THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms M Zughbeih	**v**	**The King Fahad Academy Limited**

Heard at: London Central **On**: 11 October 2021

Before: **Employment Judge Glennie**
Ms T Breslin
Mr S Soskin

Representation:
Claimant: Miss Ahmed (Representative)
Respondent: Ms Boorer (Counsel)

JUDGMENT ON REMEDIES

The unanimous judgment of the Tribunal is as follows:

1. **The Respondent shall pay to the Claimant compensation for unfair dismissal assessed at £3,043.48.**

2. **The Respondent shall pay to the Claimant compensation for breach of contract (wrongful dismissal) assessed at £1,159.35.**

3. **The total of the two sums above is £4,202.83**

4. **The Recoupment Regulations apply to this judgment.**

   (a) The total monetary award is £4,202.83.
   (b) The prescribed element is £1,054.35.
   (c) The prescribed period is 1 April to 16 June 2020.
   (d) The non-prescribed element is £3,148.48

REASONS

1. By its judgment on liability, the Tribunal found that the Claimant's complaints of unfair constructive dismissal and breach of contract (wrongful dismissal) were well-founded. These reasons relate to the Tribunal's judgment on remedies.

2. With the agreement of the parties, the remedies hearing (like the liability hearing) was heard wholly remotely, by video (CVP). At the conclusion of the hearing, the Tribunal reserved its judgment.

3. The parties and the Tribunal referred to the reasons given for the liability judgment for relevant findings of fact made at that stage.

Further evidence

4. Further evidence was given at the remedies hearing by the Claimant and Dr Aljafari. Both produced witness statements and were cross-examined. There was also an additional bundle of documents for this hearing. Page references to that bundle are given with the prefix "R"; references to the liability bundle are given without a prefix.

5. The Claimant resigned from her employment with the Respondent on 31 March 2021. The earliest written application for new employment in the bundle was dated 25 January 2021, at page 168. When asked about this in cross-examination, the Claimant said that this was not the first application she had made after resigning, and that she had made her first application in April 2020. When asked why she had not included a copy of that application, the Claimant replied that "it was lockdown at that time and it was horrible for everyone". She said that she was "looking everywhere", and that she did not think that she had produced evidence of every job she had applied for.

6. The Claimant had commenced sickness absence from work on 2 December 2019 and remained absent due to sickness until her resignation. The bundle contained medical certificates from December 2019 (page 162, referring to depression and anxiety); October 2020 (page 163, referring to severe low mood); and February 2021 (page 165, referring to low mood, self-esteem and self-confidence). When Ms Boorer put it to the Claimant that she had not been able to work before at least January 2021, she disagreed, saying that she had been calling agencies, and that not getting a job contributed to her depression.

7. Ms Boorer also suggested that, had the Claimant not resigned on 31 March 2020, she would inevitably have had to leave her employment at some point after that because of ill-health, and in this regard referred to the Respondent's absence review process, at pages R2 onwards. The

Claimant disagreed, saying that if the grievance process had gone "the good way" (i.e. more favourably to her) she would have been much better.

8. The Claimant had not appealed the grievance outcome. Ms Boorer put it to her that, had she appealed and the appeal had not been upheld, she would have resigned at that point. The Claimant's initial response was that it would depend on the grounds for the appeal not being upheld, but then added that it was not possible that if the "threat" (i.e. about the disciplinary process being reinstated if she appealed) had not been included, she would still have resigned.

9. When Ms Breslin asked about the same aspect, by reference to points 1, 2 and 4 of the grievance remaining the same, the Claimant at first replied "I needed my ground floor room". When asked whether she would have continued working had those matters remained unchanged, the Claimant said: "No, I'm not sure. Any normal head teacher would have given me the ground floor and regarding fees [for her children's attendance at the school] I had made an arrangement with the school." The Claimant then added: "The ground floor was a must for me. I would have negotiated that with them. If they had not been able to arrange it until the next year, I don't know. If there was a ground floor room I definitely would have come back. That was my main reason to resign."

10. Dr Aljafari stated that, had the Claimant not resigned, it was likely that the sickness absence process would have been started and that a decision to dismiss could have been made by the end of the summer term, i.e. early July 2020. Dr Aljafari also stated (and this was not disputed) that the Claimant's entitlement to statutory sick pay would have been exhausted by 16 June 2020 and that, had her employment continued thereafter, she would not have been in receipt of any pay.

11. Dr Aljafari also referred to a breakdown in the Claimant's trust in the Respondent's leadership, although she accepted that this did not appear in the grievance outcome letter. In answer to Mr Soskin, Dr Aljafari said that she had not spoken to the Claimant about the sickness absence policy at the relevant time, and that she could not remember if she had invoked that policy on any previous occasion when the Claimant had been absent sick.

Findings and conclusions

12. The Tribunal considered that the best way to set out its conclusions was to show its findings in principle by reference to the different heads of compensation, and then to set out the calculations that followed from these.

Compensation for wrongful dismissal

13. The Tribunal will first set out its decision on compensation for breach of contract (i.e. wrongful dismissal, without notice).

14. The contractual notice period was 3 months, and so covered the period 31 March to 30 June 2020. During that period the Claimant would have been in receipt of statutory sick pay until 16 June had her employment continued, and had she remained on sickness absence. Thereafter, she would have received no pay unless she had returned to work.

15. Ms Boorer recognised that there was an argument that there was a prospect that, if she had not resigned, the Claimant would have returned to work during this period. The Tribunal accepted Ms Boorer's submission that it was unlikely that the Claimant would have returned had the grievance outcome not contained the "threat" attached to the "peaceful solution". In particular, the issue about the ground floor room was, as the Claimant stated in her evidence in the present hearing, very important to her. Additionally, the Claimant had remained unwell until February 2021: it seemed unlikely (although not wholly impossible) that her health would have improved sufficiently to allow her to return to work before the end of June 2020, had the grievance outcome been the same but for the "threat".

16. The Tribunal therefore concluded that there was no real prospect that, in the absence of the "threat", the Claimant would have returned to work before the end of the 3-month notice period, and that compensation for wrongful dismissal should be calculated on the basis of statutory sick pay until 16 June 2020 and nil pay for the remaining 2 weeks to 30 June.

17. As a matter of calculation, the SSP to 16 June 2020 was agreed as amounting to £1,054.35. That is therefore the amount of the compensation for wrongful dismissal.

Basic award for unfair dismissal

18. This was agreed as a matter of calculation at £2,267.48 (being £302.33 per week x 1.5 x 5 years).

19. Ms Boorer argued for two reductions to the basic award. The first arose under section 122(1) of the Employment Rights Act 1996, which provides that:

Where the tribunal finds that the complainant has unreasonably refused an offer by the employer which (if accepted) would have had the effect of reinstating the complainant in his employment in all respects as if he had not been dismissed, the tribunal shall reduce or further reduce the amount of the basic award to such extent as it considers just and equitable having regard to that finding.

20. Ms Boorer submitted that Dr Aljafari's request in her email of 1 April 2020 that the Claimant should reconsider her resignation was an offer of reinstatement. In the circumstances of a resignation rather than an express dismissal, the Tribunal agreed that it was. Was it an offer which, if accepted, would have had the effect of reinstating the Claimant as if she had not been dismissed? In the context of a constructive dismissal, the

Tribunal considered that this had to mean that it would have remedied the breach of contract that had entitled the Claimant to treat herself as dismissed. This in turn would have meant rescinding the "threat" of reinstating the disciplinary process were the Claimant to appeal. Dr Aljafari's email, while offering to arrange an appeal hearing, was silent on the disciplinary process.

21. Recognising the latter point, Ms Boorer argued that the Claimant had not engaged with Dr Aljafari in order to find out what she meant. The Tribunal observes that it is equally the case that Dr Aljafari has not stated in her evidence that her intention was both to allow the Claimant to appeal and to drop the disciplinary process (which is not what she had previously said), and that in her remedies witness statement she referred to the possible outcome of the outstanding disciplinary proceedings. In the event, the Tribunal was not satisfied that the offer was in fact one which would have had the effect of reinstating the Claimant as if she had not been dismissed, in this particular respect.

22. For essentially the same reasons, the Tribunal also found that the Claimant's refusal of the offer was not unreasonable. The offer did not suggest that the prospect of an appeal hearing was other than on terms that the disciplinary process would continue, in accordance with the proposal about the peaceful solution in the grievance outcome letter. Dr Aljafari did not make it clear at the time that she meant something other than that, and has not subsequently said that this was the case. It was not, in the Tribunal's judgment, unreasonable for the Claimant to refuse to rescind her resignation.

23. The second point in relation to the basic award arose under section 122(2) of the Employment Rights Act, which provides as follows:

Where the tribunal considers that any conduct of the complainant before the dismissal……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.

24. Ms Boorer submitted that the Claimant's conduct on 11 November 2019 should be taken into account under this subsection. The Tribunal reminded itself of the evidence about this incident set out in paragraphs 44-47 of its reasons on liability. We concluded that it would not be just and equitable to reduce the amount of the basic award on account of this conduct for the following reasons:

24.1 The situation was inherently stressful and distressing for the Claimant: her children were being excluded from the school.

24.2 It must have been particularly upsetting for the Claimant, who had been told she was required to remove her children, to then be told that she was not permitted to remove them.

24.3 It was not surprising that she became angry and raised her voice in the circumstances.

24.4 The Tribunal noted that Dr Aljafari had taken the view that an immediate apology would have remedied the situation: this was not, in the Tribunal's judgment, a serious incident.

Compensatory award for unfair dismissal

25. Section 123 of the Employment Rights Act includes the following provisions about the compensatory award:

(1) ……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) ….
(3) ….
(4) …..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….
(5) ….
(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

26. The Claimant sought £500 for loss of employment protection. Ms Boorer made no submission to the contrary on this element, and the Tribunal considered that this was a reasonable figure. We therefore assessed compensation under this head at £500.

27. Various issues were canvassed in relation to loss of earnings. Miss Ahmed sought loss of earnings to the date of the hearing and for a further 9 months of future loss. Ms Boorer advanced a number of arguments, as follows:

27.1 Ms Boorer submitted that there was a prospect that the Claimant would have resigned even in the absence of the "threat", putting this at 80-90% taking into account all of the following matters. Ms Boorer contended that the Claimant might have decided not to appeal and resigned on 31 March in any event; if she had appealed, and the element concerning the ground floor room had not been upheld, she might have resigned then; and even if the appeal had been upheld, it was likely that some future incident or criticism would have led to her resigning. On this point, although Miss Ahmed submitted that the Claimant would have appealed in the absence of the "threat", the Tribunal noted the strength of the Claimant's feelings about the ground floor room, and that on a previous occasion in 2019 she had

resigned when she felt unfairly treated, although she had withdrawn this.

27.2 Ms Boorer submitted that there was a chance, which she put at 20%, that the Claimant would have been dismissed for misconduct arising from the 11 November incident. Miss Ahmed argued that Dr Aljafari's indication that a prompt apology would have remedied the situation showed that this was not viewed as serious misconduct.

27.3 Additionally, Ms Boorer argued that there was a prospect that the Claimant would have been dismissed for long-term sickness absence at some point, there being a significant chance (which she put at 80%) of this from July 2020 onwards. Miss Ahmed stated that the Claimant's depression stemmed from the actions about which she has complained: the Tribunal considered that, while this might be true in a broad sense, the Claimant's sickness absence had commenced several months before the breach of contract contained in the grievance outcome, and so cannot have been caused by that (although the breach may have played a part in its continuation).

27.4 In relation to conduct (under section 123(6)), Ms Boorer contended for a 25% reduction on account of the Claimant's conduct on 11 November 2019. Miss Ahmed's submission that the conduct was not serious was also relevant here.

27.5 In relation to mitigation of loss, Ms Boorer submitted that there was no evidence of the Claimant having applied for any jobs prior to January 2021, and that any loss of earnings should be limited to 3-6 months from the date of resignation, while being further reduced within that period on account of the other issues. Miss Ahmed submitted that the Claimant had done everything she could to find employment

28. The Tribunal considered that, rather than making individual assessments of percentage chances for each possible contingency, it was more realistic to make an overall assessment. In doing so, we made the following findings:

28.1 There was a prospect that the Claimant would have resigned in any event even in the absence of the "threat". The Tribunal considered it probable that, without that, the Claimant would have appealed against the grievance outcome, as there would have been no particular reason for her not to do so. We also found that an appeal might or might not have resolved the issue about the ground floor room, but it was likely that it would not have done so, as the person determining the appeal would not have been likely to overturn Mr McWilliams' decision at that point in the academic year. Given her strength of feeling on the point, there was a high chance that the Claimant would have resigned at that point, which probably would have come within 3 months of 31 March.

28.2 For essentially the reasons given in relation to the basic award, there was no real prospect that the Claimant would have been dismissed for misconduct.

28.3 If the Claimant had not resigned, there was a real prospect that the Claimant would have remined absent due to sickness. Her ill-health in fact continued into 2021. There was some prospect, in particular if the ground floor room issue were resolved, that the Claimant would have recovered sufficiently to return to work, but as the Tribunal has found, this was unlikely, at least in the short term. If the Claimant had remained absent due to sickness, it was unlikely that the Respondent would have allowed this to continue into the new academic year, and therefore there was a real prospect that the Claimant would have been dismissed on ill-health grounds.

28.4 For the reasons already given on the conduct issues, the Tribunal considered that it would not be just and equitable to reduce the compensatory award on account of the Claimant's actions on 11 November 2019.

28.5 With regard to mitigation of loss, the Tribunal found that there was no evidence that the Claimant had applied for any jobs before January 2021, as opposed to investigating with agencies what positions might be available. Although the pandemic has had an effect on all areas of life, schools were functioning throughout 2020, albeit often remotely. The Tribunal concluded that, either the Claimant was not well enough to apply for jobs (which was relevant to point (3) above), or that if she was well enough, there had been a failure to mitigate. A claimant is not to be judged by too rigorous a standard in this regard, but the Tribunal considered that, assuming that the Claimant was well enough, there was a failure to mitigate from around July 2020 onwards, when schools would have been looking to the new academic year, and when the Claimant could reasonably be expected to be able to move on from her departure from the Respondent's employment

29. Taking into account points (1), (3) and (5) above, the Tribunal concluded that all of the variables could be allowed for by determining that compensation for loss of earnings should be assessed as that applicable for a period of 3 months from 31 March 2021. Given the Tribunal's finding that there was no real prospect of the Claimant returning to work during the 3-month period, that would amount to statutory sick pay for the period to 16 June, and nil pay thereafter. This amount has already been fully accounted for in the calculation of compensation for wrongful dismissal, and so will not be awarded again.

30. The amount of the compensatory award is therefore £500.

ACAS Code

31. Section 207A of the Trade Union and Labour Relations Act 1992 provides for an increase or a reduction in an award to an employee where a relevant code of practice applies and there has been an unreasonable failure to comply with that code of practice on the part of the employer or the employee. An increase or a reduction may be applied where the Tribunal considers that it is just and equitable to do so, and the limit in each case is 25%. The provision applies to compensation for unfair dismissal and for breach of contract.

32. Both parties relied on section 207A. Ms Boorer submitted that the Claimant's failure to appeal against the grievance outcome was unreasonable and should attract a reduction of 20%. The Tribunal found that the failure was not unreasonable, and that in any event it would not be just and equitable to impose a reduction, where the Claimant had been discouraged from appealing in the circumstances in the present case, and where the Tribunal has found that this amounted to a breach of contract entitling her to treat herself as dismissed.

33. Miss Ahmed argued that discouraging the Claimant from appealing in this particular way amounted to denying her the right of appeal. For the reasons given for finding that the Claimant had not unreasonably failed to appeal, the Tribunal found that the "threat" amounted to a refusal. We also considered that, in the circumstances, it was just and equitable to order an increase in the compensation awarded to the Claimant on account of this. The effect of this – whether or not Dr Aljafari had thought of it in exactly these terms – was to put pressure on the Claimant not to appeal.

34. As to the quantum of the increase, the Tribunal reminded itself that increases at the maximum or upper end of the scale should only be ordered in the most serious cases. The Tribunal considered that this was not such as case. We assessed the increase at 10%.

Calculation of awards

35. The Tribunal calculated compensation for unfair dismissal as follows:

Basic award:	2,267.48
Compensatory award:	500.00
Sub-total:	2,767.48
Add 10% increase:	276.00
Total:	£3,043.48

36. The Tribunal calculated compensation for wrongful dismissal as follows:

Total of SSP to 16 June 2020:	1,054.35
Add 10% increase:	105.00
Total:	£1,159.35

37. The total amount awarded under both heads is therefore £4,202.83. The effect of the Recoupment Regulations on this is that the non-prescribed element of £3,148.48 is payable to the Claimant within 14 days of the date of this judgment, in accordance with rule 66. The prescribed element should be retained by the Respondent until any claim by the Secretary of State for benefits paid to the Claimant during the prescribed period has been satisfied, whereupon the balance should be paid to the Claimant.

Employment Judge Glennie

Dated: …… 29 December 2021……..……..

Judgment sent to the parties on:

30/12/2021.

For the Tribunal Office