EMPLOYMENT TRIBUNALS

Claimant:	**Mrs M Carroll-Cliffe**	
Respondent:	**Pembrey and Burry Port Town Council**	
Heard at:	**Cardiff by video**	**On: 7 January 2022 and in chambers on 17 January 2022**
Before:	**Employment Judge R Harfield**	
	Members	**Mr C Stephenson**
		Ms S Hurds

Representation:
Claimant: In person
Respondent: Mr Bunting (Counsel)

RESERVED REMEDY JUDGMENT

It is the unanimous decision of the Tribunal that the sums payable by the Respondent to the Claimant are:

- Basic award: £4,572.00
- Compensatory award: £28,919.28
- Wrongful dismissal: £6,808.09
- **Total award: £40,299.37**

REASONS

Introduction

1. The remedy hearing came before us on 7 January 2022 following our liability judgment dated 30 May 2021 in which the claimant's ordinary unfair dismissal and wrongful dismissal complaints were upheld. The other complaints of protected disclosure detriment, protected disclosure dismissal and breach of contract (wages) were unsuccessful and dismissed.

2. On 5 January 2022 the claimant made an application (not opposed by the respondent) to postpone the remedy hearing, on the basis that the parties had agreed a settlement sum but were yet to agree settlement wording. EJ Harfield rejected the application on 6 January 2022 on the basis that if the sum was agreed the parties should have sufficient time to agree wording. More time was given to the parties on the morning of 7 January 2022 while the Tribunal had some reading time. The parties were unable to agree terms because of a dispute about costs. It appears that dispute would always have been a bar to the parties agreeing settlement.

3. The claimant had been represented by solicitors throughout the proceedings. On the evening before the hearing the claimant emailed the Tribunal to say that her solicitors remained on the record, but she would be appearing in person at the hearing because she had been informed her solicitor did not have capacity to represent her. EJ Harfield therefore directed the claimant's solicitor to attend the start of the hearing to explain what had happened with regard to representation. The remedy hearing notification had been sent to the parties on 25 October 2021 and the date had therefore been well known to all parties for some time.

4. The claimant and the claimant's solicitor's accounts differed somewhat in relation to representation arrangements for the hearing and they are matters in respect of which the Tribunal does not need to adjudicate. However, ultimately the claimant's position was that she was not in a position to fund representation for the remedy hearing and that would be the position and her decision whenever the remedy hearing took place. The claimant confirmed she was not making a postponement application on the basis of a lack of representation. Neither party had made any other effective applications.

5. The claimant's solicitor was therefore released from attendance at the hearing and the remedy hearing proceeded with the claimant representing herself. We had before us a remedy bundle provided by the respondent's solicitors. We also had before us a remedy witness statement from the claimant, 3 payslips which she wished to rely upon and a list from the claimant of pages within the bundle from the liability hearing that she wished to rely upon. We heard evidence on oath from the claimant. We took an extended lunch break so that the claimant had sufficient time to prepare any closing comments she wished to make and also time to consider the legal framework relating to the calculation of a week's pay under the Employment Rights Act, which is central to the remedy dispute in this case. Mr Bunting also emailed the claimant to identify the key piece of case law he was relying upon in this area, so that the claimant would have time, as a litigant in person to prepare. We have not repeated the parties' closing submissions here, but we took them fully into account. We

reserved our decision as there was insufficient time for the panel to deliberate and to deliver an oral judgment. In fact, we were unable to complete our deliberations and did so on a further day in chambers on 17 January 2022.

The issues to be decided

6. Having read the remedy bundle (and in particular the schedule of loss and counter schedule of loss) and the claimant's witness statement we identified with the parties that the key areas of dispute appeared to be:

   (a) The calculation of a week's pay under the Employment Rights Act;
   (b) The calculation of the basic award (particularly in relation to the calculation of a week's pay);
   (c) The basis of the calculation of pay for the purposes for the loss of earnings element of the compensatory award;
   (d) The mitigation of loss for the purposes of the compensatory award;
   (e) The amount of any award for loss of statutory rights;
   (f) Whether the claimant was entitled to an Acas uplift and the calculation of such an uplift;
   (g) The size of the award to the claimant under Section 38 of the Employment Act;
   (h) The calculation of the statutory cap that applies to the claimant's compensatory award (and in particular the calculation of a week's pay);
   (i) The calculation of any separate wrongful dismissal award.

7. We also noted, dependent upon our primary findings, that there may be issues arising in relation to taxation and the need for grossing up, and also recoupment in respect of social security benefits. We explained these concepts to the claimant.

The relevant legal principles

Basic award

8. Under section 118 Employment Rights Act (ERA), where the award sought in a successful unfair dismissal claim is compensation, the award must consist of a basic award and a compensatory award. The basic award is calculated in accordance with sections 119 to 122 ERA. The amount awarded depends on whole years length of service, age and a week's pay. It is a week's pay that is in dispute in this case.

9. A week's pay is in turn calculated by Part XIV Chapter 2 ERA. Section 220 states that the amount of a week's pay of an employee shall be calculated for the purposes of the Employment Rights Act in accordance with that chapter.

10. Section 221(1) and (2) says:

"(1) This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.

(2) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a weeks' pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week"

11. Section 234 is concerned with normal working hours. It states:

"(1) Where an employee is entitled to overtime pay when employed for more than a fixed number of hours in a week or other period, there are for the purposes of this Act normal working hours in his case.

(2) Subject to subsection (3), the normal working hours in such a case are the fixed number of hours.

(3) Where in such a case –
(a) The contract of employment fixes the number, or minimum number, of hours of employment in a week or other period (whether or not it also provides for the reduction of that number or minimum in certain circumstances), and
(b) That number or minimum number of hours exceeds the number of hours without overtime,
The normal working hours are that number or minimum number of hours (and not the number of hours without overtime)."

12. The Court of Appeal addressed section 234 in relation to overtime and normal working hours in Tarmac Roadstone Holdings Ltd v Peacock and others [1973] ICR 273. It was held there were 3 different categories of overtime:

(a) Guaranteed compulsory overtime where, even if the employee is not called upon to work the overtime, the employer is obliged to pay for it. Overtime of this nature is included in normal working hours;
(b) Voluntary overtime, where an employer cannot compel an employee to work overtime and does not have to provide it. Such overtime is excluded from normal working hours;
(c) Non guaranteed overtime, where an employee is obliged to work overtime if required by the employer but imposes no obligation on the

employer to provide overtime or offer payment in lieu. Such overtime is again excluded from normal working hours.

13. In the Tarmac case the claimant's contract provided for payment of overtime rates when he worked more than 40 hours. He was obliged to work overtime, and he regularly worked more than 57 hours a week. However, the employer was not obliged to provide overtime and the claimant's weekly pay fell to be calculated on the basis of a 40 hour week.

14. Section 227(1)(a) states that for the purpose of calculating an unfair dismissal basic award the amount of a week's pay shall not exceed a specified figure. The figure is changed by Order each year and is referrable to the effective date of termination. For the period 6 April 2018 to 5 April 2019 the cap on a week's pay was £508.

Compensatory award

15. The compensatory award is governed by sections 123 and 124 ERA. In particular section 123 says, where relevant:

(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 and 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. …

(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…

16. Section 124 sets a limit on the amount of a compensatory award calculated in accordance with section 123. The amount is the lower of a given figure that is updated every year or 52 multiplied by a week's (gross) pay of the person concerned. Unlike the basic award, the week's pay is not capped by the statutory maximum of £508 but it does still fall to be calculated in accordance with Part XIV Chapter 2 ERA. It is this 52 week

cap that applies in the claimant's case to the maximum that can be awarded by way of a compensatory award.

17. Section 124A states:

"*Where an award of compensation for unfair dismissal falls to be –*

(a) Reduced or increased under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (effect of failure to comply with Code; adjustment of awards), or
(b) Increased under section 38 of that Act[1] *(failure to give statement of employment particulars),*

The adjustment shall be in the amount awarded under section 118(1)(b) [calculation of a compensatory award] and shall be applied immediately before any reduction under section 123(6) or (7)."

18. Section 207A(2) TULR(C)A provides that: "*If in any proceedings to which this section applies, it appears to the employment tribunal that – (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) the failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent*."

19. Section 207A(5) provides that where an award falls to be adjusted under that section and under section 38 of the Employment Act 2002 the adjustment under Section 207A is made first. Section 207A(1) states that the section applies in respect of claims proceeding before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2. The schedule includes unfair dismissal claims and claims brought for breach of contract under The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

Discussion and Conclusions

Basic Award

20. It is not in dispute that the claimant's is entitled to 1.5 weeks' pay for her 6 years of complete service. What is in dispute between the parties is the value of a week's pay. The respondent states that the claimant was earning gross annual pay of £24,180 a year and therefore her gross

weekly basic pay a week was £465.00. They assert that in any event the maximum that can be awarded for a week's pay for the basic award is capped at £508 a week. The respondent's position is that the claimant was contracted to work 27 hours a week in respect of which she was paid a salary.

21. The claimant asserts that the calculation of a week's pay under ERA should be higher than the amount of £465. To the best the Tribunal could understand her position it was that:

(a) There had been an express oral variation to her contract of employment that she would work full time at 37 hours a week instead of her previous part time hours of 27;
(b) Alternatively, there had been a variation to her contract of employment to full time hours by custom and practice;
(c) Alternatively, again, she was entitled to guaranteed overtime (by way of an express or implied variation of her contract) to take her up to 37 hours a week.

22. The claimant's witness evidence was that on 27 July 2017 the respondent's chairs committee decided that the post of Clerk should be considered to be a full time post. She relies on the minutes of the meeting contained in the remedy bundle (she was not actually present at the meeting). The minutes state:

"3. FUTURE NEEDS AND STAFF RESOURCES

3.1 Agreed that based on increasing responsibilities for the Town Council Needed to re-examine the current staff resources and increase them.

3.2 Agreed that the posts of Clerk and TSO should be considered as full-time posts and that the arrangements for the Finance Officer should be reviewed.

3.3 Agreed that if the roles, times and workload for posts are changed or increased the posts should be advertised."

23. The claimant says that previously when she had worked occasional additional hours she was paid at enhanced overtime rates of time and a half or double time. She says that as the Council and her role became

[1] There appears to be a drafting error in the legislation and properly read this is in fact a reference to section 38 of the Employment Act 2002

busier, she was working long hours and the equivalent of full time. She says at that time Councillor Owens told her that due to the significant increase in her working hours and the respondent's recognition that her hours should be regarded as full time hours, and that all of her hours worked would be paid at the normal flat rate. She says she was told this was an interim arrangement until the job evaluation process was complete when she would receive a new written full time contract. She says she was told to notify Councillor Owens of the additional hours worked. The hours were then sent by the claimant to Carmarthenshire County Council who ran the payroll.

24. The claimant says that her January payslip only shows an additional 17.3 hours being paid at flat rate because she had some leave at Christmas and the offices were closed for a period. She says that her February payslip then shows she was paid an additional 40.3 hours for the month of January and in March she was paid an additional 41 hours (for February). She says that full time hours for the respondent are 37 a week. She says that whilst she was on sick leave she only received sick pay based on 27 hours a week not 37 but that she was not in a position to challenge the level of her pay at that time.

25. The respondent did not accept that there had been any contractual variation to move the claimant to full time hours or guaranteed overtime. Mr Bunting said that the claimant's witness statement had only been received the evening before the remedy hearing and the respondent had not appreciated, from the meeting minutes alone, that this was the nature of the claim the claimant was bringing. He said the respondent had therefore not been in a position to call a witness. He accepted, however, that he was not seeking a postponement to do so.

26. In the Tribunal's judgment the chairs committee meeting minutes read as agreement being reached amongst the committee chairs that the requirements of the Clerk's post (and TSO) were for full time hours and looking forward that is what they would be moving towards as opposed being to a unilateral decision to change the claimant's contract there and then to a full time contract. This is supported by the reference to the need to advertise posts and also by what happened next as to what was said to the claimant and what happened with her hours and pay.

27. We consider it likely, and find, that Councillor Owens then said to the claimant words to the effect that they knew the claimant needed to work longer hours than her 27 hours, that when the job evaluation process was sorted the claimant would be given a contract for full time hours, but in the meantime she could work additional hours up to full time as needed and if

she notified him of the hours she would be paid. However, given the frequency of these hours they would be paid at the plain time rate. The claimant was expecting the job evaluation process to be completed in fairly short measure. She therefore agreed, notwithstanding the reduction in the rate of pay. We have reached this conclusion as it is the most natural fit as to what happens with the reporting of the claimant's additional hours to Councillor Owens and Carmarthenshire County Council's administration of those hours on the payslips where they are recorded as overtime and paid at the plain rate (notification of which was given by the claimant herself). It is also similar to the arrangement that the Tribunal recalls from the liability hearing was put in place for the TSO at the time. It also fits with the claimant only being paid for those additional hours when she actually worked them, and hence why they were not paid when she was on holiday, or on sick leave and why the figures vary from month to month as opposed to always being based on 37 hours a week. We also consider that if the claimant had been guaranteed 37 hours work a week (whether a change to her primary working hours or whether by way of guaranteed overtime) it is something she would have challenged during her sick leave and thereafter as she would have considered herself underpaid.

28. Based on these findings of fact, we do not find that there was an express variation of the claimant's contract agreed between her and Councillor Owens that she was now employed on a full time contract.

29. There is no clear authority as to whether a variation in a term in a contract of employment can be implied through custom and practice.[2] However, for a term to be implied into an employment contract by way of custom and practice requires that the term be reasonable, notorious and certain. This means that the custom must be fair and not arbitrary or capricious, that it must be generally established and well known, and it must be clear cut whether in a particular trade or industry, a particular locality or by a particular employer. The basis behind the principle is that parties in the trade/ industry/locality/employer were aware of the long term custom and tacitly agreed it should be part of their contract without any need to put it in writing. We do not find that there was a custom or practice that the claimant worked on a full time contract. There was no long term employer or trade wide practice that was notorious and certain.

30. It may be that the claimant's argument was intended to be that variation to her contract should be implied from the conduct of the parties. Variation can sometimes be implied where the employee's conduct, by

[2] See Solectron Scotland Ltd v Roper and others [2004] IRLR 4

continuing to work without protest to the new term, is only referable to their having accepted new terms imposed by the employer. We do not find there was such an implied variation here. On our findings of fact, the variation being offered to the claimant about how overtime would be handled until the job evaluation process was complete, not a change at that time to the claimant's baseline contractual hours. The conduct of the parties is referrable to how overtime would be handled, not to a change to full time hours.

31. On the face of it, therefore, the claimant had normal working hours of 27 hours a week. But we then have to address the claimant's secondary argument her overtime then falls to be included within normal working hours. Again, we do not find that is the case. We do not find that the overtime was guaranteed, compulsory overtime. To be so the employer has to be obliged to pay for the overtime even if the employee is not called upon to work it. We do not consider that such a suggested arrangement or agreement corresponds with the facts as found in this case. If 10 hours overtime were guaranteed a week (or the equivalent monthly provision) there would be no need to record the hours and notify them to Councillor Owens and in turn to the County Council for payment purposes. Moreover, the claimant would have been paid the hours when sick, when on holiday or when the council offices were closed (and she would have challenged it if she was not). The claimant's situation instead was one where the respondent had no obligation to provide overtime or offer payment in lieu. Like in the Tarmac case, that the claimant may have regularly worked more than her base line hours does not mean that it meets the relevant test in section 234.

32. It follows that sections 234(1) and (2) apply. The claimant was entitled to overtime pay when employed for more than a fixed number of hours (27) in a week. The normal working hours are the fixed number of hours of 27. Under Section 221(2), if the claimant's remuneration did not vary with the amount of work done in that period, the amount of a week's pay is determined by:

> *"the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week."*

33. In University of Sunderland v Drossou [2017[ICR D23, the Employment Appeal Tribunal found that an employer's occupational pension contributions formed part of a week's pay. It was held that remuneration is a reward in return for services and employer's pension contributions met that test.

34. It follows that a week's pay should be what is payable to the claimant under her contract of employment on force on the calculation date, which can include employer pension contributions.

35. At the time of the claimant's dismissal the job evaluation process had not completed. New contractual terms had not been agreed. In our liability judgment we also addressed the point that there had also been no effective variation to the claimant's pay rate from SCP 36 to 38 because there had been no acceptance on the part of the claimant to that proposed variation. As such, and whilst the Tribunal appreciates that the claimant here was a victim of the respondent's delays, a week's pay falls to be assessed on the basis of her contractual position of her existing rate of pay at 27 hours a week.

36. The claimant in her oral closing submissions gave us the rate for SCP 36 of £38,813 which she said was in place from March or April 2019. The difficulty with that, however, from the Tribunal's perspective is that the claimant's effective date of termination was in February 2019 which would be before the annual uprating of pay awards in the April. In our judgment, the most reliable indicator of the claimant's contractual rate of pay at the time of the termination of her employment comes from her payslips. These show (for example at [1529] from the liability bundle) the claimant receiving basic gross pay each month of £2015.03. That equates to £24,180.36 a year on a part time contract of 27 hours a week (the full time equivalent would be £33,136.05).

37. £24,180.36 divided by 52 is gross pay of £465 a week, which is the figure given by the respondent in their counter schedule of loss. The claimant was, however, also in receipt of employer pension contributions. In her schedule of loss she asserts this has a value of 23.5%. The respondent does not deal with the pension claim in their counter schedule. No other information is given by either party about the pension scheme. Looking at the claimant's pay slips, it would appear that employer pension contributions are valued at 19.6%. That would give a weekly value of £91.14. Added to £465 that totals £556.14 a week.

38. This figure of £556.14 for weekly pay is above the statutory cap on a week's pay which at the time was £508. In terms of the basic award, the figure is therefore capped at £508. The respondent's calculation at **£4572.00** is therefore the correct one and is the sum we award for the basic award.

Compensatory award

Financial Losses

What the claimant would have earned if the dismissal did not happen

39. The claimant is seeking immediate financial losses of pay and pension until 15 March 2021 when she found new employment. The respondent asserts that the claimant has failed to mitigate her losses in seeking new employment.

40. We have to determine the loss sustained by the claimant in consequence of her dismissal in so far as that loss is attributable to action taken by the respondent. Before considering the question of mitigation we therefore have to firstly consider what would have occurred to the claimant but for the dismissal. What net pay and benefits would the claimant have earned but for the dismissal? What are the sums the claimant reasonably expected to receive if she had remained in employment? That is a point that neither party addressed us on in any meaningful way whether in evidence or by way of submissions. Given the complicated factual background it is also a question that is very difficult to answer. But it is an assessment as a Tribunal that we have to make doing the best that we can on the information we have and looking at the likelihood, in our judgment, of the sums the claimant would have become entitled to if she had not resigned/been dismissed. That can include overtime, whether contractual or not, where there is a reasonable expectation that it would have been worked and likely pay increases. The losses have to flow from the dismissal i.e., the claimant's acceptance of the repudiatory breach rather than the employer's repudiatory conduct itself. However, we also have to consider that point from the perspective of assuming that this employer would act in a fair and rational way. To do so otherwise would not be awarding an amount we consider is just and equitable under section 123[3].

41. We consider it likely that if the claimant were not dismissed/resigned then she would have returned to work with some measures in place. We consider it likely that those measures would have involved prompt resolution of the claimant's outstanding pay evaluation. In our liability judgment we made a finding that the understanding of the parties was that Mr Egan's pay evaluation would be the guiding report as to what would happen next in terms of the claimant's pay. We noted that the respondent, whilst saying they did not accept Mr Egan's assessment, had not been able to clearly set out exactly that it was they said he had got wrong. We found that to act in a manner compatible with maintaining trust and

[3] See in this regard Toni and guys (St Paul's Limited) v Georgiou [2013] ICR 1356 and also (albeit in the context of discretionary bonuses) Horkulak v Cantor Fitzgerald International [2005] ICR 402.

confidence the respondent should have promptly clarified any issues they did in fact have with Mr Egan's analysis, and then made a rational, reasonably prompt, non-capricious decision in good faith about the claimant's pay that also reflected the expectation that Mr Egan's report was the agreed guiding framework. We found that would also involve proper consultation with the claimant. We found that it is a process which, if done fairly and appropriately, should not have taken long. We did not accept that the respondent had an intention to get a further comparative report from Carmarthenshire County Council and held that in any event if the respondent had done so that would have in itself been a breach of trust and confidence and would not have been in good faith.

42. Bearing in mind those findings, we are of the view that the if this employer had been acting fairly and in good faith the claimant's return to work would have involved prompt negotiation and resolution about the claimant's pay, her hours of work and the issue of back payment. We further consider that it is likely the respondent, given their previous commitment, would have resolved that they needed to honour Mr Egan's pay evaluation. They were also aware of the need to move the role over to full time hours rather than continuing to pay overtime. Mr Egan's conclusion was that the Town Clerk should be on LC3 Points 48-51 which he says in salary terms in 2017/18 equates to £42,899 to £46,036 per annum pro rata ([608] in the liability bundle). That represented a significant increase for the claimant and a significant increase in cost for the respondent, compounded by the potential for backdating. The respondent had indicated it would apply backdating to 10 July 2017 the claimant was seeking further backdating again. It seems inevitable that the implications of Mr Egan's pay evaluation would have been beyond anything that the respondent had budgeted for, and they are primarily funded through the precept. There would therefore have been a limit on their means.

43. Taking that all into account we consider it most likely that the respondent would have sought to agree a deal with the claimant that she would be moved to full time hours at the bottom of the pay scale given by Mr Egan but on the basis that there would be no backdating. The issue of backdating would have been complicated in any event because of the overtime the claimant had worked. We cannot see that the respondent would both pay the claimant overtime pending being moved to a fulltime contract and then also backdate such pay. We consider that the claimant would have been likely to agree to such a proposal. The respondent's resourcing situation had never been lost on her and she had been patient with the time the respondent had been taking to resolve the pay evaluation process. What she had been seeking was a resolution to that process and a pay evaluation process that was properly and transparently undertaken. It is therefore likely, in our judgment, that such an agreement would have been reached between the parties.

44. We therefore consider that the claimant's losses should be calculated on the basis of the pay and pension she would have received at LC3 point 48 through to (before mitigation is considered) the date that she started new employment. We do not have the figure for February 2019. We therefore use the figure of £42,899 given in Mr Egan's report. We add to that employer pension contributions at 19.6% which would total a further £8408.20 gross a year. The net figures need to be identified. However, before finalising the mathematical calculations we address the point of mitigation.

<u>Mitigation</u>

45. In respect of mitigation the burden of proof is on the respondent to prove that the claimant has acted unreasonably in failing to mitigate. We have to consider what steps were reasonable for the claimant to have to take in order to mitigate her loss. We have to consider whether she did take reasonable steps to mitigate her loss and to what extent, if any, the claimant would have actually mitigated her loss if she had taken those steps. We have to bear in mind that a failure to take a particular reasonable step or steps by an employee is not the same as the employer establishing that a claimant has acted unreasonably in failing to mitigate her losses; it would set the hurdle too high. It was helpfully said in <u>Archbold Freightage Ltd v Wilson</u> [1974] IRLR 10 that the duty to mitigate will be fulfilled if the claimant can be said to have acted as a reasonable person would do if she had no hope of seeking compensation from her previous employer.

46. The claimant's witness statement sets out her evidence on mitigation and there are also some documents, as identified by the claimant, in the original liability bundle. She was also cross examined about mitigation.

47. After her resignation the claimant initially considered the prospect of returning to be a family law practitioner. She contacted former contacts in local firms to see if there were any vacancies. There were none. The claimant therefore decided to widen her ambit and look at other sectors where she could utilise her legal background and her town council/public sector background. In the 13 months following her resignation, other than the steps set out above to consider a return to family law, the claimant applied for one job. That was post of external reviewer for the Local Government and Social Care Ombudsman in March 2020 [1538 of liability bundle]. She then applied for a job as Assistant Land Registrar in August 2020 [1539],

48. It appears to the Tribunal that by the Autumn of and then onwards the claimant took more significant steps to apply for work. She applied for a

job as a work coach with DWP in October 2020, as Associate Investigation Officer with the Public Services Ombudsman for Wales in or around October 2020, and a role as a chaperone in October 2020. At some point the claimant then applied for and was successful in the role she now has in the NHS. On dates unknown (other than the claimant says it was sometime in 2020) the claimant registered with various job websites that send out alerts including the NHS, the civil service, and linked in. Her search parameters included a wide radius from home for jobs in the NHS, legal, audit, governance, investigations, policing, and policy sectors. In September 2020 the claimant had also applied for jobseeker's allowance and had the assistance of the Job Centre in looking for work.

49. We acknowledge that the claimant had been on sick leave prior to her resignation. But we were also not given any medical evidence to suggest that the claimant was medically too unwell to look for work after her resignation. The claimant says that her confidence was knocked following what had happened with the respondent and also that she was hampered in finding work because of geographical restrictions. Burry Port is not immediately surrounded by cities with largescale employers, and she had childcare commitments. We take account of that but also the fact that the claimant has many skills and experience to offer the world of work. The claimant said the covid pandemic made finding employment difficult albeit as time went on it then opened up fresh opportunities for home working. We acknowledge the point; however, the impact of the pandemic was only really first felt in March 2020, over a year following the claimant's resignation.

50. We accept that following her resignation the claimant would have needed a period of time to process all that had happened and be emotionally in a position where she was able to look for work. We do not consider, on the evidence available, that would reasonably have been more than about 3 months. It was also a reasonable first step to consider a return to family law and to make the enquiries the claimant did. That would not, however, have been a long process. Thereafter it was reasonable for the claimant to expand her job search to the type of work and the radius that are shown on the job alert documents in the liability bundle. We are mindful of the burden of proof and the absence of any alternative job adverts being put forward by the respondent. However, standing back and looking at it we are unable to accept that if the claimant had been actively pursuing such searches there would only have been, in the first year, one potential job (i.e., the external reviewer job) thrown up. Looking at the ambit of the claimant's job search alerts and the jobs we later see the claimant applying for, we simply do not find it plausible that there was only one job in 13 months that the claimant could apply for within those parameters.

We therefore do not consider that the claimant, until around September 2020, took reasonable steps to mitigate her loss.

51. Turning to the question of what extent, if any, the claimant would actually have mitigated her loss if she had taken such steps, we consider that it is likely the claimant would have been able to secure equivalent work by January 2020. We have factored in the claimant needing about 3 months to be in a position to be able to start looking for work, time then to search for work, make applications, go through various application and interview processes, and the time involved in securing a job offer and then starting work. We consider that with reasonable steps taken in mitigation the claimant should have been in a position to return to equivalent work by January 2020.

52. Turning to the mathematical calculation we have decided to deal with the claimant's notice pay claim separately below in relation to the wrongful dismissal claim. The start of the period of financial losses for the unfair dismissal compensatory award therefore commences 6 weeks after the effective date of termination which is 26 March 2019. If the claimant had not been dismissed, she would have been paid the appropriate net income for the period 26 March 2019 to 1 January 2020 at the gross rate of pay of £42,899.00. In addition, the claimant lost the value of employer pension contributions at 19.6% worth £8404.20 gross. The total gross benefits package would therefore be £51,303.20. Netted down using standard tax rates as at the 2019/2020 tax year would give a weekly net figure of £736.38. 26 March 2019 to 1 January 2020 is 40 weeks. 40 x £736.38 = **£29,455.20** net loss of pay and benefits in the period.

Loss of statutory rights

53. The Tribunal awards the sum of £**500.** We consider that is the appropriate sum, being approximately the value of a week's pay at the time of the claimant's dismissal. This takes the compensatory award to £29,955.20.

Acas Uplift

54. The respondent asserted that no Acas uplift should be awarded as there had not been any specific breaches of the Acas Code identified and that any failure that may be identified by the claimant could not be said to be an unreasonable failure. Thereafter it was said that the Tribunal had a residual discretion such that it would not be just to award and uplift and even if that discretion were exercised any uplift awarded should be a small one bearing in mind this was a modest sized organisation.

55. The claimant submitted that breaches of the Acas Code of Practice relating to grievances had been identified, particularly in relation to not having been given a full copy of the grievance investigation report, not concluding the claimant's grievance, not giving the claimant a final grievance outcome letter, not giving the claimant the right of appeal, and not honouring the proposed grievance outcome in terms of being open with the claimant about the pay evaluation process, its results, or the offer of a right of appeal about pay evaluation (paragraph 252(d), (e) and (f) of the liability judgment. The respondent's counsel was asked if he had any further submissions to make in response to this, and he said he did not.

56. The claim to which these proceedings relate does concern a matter to which a relevant Code of Practice applies. The claimant's grievance, and its handling, is a substantial part of the backdrop to the claimant's constructive unfair dismissal claim, including that part of the claimant's grievance that related to the pay evaluation process. We do consider that our liability findings amount to a finding that the respondent had failed to comply with the Acas Code of Practice relating to grievances in relation to that matter. The Code Provides that "employers… should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions." It states, "Following the [grievance] meeting decision on what action, if any to take. Decisions should be communicated to the employee, in writing, without unreasonable delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance." It states, "Employers should allow an employee to appeal against any formal decision made." The findings of fact show those principles were not met and we find that these failings were unreasonable for the reasons already set out in the liability judgment.

57. We do consider it just and equitable to increase the award to the claimant. Our findings of fact included that the grievance outcome suggested to the claimant in the meeting was that Mr Egan would undertake his job evaluation and that would be the guiding basis for concluding the job evaluation. It was said the claimant would be given the detailed results of the process and the right of appeal. The respondent then did not do this, and we found that the respondent had deliberately sat on Mr Egan's report because they found its content to be unpalatable. The respondent therefore obstructed and did not honour what they said they would do. There was no actual grievance outcome letter and thereafter no right of appeal. This was significant conduct, particularly in relation to the pay evaluation side of the claimant's grievance.

58. We do not award the maximum 25% because we have taken into account the fact that the respondent did have a grievance process that it initially followed, including the proper appointment of Mr Egan to investigate the grievance and report. We have decided in the circumstances that it is just and equitable to award an uplift of 15%. That produces an additional sum of **£4493.28**

Section 38 Employment Act 2002

59. The respondent submits that only 2 weeks' pay should be awarded on the basis that this was a small employer and they had made some attempt to resolve contractual issues. We award the full 4 weeks. The claimant's statement of particulars of employment had been outstanding for 6 years. The four weeks' pay which is capped at the maximum limit on a week's pay at the time of the claimant's dismissal. 4 x £508 = **£2032.00**

Grossing up

60. The total awards are:

- Basic award £4572.00
- Loss of earnings/pension £29.455.20
- Loss of statutory rights £500.00
- Acas uplift £4493.28
- Section 38 EA award £2032.00
- This totals £41,052.48.

61. The award exceeds £30,000 by £11,052.48 which must be grossed up. The claimant is earning £40,057.00 in her new employment. We presume that will exhaust her tax free personal allowance in the current tax year. The basic rate of tax runs from £12,571 to £50,270. We therefore presume that the claimant's earnings in her new employment will all be taxed at the basic rate and would use up £27,487 of that tax band leaving sufficient room in the basic rate tax band for the element of the tribunal award requiring grossing up to also fall within it. The award would therefore be taxable at the basic rate of 20%.

62. £11,052.48 /80 x 100 = £13,815.60. The tax element is £13,815.60 minus £11,052.48 = £2763.12. The sum of £2763.12, representing tax due, therefore needs to be added to the compensatory award.

Application of the statutory cap

63. The calculations prior to the application of the statutory cap are:

- Basic award £4572.00
- Loss of earnings/pension £29.455.20
- Loss of statutory rights £500.00
- Acas uplift £4493.28
- Section 38 EA award £2032.00
- Grossing up £2763.12

64. The compensatory award prior to application of the cap totals £39,243.60. The statutory cap applied is £28,919.28 (52 x weekly pay of £556.14). The claimant is therefore awarded for her unfair dismissal claim a basic award of £4572.00 and a capped compensatory award of **£28,919.28.** We would add that it seemed likely to us that whatever way we approached the claimant's losses flowing from her dismissal and the question of mitigation, the outcome in terms of the cap would have remained the same. The law is also clear that all of the above adjustments and calculations must be undertaken before the application of the statutory cap.

Notice pay

65. The claimant succeeded in her wrongful dismissal claim. It is not in dispute that she was entitled to a notice period of 6 weeks. The claim is a contractual one and the claimant is entitled to a sum that would put her in the position she would have been in had the contract been performed by the employer lawfully terminating the contract. The claimant is therefore entitled to the benefits she could have received had she remained in employment until the end of her notice period. Awards for post employment notice pay are treated as taxable by HMRC and should be awarded gross. We award 6 x £986.68 (to represent gross pay and loss of employer pension) totalling **£5920.08**.

66. We also award the Acas uplift of 15% that can likewise apply in a wrongful dismissal claim[4]. Our reasoning is as set out for the unfair dismissal claim. The uplift is **£888.01.**

Recoupment

66. The unfair dismissal award potentially falls within the remit of the Employment Protection (Recoupment of Jobseeker's Allowance and

[4] See *Brown v Veolia ES (UK) Ltd* (UKEAT/0041/20/JOJ)

Income Support) Regulations 1996. However, under Regulation 8 the requirements do not apply where the Tribunal is satisfied each day for which the prescribed elements relate the employee has not received or claimed any of the benefits in question. The claimant was not in receipt of benefits until June 2020 which is after the period covered by the unfair dismissal compensatory award. The recoupment regulations therefore do not apply.

Employment Judge R Harfield
Dated: 18 January 2022

JUDGMENT SENT TO THE PARTIES ON 19 January 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche