive – say, as a result of ignorance or insensitivity. That will, however, only of course be the case if the claimant is aware of the motive in question: otherwise it could not be effective to aggravate the injury – see ***Ministry of Defence v Meredith*** *[1995] IRLR 539, at paras. 32-33 (p. 543). There is thus in practice a considerable overlap with head (a).*

(c) Subsequent conduct. The practice of awarding aggravated damages for conduct subsequent to the actual act complained of originated, again, in the law of defamation, to cover cases where the defendant conducted his case at trial in an unnecessarily offensive manner. Such cases can arise in the discrimination context: see ***Zaiwalla and Co. v Walia*** *[2002] IRLR 697 (though N.B. Maurice Kay J's warning at para. 28 of his judgment (p. 702)); and* ***Fletcher*** *(above). But there can be other kinds of aggravating subsequent conduct, such as where the employer rubs salt in the wound by plainly showing that he does not take the claimant's complaint of discrimination seriously: examples of this kind can be found in* ***Armitage****,* ***Salmon*** *and* ***British Telecommunications v Reid****. A failure to apologise may also come into this category; but whether it is in fact a significantly aggravating feature will depend on the circumstances of the particular case. (For another example, see the very recent decision of this Tribunal (Silber J presiding) in* ***Bungay v Saini*** *(UKEAT/0331/10/CEA).) This basis of awarding aggravated damages is*

rather different from the other two in as much as it involves reliance on conduct by the defendant other than the acts complained of themselves or the behaviour immediately associated with them. A purist might object that subsequent acts of this kind should be treated as distinct wrongs, but the law has taken a more pragmatic approach. However, tribunals should be aware of the risks of awarding compensation in respect of conduct which has not been properly proved or examined in evidence, and of allowing the scope of the hearing to be disproportionately extended by considering distinct allegations of subsequent misconduct only on the basis that they are said to be relevant to a claim for aggravated damages."

FINDINGS OF FACT

22. As with the liability Judgment I ask the parties to note that I have only made findings of fact where those are required for the proper determination of the issues. The relevant findings of fact that I have therefore made against that background are set out below. References to pages in the hearing bundle are to those in the bundle before me and which were before the Tribunal and the witnesses.

23. The Claimant commenced employment with the Respondent on 6th April 2016 as a Print Finishing Assistant within the Alpha Card Department. Her employment terminated following her resignation, with immediate effect, on 31st July 2019 following the altercation with Kevin Sims which is referred to in the liability Judgment. She earned the net sum of £291.30 net per week whilst employed by the Respondent.

24. Following her resignation the Claimant took approximately two weeks before she began to seek alternative employment. That was effectively to recover from her experiences and the way in which her employment had come to an end. Given her upset and the events that had led to her terminating her employment, I do not consider that to be unreasonable. I accept in that regard that she was distressed over, particularly, the altercation which had occurred with Kevin Sims on 31st July 2019. I therefore do not find that there was any failure to mitigate loss during that period.

25. After that time I accept the Claimant's evidence that she had signed up with a number of job sites on the internet as part of her search for alternative employment. Although Ms. Thompson points to a lack of mitigation evidence having been provided by the Claimant up until October 2020, I accept her evidence that she was not initially informed by her solicitors that she was required to retain that sort of documentation and that is why it has not been supplied.

26. I also accept her evidence that she regularly applied for alternative employment and generally did so on a daily basis but that she often did not receive a response to her applications. Examples of the applications that the Claimant made appear in the remedy bundle at pages 55 to 59 and I accept her evidence that the positions that she applied for were mainly office based at the local hospitals, the Police force or for the city council. As I have already said, I accept that there is not more evidence of mitigation because the Claimant was not aware that she had to retain the same. I do not accept that the Claimant did not apply for roles as I am satisfied that she was concerned about her financial

circumstances so that that was not, in all events, an option available to her. I accept that she was very keen to obtain alternative employment and would have taken whatever was offered to her. In short, I do not accept that there was any failure to seek to mitigate loss until October 2020 as the Respondent claims and I accept that the Claimant was actively seeking alternative employment from the period from mid August 2019 to the point that she secured a position elsewhere.

27. In November 2019 the Claimant enrolled on a college course to obtain health and safety and customer service qualifications to make her more attractive on the job market (see pages 85 and 86 of the remedy bundle). She similarly undertook a course on employability skills (see pages 87 and 88 of the remedy bundle).

28. By this time the Claimant was claiming job seekers allowance. She had not initially claimed that benefit because she did not believe that she was entitled to any assistance for 26 weeks because she had resigned from her job rather than having been dismissed. She was told that she might be able to claim and after she did so, it was suggested that she enrol on the courses referred to above. I accept that the Claimant did so to improve her prospects of obtaining alternative employment.

29. The Claimant was successful in obtaining employment with Steve Burt Woodworking Ltd where she secured the position of Office Administrator. The Claimant had previously undertaken work in administration prior to joining the Respondent and so this was a position for which she had prior experience. She has, in this regard, a significant number of years of payroll and administration experience. I accept that despite a number of job applications, the only interviews that the Claimant was offered was with Steve Burt Woodworking Ltd.

30. The Claimant commenced the role with that employer on 2nd January 2020 and she earns the sum of £218.50 net per week. She continues in that post today. Her earnings are £72.80 net per week less than she received whilst working for the Respondent.

31. However, whilst the Claimant's hourly rate of pay is higher she is working less hours compared to that which she worked for the Respondent. With the Respondent she worked, generally speaking, an 8 hour shift between 8.00 a.m. and 4.00 p.m. and therefore a forty hour working week. The Claimant's employment with Steve Burt Woodworking Ltd has a working week of 24 hours with her working 8.30 a.m. on Monday to Thursday and 8.30 a.m. to 4.30 p.m. on a Friday.

32. The Claimant did not continue to seek alternative employment after securing the role with Steve Burt Woodworking Ltd. Ms. Thompson is critical of that position and contends that the Claimant should have continued to seek alternative employment with more hours so that she did not have any continuing loss. However, I accept the Claimant's position that she was grateful for the role and did not want to let her new employer down, particularly as they had expended money on a costly interview process. In addition, there was the possibility of an increase in hours in her existing post and for it to become full time, but the Covid-19 pandemic caused that not to come to fruition. She was also aware of difficulties obtaining employment during the pandemic and gave the example of her sister who had experienced considerable problems in that regard despite being educated to degree level. I do not consider the Claimant's stance to have

been unreasonable given all of those circumstances and again I do not consider that she has failed to mitigate her losses in this respect.

33. I also do not accept that the Claimant's part time hours are a lifestyle choice as contended by Ms. Thompson, although she candidly accepted that they do suit her. I accept that she simply took the first job that she was offered and had that been full time she would have accepted it.

34. The Claimant's evidence was that there had been an increase in work in recent weeks with her new employer and I consider that that upsurge will have the result of the Claimant being able to be given the additional hours that were referenced at the time of her commencement and prior to the effects on the business of the Covid-19 pandemic. Even a modest increase in hours would see her wages reach those which she enjoyed with the Respondent.

35. The Claimant was not enrolled into a pension scheme in her employment with Steve Burt Woodworking Ltd but she accepted in cross examination that she should have been auto enrolled into a pension scheme in that employment and will take the matter up with her present employer. The rate of pension contributions that the Claimant enjoyed with the Respondent was three percent (see page 43 of the remedy bundle).

36. Whilst employed by the Respondent the Claimant also had the benefit of a healthcare package which provided contributions to the costs incurred in respect of dental and optical appointments and the like. I accept the Claimant's evidence that this entitled her to claim the sum of £60.00 twice a year and that sum was also accepted within the Respondent's counter schedule of loss.

37. In March 2020 the Covid-19 pandemic hit and I accept that that has inevitably had an effect on the Respondent's business. It is the Respondent's case that the Claimant would have been made redundant by January 2020 at the latest. It is said that there has been a fifty percent reduction in the numbers employed in the Claimant's team with the headcount being reduced from eight to four and that the Claimant would have been selected for redundancy based on the Respondent's skills matrix. It is notable, however, that the Respondent has not disclosed that skills matrix and there has been no reasonable explanation for that surprising omission. It also appeared to be initially suggested that the reduction of four was purely down to redundancies when in fact two of the four resigned.

38. The suggestion that the Claimant would have been made redundant in January 2020 at the latest was contradicted by the evidence of Mr. Lockley that at that time there was not the cashflow to make necessary redundancies and I found his evidence generally about whether there had in fact been any redundancies in the first quarter of 2020 to be somewhat confused. Whilst I accept that the Claimant was not replaced after her resignation, I do not accept that that was indicative of the fact that there was a later redundancy situation and that that would have occurred in January 2020 had Conor Foxton not resigned and the Claimant had still been in post.

39. The Claimant's team of eight was comprised (prior to her resignation) of the following:

    a. The Claimant;
    b. Kevin Sims;
    c. Steven Oakes – the Claimant's husband;
    d. Connor Foxton who it is said resigned from employment on 29th January 2020;
    e. Connor Hearne who it is said was made redundant on 13th August 2020;
    f. Dave Clowes who it is said was made redundant on 16th November 2020;
    g. Joe Hawker who appears to have resigned; and
    h. Violeta-Daniela Tufan.

40. Mr. Sims and Mr. Oakes were skilled finishers who, in comparison to the remainder of the team, would have needed to be retained. That would have therefore left the Claimant and Ms. Tufan as at August 2020 and it is said by the Respondent – and particularly the evidence of Mr. Lockley – that of the two of them it would have been the Claimant who would have been made redundant. Ms. Tufan was the only remaining member of the team who did the same job as the Claimant.

41. Whilst the evidence of Mr. Lockley was that the Respondent would apply a skills matrix comprising of work experience, work performance, disciplinary record, timekeeping and customer focus and that each area would be weighted, that was evidence that was only forthcoming via supplemental questions. No copy of the matrix was disclosed as I have already referred to above nor was there any attempt before oral evidence to compare the Claimant's attributes in those areas with those of Ms. Tufan. I did not accept Mr. Lockley's evidence at all that it was a foregone conclusion that the Claimant would have been the one to be made redundant, particularly in view of the failure to properly and evidentially address that at all before oral evidence. For example, no sample scoring was undertaken or evidence in support of Mr. Lockley's oral contentions supplied within the disclosure exercise. I considered his unsupported evidence to be rather too convenient and I also note that he would not have been responsible for scoring for redundancy in all events as that would fall to the relevant line manager. It is therefore difficult to see how he could fairly and accurately conclude that the Claimant would have been made redundant based on his off the cuff assessment in his oral evidence.

42. Moreover, it is far from certain that the Claimant and Ms. Tufan would have been the only individuals within a pool for selection for redundancy as at January 2020 - or at any other point - given the evidence of Mr. Lockley that after a cost cutting exercise in June 2019 Ms. Tufan had been engaged not in the Alpha Cards team but as general support.

43. I have not been provided with a scrap of documentary evidence about the redundancies that did take place, the financial circumstances of the Respondent as at January 2020 or at any other time, the pooling that took place when making any such redundancies and the method of selection. That is very surprising when taking into account that the redundancy position was one of the

Respondent's central arguments and they have at all times been professionally represented.

44. Given the lack of evidence about both the need for redundancies generally – which Mr. Lockley accepted in cross examination was available from documentation held by the Respondent – the appropriate pool for selection or the redundancies that it is said were made within the Alpha Cards team, I can therefore make no finding that the Claimant would have fallen to be made redundant or that there was any real prospect of that taking place.

45. It is also said that the Claimant would have been placed on furlough in the event that she had not been made redundant in January 2020 and would only have received 80% of her usual pay, reducing it to £1,032.00 per month net. Again, there is no documentation at all which has been disclosed about who was furloughed by the Respondent, when and for how long and how it was determined who would be furloughed and who would not. Again, I considered Mr. Lockley's unsupported evidence on that point to be somewhat convenient and I did not accept his account that Ms. Tufan was furloughed for a very specific percentage of time which was again unsupported by any documentation and not referenced at all in his witness statement. I also did not accept his assessment that Ms. Tufan would have been retained to work in preference to the Claimant as, again, there is no evidence to support that otherwise convenient position.

46. I therefore cannot make any finding that there was any real certainty that the Claimant would have been made redundant in January 2020 or, indeed, at all. I have not seen the matrix which the Respondent relies on nor any comparison between the Claimant and Ms. Futan in that regard. I also accept the Claimant's evidence that she had longer service than Ms. Futan who could in fact have been made redundant without having to be paid a redundancy payment at all and I remind myself of the evidence of Mr. Lockley that costs of redundancy was an issue to the Respondent.

47. The Claimant's schedule of loss sought an adjustment to compensation for the failure to comply with the ACAS Code of Practice on Grievance and Disciplinary Procedures ("The ACAS Code"). As set out in the liability Judgment the Claimant raised a grievance with the Respondent on 24th April 2017 regarding the failure to permit her and other workers to take rest breaks. As I set out at paragraph 59 of the liability Judgment the Respondent did not comply with their own grievance procedure in dealing with that grievance. Similarly, there was no compliance with the ACAS Code either. All that occurred was a group meeting. There was no individual meeting with the Claimant nor was she given any written outcome.

48. Whilst the Claimant raised a further detailed letter setting out her complaints and why she considered those to have led to her resignation, her evidence at the liability hearing was that she did not intend that letter to be a further grievance (see paragraph 90 of the liability Judgment).

CONCLUSIONS

49. Insofar as I have not already done so, I now deal with the amount of compensation which I have Ordered the Respondent to pay to the Claimant.

50. I begin firstly with the complaint of constructive unfair dismissal. It is not in dispute that the amount of the basic award to which the Claimant is entitled based on her age and length of service was **£1,477.75**.

51. The Claimant seeks the sum of **£200.00** in respect of the loss of her employment rights. I consider that an appropriate sum to Order be paid and it is also the sum reflected in the counter schedule of loss.

52. I then turn to compensation for loss of earnings. As I have already set out above, I make no finding that the Claimant has failed to mitigate her loss either in respect of the two week period before she began her search for alternative employment or in respect of seeking alternative roles generally. That includes not seeking full time employment following securing her existing role. I have already given the reasons for that position above and therefore do not need to repeat them here.

53. The Claimant suffered a loss of earnings between her resignation on 31st July 2019 and the date of this hearing and given the findings that I have made as to mitigation of loss and the position on a later redundancy, I consider it appropriate that she be compensated until that time. That is a period of 94 weeks at a weekly loss of £291.30 per week, equating to the sum of £27,382.20.

54. However, the Claimant commenced alternative employment on 2nd January 2020 and from that point to the time of this hearing she has earned the sum of £15,732.00. Her loss of earnings to the date of this hearing are therefore in the sum of **£11,650.20**.

55. As to pension loss, the Claimant had a three percent contribution made by the Respondent which she has lost for a period of 22 weeks (until 2nd January 2020) equating to a loss of **£123.24**. I make no award after that point as the Claimant accepted that she should have been auto enrolled upon commencement of her employment with Steve Burt Woodworking Ltd at the same rate that she enjoyed with the Respondent. That is a matter that she intends to take up with that employer and I do not consider that the Respondent should be required to compensate the Claimant for the failure of her existing employer to comply with their duty to provide her with a workplace pension.

56. The Claimant also suffered the loss of her healthcare provision which entitled her to claim the sum of £60.00 twice per annum. That loss therefore equates to the sum of **£120.00** as claimed in the most recent schedule of loss and as accepted in the counter schedule of loss.

57. Turning then to compensation for detriment. There are two acts of detriment which I found the Claimant to have been subjected to. Those were the events of a meeting with Mr. Sims and Mr. Nooney in June 2019 and the actions of Mr. Sims on 31st July 2019; the latter of which was the catalyst for the Claimant's resignation. I deal with each of those matters separately and can perhaps do

little more than rehearse my conclusions within the liability Judgment. Insofar as the July 2019 meeting was concerned my conclusions were these:

"The Claimant was clearly subject to disadvantage in being called to a meeting and taken to task for raising her complaints about rest breaks. Her evidence was that she was angry about how she was treated. Her concerns were trivialised; ignored and she was told that she was lucky to have a job. I accept that she was angry – and reasonably so – about that meeting and what was said and done."

58. The Claimant's evidence at the remedy hearing was that what happened at the meeting made her frustrated and demoralised, that it was horrendous and she felt that she had been treated like a "12 year old child".

59. As to the events of 31st July 2019, my conclusions were these:

"She was again taken to task in very strident term for raising issues surrounding breaks. Mr. Sims raised his voice at the Claimant and made plain his "frustrations" at her continuing to raise the issue of breaks. That was done in public and made clear his contempt for the Claimant's position on rest breaks. I am therefore satisfied that she was subjected to detriment."

60. The Claimant's evidence was that she was angry about this incident and found it demoralising because she was told to "get back to work" in front of workers half her age.

61. I have no doubt as to the Claimant's evidence that the treatment that she was afforded left her angry, upset and demoralised and that she felt as if she was being treated like a child and her concerns were being ignored. Whilst the treatment of the Respondent was clearly inappropriate, I remind myself that there were only two incidents of detriment. They were over relatively quickly and have not had any lasting effects on the Claimant. They are not in my view, even cumulatively, incidents which could be described as serious cases falling into the middle **Vento** band. This is in my view a "less serious" case falling within the bottom **Vento** band. I consider an award towards the middle of that band to be appropriate given the upset caused to the Claimant and the fact that the detriment that she experienced occurred more than once. I therefore consider an award of **£4,000.00** in respect of injury to feelings to be appropriate in these circumstances and I agree with Ms. Thompson that the award of £15,000.00 claimed in the schedule of loss was excessive given the detriment to which the Claimant was subjected and the effect on her.

62. I turn then to the question of any adjustment to compensation for the failure to deal with the Claimant's grievance in accordance with the ACAS Code. This applies to each of the complaints which I have found to be made out.

63. Section 207A Trade Union & Labour Relations (Consolidation) Act 1992 deals with adjustments to awards. In short it provides that an adjustment of up to 25% can be made if, in the case of proceedings to which that 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 (here the ACAS Code) applies,

b. the employer has failed to comply with that Code in relation to that matter, and
c. that failure was unreasonable.

64. Whilst there was a clear failure to comply with the ACAS Code in respect of the grievance of 24th April 2017, the subject of that grievance related only to the issue of rest breaks and, thus, the proceedings under Regulation 12 Working Time Regulations. Mr. Gordon accepts that no financial compensation can be awarded in respect of that complaint. As such, there is nothing to adjust. I do not accept that that grievance can be construed so as to encompass the other complaints of detriment or constructive dismissal given that at the time that the grievance was raised those events had not yet occurred. As such, the grievance procedure could not possibly have dealt with them even if the Respondent had complied with the ACAS Code.

65. There can also be no adjustment for a failure to comply with the ACAS Code in respect of the letter that the Claimant sent after her resignation given that, as I have set out above, she did not intend that letter to be a grievance.

66. For those reasons, I make no adjustment to compensation under Section 207A Trade Union & Labour Relations (Consolidation) Act 1992.

67. The Claimant also claims a sum for aggravated damages. Mr. Gordon relies only on the third category identified in **Shaw**; that is subsequent conduct. The only conduct relied upon in that regard is that the Respondent is said to have deployed witness evidence that was unreliable or untruthful with the intention that that evidence was simply to toe the party line. It is said that that has had a devastating effect on the Claimant.

68. Ultimately, I do not consider this to be a case where aggravated damages are justified. Whilst I did not consider the evidence of a number of the Respondent's witnesses to be credible and preferred the evidence of the Claimant, this is not a case where that evidence was offensive, demeaning or sought to rub salt in the Claimant's wounds. It is not unusual for there to be diametrically opposed accounts in claims of this nature and this is not a case which tips anywhere near into the territory of aggravated damages.

69. The most stark example of the evidence that I found to lack credibility was that of Ms. Futan but that was not offensive or demeaning as to the Claimant; it simply focused on the issue of breaks and what was said at a meeting that that witness claimed to have been present at. It was plain from the Claimant's own evidence that her other colleagues, her husband included, were less concerned about breaks than she was and were not willing to take a stand over such matters. The evidence that she gave was not offensive or demeaning to the Claimant and cannot have been such as to rub salt into the wounds as required by **Shaw**. An award of aggravated damages is therefore not appropriate in this case and none is made.

70. The sums that the Respondent is therefore Ordered to pay to the Claimant are set out above. As I have already observed, I have no jurisdiction to Order those to be paid in instalments as the Respondent sought in Mr. Lockley's witness statement.

71. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply to the compensation that I have Ordered be paid to the Claimant in respect of her constructive unfair dismissal. The effect of those Regulations is that the Secretary of State may recoup the benefits paid to the Claimant (or the prescribed element if less) by serving a notice on the Respondent within 21 days from when the Tribunal's decision is sent to the parties or as soon as practicable thereafter.

72. The effect of the notice is that the Respondent must pay the recoupable amount to the Secretary of State and the balance of the prescribed element to the Claimant. Accordingly, the Respondent is not obliged to pay the prescribed element of compensation to the Claimant until either the Secretary of State has served a recoupment notice on it, or the Secretary of State has notified it in writing that it does not intend to do so. The prescribed element is any amount ordered to be paid and calculated under section 123 Employment Rights Act 1996 in respect of compensation for loss of wages before the conclusion of the Tribunal proceedings – that is the sum of £11,650.20. The Regulations do not apply to the non-prescribed elements nor to the compensation for injury to feelings.

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Employment Judge Heap

Date: 19th August 2021
JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Note:

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.