Case Number: 2201475/2020

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms A Uzuegbu		Hestia Housing and Support

Heard at: London Central (in person) **On**: 15 July 2021

Before: Employment Judge Stout

Representations
For the claimant: In person
For the respondent: Mr S Crawford

JUDGMENT ON REMEDY

(as amended on 18 November 2021 under Rule 69 to correct arithmetical errors)

The judgment of the Tribunal is that the Respondent shall pay to the Claimant (subject to the recoupment order below) compensation for unfair dismissal totalling **£17,370.18**.

This includes a basic award of **£7,787.67**. The compensatory award comprises an award for loss of earnings post dismissal of **£7,518.27** and **£400** compensation for loss of statutory rights, both of which are subject to an **uplift of 15%** for unreasonable failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures, giving a total compensatory award of **£9,106.01**.

Recoupment

For the purposes of regulation 4 of the Employment Protection (Recoupment of Benefits) Regulations 1996:

The total monetary award is **£16,893.68**.

The prescribed element (i.e. the amount representing loss of earnings) is **£7,518.27**.
The prescribed period is 5 December 2019 (the date of dismissal) to 1 February 2021 (the date after which no award for loss of earnings has been made).
The monetary award exceeds the prescribed element by **£9,375.41**.

The basic and compensatory awards exceed the potential recoupment figure of **£5,317** by **£11,576.68** and that is the amount that the Respondent must pay to the Claimant within 14 days of the sending of this judgment. In the event of the DWP not recouping the £5,317 from the Respondent, the Respondent will be bound by regulation 8(8) of the 1996 Regulations to pay the balance of the total compensation for unfair dismissal (**£16,893.68**) to the Claimant.

REASONS

1. By a judgment sent to the parties on 15 December 2020 I upheld the Claimant's claim for unfair dismissal and decided that no *Polkey* reduction should be made to reflect her working for a competitor.

Issues

2. The issues for this hearing were agreed to be as follows:
    a. Whether or not the Claimant had contributed to her dismissal in such a way that I should make a reduction to her compensatory or basic awards;
    b. Whether or not she had taken reasonable steps to mitigate her loss;
    c. Whether or not any uplift should be awarded for failure to provide with the ACAS code of practice on discipline and agreements procedures;
    d. What allowance of basic and compensatory awards should be made to the Claimant.

Contributory fault

The law

3. Section 122(2) ERA 1996 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.

4. Section 123(1) ERA 1996 provides that, subject to the provisions of that 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”.

5. Section 123(6) further provides:

> 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.

6. It should be noted that while s 123(6) requires an element of causation before a deduction can be made under that section, there is no such requirement in relation to a reduction of the basic award under s 122(2). Nor is there any such limitation on the Tribunal’s ‘just and equitable’ discretion under s 123(1) as to what compensation, overall, is appropriate. Reductions can, therefore, be made for conduct which did not causally contribute to the dismissal, such as may be the case where misconduct occurring prior to the dismissal is discovered after dismissal: see *W Devis and Sons Ltd v Atkins* [1977] ICR 662 and cf *Soros v Davison* [1994] ICR 590. However, in cases where the conduct is known about prior to dismissal, the Tribunal must generally be satisfied that the conduct caused or contributed to the dismissal to some extent: see *Nelson v British Broadcasting Corporation (No. 2)* [1980] ICR 110 per Brandon LJ at p 122 and *Frith Accountants Ltd v Law* [2014] ICR 805 at [4].

7. Further, in every case, it must be established that there has been culpable or blameworthy conduct on the part of the employee. Giving the leading judgment of the Court of Appeal in *Nelson v British Broadcasting Corporation (No. 2)* [1980] ICR 110 Brandon LJ gave further guidance at pp 121-122 as follows on what constitutes culpable or blameworthy conduct and how contributory fault should be approached by Tribunals:

> It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody-minded. It may also include action which, though not meriting any of those more pejorative epithets, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved.
>
> It follows from what I have said that it was necessary for the industrial tribunal in this case, in order to justify the reduction of Mr. Nelson's compensation which they made, to make three findings as follows. First, a finding that there was conduct of Mr. Nelson in connection with his unfair dismissal which was culpable or blameworthy in the sense which I have explained. Secondly, that the unfair dismissal was caused or contributed to to some extent by that conduct. Thirdly, that it was just and equitable, having regard to the first and second findings, to reduce the assessment of Mr. Nelson's loss ….

8. In considering contribution the Tribunal has to make its own factual findings about whether the misconduct did in fact take place. That is a very different approach to that in determining whether the dismissal was fair or unfair which turns on the question of whether the respondent's decision on the evidence that it considered was one that was open to a reasonable employer: see *London Ambulance Service v Small* [2009] IRLR 563, CA at [44]. In accordance with ordinary principles, the burden is on the Respondent to show that the Claimant committed the misconduct in question.

9. The Respondent submitted that the Claimant had contributed to her dismissal by:
   a. Shouting, as set out in the evidence collected for the disciplinary and dealt with in particular at [111b.] and [d.] of my judgment; and/or
   b. Being strict with service users to the extent that it was reflected in the 'customer insight officer interviews' in June 2019 (judgment, [40]);
   c. Her email exchanges with Mr Wall, which were taken into account by Miss Chandler at the appeal stage as an additional reason for not upholding her appeal.

10. Mr Crawford reminded me of the nature of this employer, the vulnerability of its service users, and its categorisation of shouting as being potential gross misconduct in its policies. He submitted that the Claimant's conduct was culpable or blameworthy in the context in which she was working.

11. In relation to each of the points relied on by the Respondent, I find as follows:-

    a. *Shouting at service users* - The Respondent does not in its policy document categorise shouting *per se* as gross misconduct, it is verbal abuse of service users (which may include shouting) that is gross misconduct. Not all shouting necessarily amounts to verbal abuse, it depends on the context. The only evidence of the Claimant shouting at service users is a prior complaint that NR made to Ms Warsame, which he confirmed in the course of the interviews but never raised as a complaint at the time. This particular incident was not focus of the disciplinary proceedings. Otherwise, the only evidence of the Claimant shouting was that she had shouted at Ms Warsame in the office. Ms Warsame was another member of staff not a service user and on that occasion the evidence strongly suggests Ms Warsame was giving as good as she got and this argument was not directed at service users in any event. To the extent that there was other references to the Claimant shouting that all came from Ms Warsame and Ms Rodrigues who may have been retaliating against a complaint the Claimant made. The Respondent failed to investigate that aspect of the case and given that I am not prepared to take the evidence of Ms Warsame's and Ms Rodrigues' interviews as proof of any culpable conduct by the Claimant. In those circumstances I do not find that, apart from the prior incident with NR

(about which no complaint was made at the time and which was not the focus of the disciplinary investigation), the Respondent has proved the Claimant ever shouted at service users. While such shouting as there was consitituted unreasonable conduct I do not find it culpable or blameworthy;

b. *Being strict with service users* – after 11 years of service without any prior warnings, even if the Claimant was strict with service users I do not consider that this was culpable or blameworthy, however unusual it might have been for it to have been mentioned in the customer service survey;

c. *The Wells emails* – these are unreasonable, but no more so than the emails that Mr Wells sent to the Claimant. I found they might not have happened if the Claimant had been given a formal warning previously (judgment, [111f.]) and in any event Mr Wells was not dismissed for his part in that exchange. In those circumstances, it was unreasonable conduct, but not to the extent that it was culpable or blameworthy and in any event it was unfairly taken into account in relation to dismissal and should not have contributed to the dismissal decision.

12. In the circumstances, I do not consider that it would be just and equitable to make any deduction from the Claimant's compensation to reflect any conduct on her part.

Mitigation of loss

13. I heard oral evidence from the Claimant regarding her post-dismissal losses and mitigation of loss. Her evidence, and my conclusions in the light of it, are as follows:-

The Claimant's evidence

14. The Claimant was working with London Cyrenians prior to her dismissal by the Respondent on 5 December 2019. She remained on their locum list and said she was available for work. The Claimant said she was ill after dismissal with the pain in her leg, but she cannot recollect for what period she was not working. She was offered work by London Cyrenians during this period that she said that she could not do because she was ill. She says that she first took up work with London Cyrenians in March or July 2020, but is confused about the date.

15. She says that she has earned an average of £260 per week with London Cyrenians for 47 weeks since she started working for them again. Her nephew worked that out for her. She also received £409 per month Universal Credit from January 2020 until February 2021 (not just for three months as

she put in her statement, which was prepared by her nephew and she thinks is incorrect). She has not got work from anyone else, she does browse the internet but not found anything. She has tried to get London Cyrenians to offer her a permanent position. She wrote an email to managers at London Cyrenians on 18 May 2021. They have told her to apply. They are not recruiting at the moment so she has not applied for any jobs yet.

16. The Claimant said that she received a Christmas bonus every year, but not in the year that she was dismissed. The Claimant said that every year the Respondent would write to her to say what the Christmas bonus would be. She claims it was between £750 and £850.

17. The Claimant has produced payslips for London Cyrenians for October 2019 when she did 69 hours while also employed by the Respondent. In January 2020 the Claimant did 95.50 hours and was paid £750.41 net. In August 2020 she did 146.50 hours and was paid net pay of £1,397.25. In September 2021 she was paid £2,346.57 net, for an apparent 294.75 hours work, but she said this included a one-off amount as a Covid-19 attendance payment. Her payslip for September 2020 shows her year to date earnings net as £9,755.93 between April and September 2020.

18. On 28 October 2020 the Respondent requested the Claimant to provide her payslips from London Cyrenians, but she did not do so. She accepted there were other payslips. She said that she had sent her bank statements, but all she sent was a partial screenshot of a bank statement dated 10 February 2018. She said that it was not intentional not to provide the payslips. The Respondent by email of 17 June 2021 requested the same and other information after the Claimant provided her schedule of loss for this hearing, but the Claimant did not provide anything further. The Claimant says that she does not provide payslips.

19. The Respondent produced evidence of numerous suitable jobs advertised within a reasonable distance of her home during 2020, all of which the Claimant accepted were suitable permanent positions for which she was qualified and experienced. However, the Claimant said that she was apprehensive about applying for alternative jobs because she would need two references and one of those would have to have been from the Respondent and she did not consider she would have got a reference. She said that is why she approached London Cyrenians because they know her. She has not however told them about her dismissal from Respondent. She was hoping that London Cyrenians might not ask her for references. She said her self-esteem has been badly affected and she does not think that anyone will employ her given her disability/health condition and references. She did not register with a work agency. She did register with the job centre when claiming benefits. She did not look for any other sort of work, but she has plans to upgrade her skills by doing something through the open university. She had not thought about looking at administrative roles for local authorities or the NHS or anything like that.

20. The Claimant had an operation in November 2020 and was not able to work for 3 months after that. The Claimant said that if she had the operation while working for Hestia she would have received her full salary as she did previously. However, her sick pay entitlement under her contract was to 30 days' full pay and 30 days' half pay.

21. The Claimant could not explain why she had not started looking for employment since having the judgment that she was unfairly dismissed. She said that her self-esteem was very affected.

My conclusions

22. I consider first what the Claimant has in fact earned since dismissal. She says in her schedule of loss it is an average of £260pw for 47 weeks, but she has not provided disclosure of all payslips despite being twice requested to do so, or provided instead proof of earnings from her bank statements which she says she has. Nor has she given consistent evidence about when she was working: she said she did not work for 32 weeks after dismissal, but she clearly worked in January 2020. She was not sure whether she had started working in March or July 2020. She could not remember. Her evidence as to earnings is completely unsatisfactory. I am not satisfied that she has proved she suffered the losses she claimed. In those circumstances, doing the best I can, I am going to draw the adverse inference that she has earned since dismissal on average what she earned between April and September 2020.

23. She earned net £9,755.93 between April and September 2020. That is an average of £375.23 per week (based on 26 weeks).

24. I calculate her net earnings from the Respondent by adding together the net payment on each of the last three complete months of employment (September, October and November 2019), plus the deductions for pension, annual leave purchased and SmartTech (as these all represent pay to the Claimant and a 'loss in her pocket' for which she must be compensated). This gives a total of £6,033.79 or £464.14 per week net. The Claimant's average weekly loss was therefore £88.91.

25. Apart from those earnings, the Claimant has not in my judgment taken all reasonable steps to mitigate her loss. She has not applied for any jobs, other than to ask London Cyrenians in May 2021 for a permanent contract. There were clearly plenty of jobs available for which the Claimant was qualified and experienced to apply. She did not try and so we will never know how she would have fared if she had tried. She did not look for other agency work or alternative employment outside care work where a reference from the Respondent would have been less important. She did not even make any efforts after receiving judgment in this case in December 2020 (once she had recovered from her operation by February 2021) when she could have approached the Respondent for a better reference in light of my judgment that she was unfairly dismissed. Although she has not been well with her knee, she has been able to work despite that at all times apart from the three months when she had her operation. (In this respect I reject the suggestion

that the Claimant was too unwell to work immediately after dismissal as it is apparent that she did a substantial number of hours work in January 2020 for London Cyrenians, which she did not mention in her statement).

26. I therefore consider the Claimant has not taken all reasonable steps to mitigate her loss at any point. However, it does not follow that I reduce her compensation any further unless I am satisfied that she could have done better if she had made reasonable efforts. I consider that a gross misconduct dismissal was a significant impediment to finding care work. I accept the Claimant's evidence that two references would be the norm in this sensitive field. However, after 6 months in my judgment she should have looked for alternatives to supplement her London Cyrenians' income, and could reasonably have expected to reduce her loss by 50% from that point, save for the three months (13 weeks) when she was unable to work because of her operation, which I consider represent a real loss as she was unlikely to have found alternative permanent employment with commensurate sick pay at that point. Since judgment in this case and recovery from her operation in February 2021 she should have been able to fully mitigate her loss.

27. I therefore calculate the Claimant's losses to be as follows:

    a. For the first 26 weeks (6 months) following dismissal the Claimant is entitled to her actual losses as I have calculated them to be, i.e. £88.91 per week x 26 = £2,311.66;
    b. For the next 21[1] weeks until her operation I calculate that she should on average have further mitigated her loss by 50% if she had acted reasonably, so that she lost £44.45 per week x 21 = £933.56;
    c. For the 13 weeks when she was off work because of her operation her loss was (£464.14 x 6) + (£232.07 x 6) + 1 week statutory sick pay (£95.79) = £4,273.05;
    d. Thereafter, having received my judgment and recovered from her operation, she should have fully mitigated her loss by obtaining alternative employment.

28. The total compensation required for loss of earnings is therefore: £7,518.27.

29. I make no award for future loss because I consider that if the Claimant had taken reasonable steps she would have fully mitigated her loss by now.

30. I make no award for Christmas bonus as I was shown no documentary evidence of the same and the Claimant's oral evidence as to dates and earnings was not reliable.

[1] At the hearing, I wrongly calculated this period as comprising 13 weeks, when it should have been 21 weeks. I have corrected this exercising my powers under Rule 71 of my own motion because I consider it in the interests of justice that the calculation be correct and the compensatory award made on a logical and consistent basis.

Uplift for failure to comply with paras 5 and 9 of the ACAS Code of Practice

31. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992) provides that (in cases such as this 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 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%"*.

32. At [111.i] and [j.] of the judgment I found that there were unreasonable failures to comply with paragraphs 5 and 9 of the ACAS Code of Practice. These were serious failings that contributed significantly in my judgment to the fact that the dismissal happened at all, but nonetheless this is not a case in which the Respondent ignored the Code of Practice. In fact, it followed an elaborate procedure and there is no doubt that a great deal of effort was put into the process by the Respondent's witnesses. Balancing those considerations, I determine somewhere just above the half-way point of the possible range of uplifts to be appropriate: 15%.

Basic Award

33. The Claimant was paid as part of her contractual pay Basic Pay and Sleep In each month. For the last three months of employment (13 weeks) she was paid a total of £6,135.71, which is an average of £471.98 per week gross pay. Taking into account ss 221-222 ERA 1996, that appears to me to be the correct figure to take for gross weekly pay. That means that the Basic Award is 1.5 x £471.98 x 11 = **£7,787.67**.

Compensatory Award

34. The award for loss of earnings is £7,518.27. In addition I award £400 for loss of statutory rights which is a relatively high award in my experience to reflect the Claimant's long service. That gives a total of **£7,918.27**.

35. The ACAS uplift applies to the compensatory award and the total compensatory award is therefore £8,318.27 x 15% = **£9,106.01**.

Recoupment

36. The Claimant told me in oral evidence that she received 13 months' of Universal Credit at £409 per month. That would have given her a total of £5,317, which is the amount that I have therefore ordered the Respondent to withhold from the Claimant pending notification by the Department for Work and Pensions as to whether it wishes to recoup any sums under the Employment Protection (Recoupment of Benefits) Regulations 1996. If the

Respondent is not required to pay all or part of the £5,317 to DWP, it must pay the balance to the Claimant[2].

Employment Judge Stout

18 November 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

19/11/2021.

FOR THE TRIBUNAL OFFICE

[2] There is no need for the Claimant to apply for reconsideration if the Universal Credit figure is wrong, contrary to discussion at the hearing. DWP should issue a recoupment notice within 21 days (or as soon as practicable thereafter) and any amount not recouped must automatically be paid to the Claimant.