EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms R McSherry	**v**	**Mr P Gupta** **Mrs R Gupta**

Heard at: Watford, in part by CVP **On:** 17-20 January & 21 February 2022

Before: Employment Judge R Lewis
Mr N Bustred
Ms A Brosnan

Appearances:

For the Claimant: Dr K Hewlett (all dates except 18 January) and Ms S Cullen (18 January only)

For the Respondents: In person

JUDGMENT

1. The respondents are correctly named above.

2. The claimant was at the material time a person with disability by virtue of dyslexia.

3. The claimant's claims of disability discrimination fail and are dismissed.

4. The respondents dismissed the claimant unfairly and her claim of unfair dismissal succeeds.

5. The respondents failed to give the claimant contractual notice and her claim for breach of contract (notice pay) succeeds.

6. The claimant's claim for holiday pay fails and is dismissed.

7. The claimant's claim for arrears of pay (March 2020) fails and is dismissed.

8. The claimant's basic award for unfair dismissal is reduced by 25% because of contributory conduct.

9. The claimant's compensatory award for unfair dismissal is reduced by 75% because of contributory conduct.

10. The Tribunal awards the claimant as compensation for unfair dismissal the sum of 189.00.

11. The Tribunal awards the claimant as damages for breach of contract the sum of £189.00.

12. The Tribunal awards the claimant as uplift for failure to follow the ACAS Code the sum of £37.80.

13. The total sum ordered payable by the respondents to the claimant is accordingly £415.80.

14. Costs / preparation time applications submitted by both parties are by consent dismissed on withdrawal.

REASONS

Procedure

1. The claimant has asked for these reasons in writing. This was the hearing of a claim presented on 2 June 2020. The claimant has at all times acted in person, with the support of Dr Hewlett and Ms Cullen, who are expert advisers and supporters in relation to dyslexia. The respondents have at all times acted in person. A Case Management Hearing took place before Judge Lang on 8 December 2020. His Order is at pages 49-57 of the bundle. Notice of these hearing dates was issued on 11 January 2021.

2. The Tribunal is familiar with the difficulties often faced by members of the public who represent themselves, or by lay representatives without experience of the Tribunal. We intend no criticism of anyone whom we saw or heard when we say that in preparing the case, the claimant, her representatives and the respondents were on unfamiliar territory, and plainly struggled with the structure and technique of Tribunal litigation. We accept that all did their best in good faith to present their cases and assist the Tribunal. We endeavoured to fulfill our duties under the overriding objective. At the end of the case, we did not consider that inexperience of the Tribunal had placed any party at a disadvantage, or made a difference to the presentation of the case or outcome; but we do not say the same about the involvement of Koru Kids Ltd, which features in the fact find below.

3. There was an agreed bundle of 550 pages. It was not in chronological order. It was not easy to work with; and much of the material which it contained touched on topics about which the parties felt strongly, but which were not considerations for the Tribunal.

4. The hearing was listed to be fully in person. At the start of the first day, we explained to the parties how CVP would operate, and confirmed that as all parties had the paper bundles, the Tribunal was flexible about participation in person or on CVP. The parties elected to proceed fully in person. At the

end of the third day, when submissions had concluded and all that remained were deliberation and delivery of judgment, the parties agreed that the fourth day could take place entirely by CVP. We thank them for their courtesy and flexibility. On the first day, we explained procedure to the parties and adjourned to read. We asked each party to identify about 25 pages of crucial documents from the bundle for our pre-reading and they did so. We dealt first with the question of whether the claimant met the s.6 definition of disability. We gave judgment on the afternoon of the first day, having decided that she did.

5. Judge Lang had directed an impact statement to be prepared. Following template wording used in many cases, he had in fact not directed that the impact statement be prepared by the claimant, and contrary to our invariable experience, the impact statement had been submitted by Dr Hewlett. We explained to the claimant that our task was to make a decision about how dyslexia impacted her, not about the generality of the condition. When we adjourned at around 12 noon on 17 January, we told the parties that we would take the claimant's evidence on impact of disability at 2pm, and asked her to be ready then to give personal examples of how dyslexia affected her.

6. On the second and third days, we heard the claimant's evidence and then that of Mrs Gupta. There were no other live witnesses. The hearing proceeded relatively slowly. On the second day, the claimant plainly found the experience of giving evidence, being questioned or challenged, difficult and at times emotive. We took breaks approximately every 50 minutes, and it was necessary to break when parties or witnesses were upset by how matters proceeded. A witness statement produced a few days before the start of the hearing (ie in January 2022) by Ms Cullen was read but did not take matters any further. On the third day, we heard Mrs Gupta's closing submission first, then after an extended lunch break, Dr Hewlett replied.

7. At the end of the third day the Judge took time to explain to the parties the procedure for delivery of judgment and for requesting reasons. He explained three main points: that reasons are available as of right if requested by either party within the time limit provided in the rules; secondly that a party who wants to appeal against any part of our judgment must have written reasons to support the appeal; and that thirdly written reasons are posted online, in a routine procedure which has had a troubling impact on the work of the Tribunal and on members of the public.

8. On the fourth day, the judge delivered judgment. His summary took about 50 minutes. The Tribunal then adjourned for lunch. After the break, the Tribunal asked the parties if there was a request for written reasons at that stage and both parties declined.

9. The Tribunal met for the remedy hearing on 21 February 2022. The claimant had submitted a schedule of loss. We proceeded informally. We asked Mrs Gupta to set out a factual framework of the events of 2022 after the claimant's dismissal. The claimant then adopted her schedule of loss and was briefly questioned. There were submissions from both parties. After we had given judgment on remedy, both sides stated a wish to apply for preparation time costs orders. We listed a hearing date in May.

However, it was vacated on the tribunal being notified that both sides had decided not to pursue the applications. In the course of that correspondence, the claimant requested written reasons.

General approach

10. We preface our findings with points of general approach. In this case, as in many others, comments, submission and evidence touched on a wide range of issues. Where we make no findings about a matter of which we heard, or where we do make a finding, but do not go to the detail to which the parties went, that should not be taken as oversight or omission, but as a reflection of the extent to which the point truly assisted the Tribunal.

11. The task of the Tribunal is to deal with economic relationships. We were keenly aware that in this case the economic relationship went beyond the usual workplace. The respondents employed the claimant as a nanny in their home for about two and a half years. The claimant's children were almost exactly the same age as the respondents' children. The case therefore touched on a number of issues of deep personal and intimate concern, including the privacy and safety of the home, the welfare of four children, and a working relationship entwined with those questions. It was not surprising that there was a great depth of emotion about the case. We recognise the strength of feeling on both sides, but we must decide the case objectively. We recognise that the relationship between the parties was, for a long period of time, harmonious and trust based; sadly, the experience of the Tribunal is often that a past strong relationship may make a subsequent dispute even more bitter.

12. We noted in this case a tendency which is a regrettable feature of much of our work. Both parties approached their dispute on a binary footing, by which we mean that each side portrayed itself as entirely in the right, and acknowledged no right on the part of its opponent. That approach rarely assists the tribunal, because it rarely reflects the reality of a workplace.

The legal framework

13. Judge Lang had set out the legal questions with outline legal analysis in his Order, which we do not repeat. The claim of disability discrimination was clearly set out in his Order. It was brought under s.15 and s.20 of the Equality Act. Both claims focused on the same factual point. The s.15 claim was that the claimant was, in essence, dismissed for poor communication, in circumstances in which it was said that poor communication was something arising from her disability of dyslexia. The s.20 claim was a failure to make reasonable adjustment to what was said to be a practice of requiring prompt reply to lengthy written communications.

14. Both those claims are subject to knowledge, ie a respondent may defend the claims by denying knowledge of the disability. Knowledge may be actual knowledge (as alleged in this case) or constructive knowledge (ie what the respondent reasonably should have known). S.15(2) provides that a s.15 claim "does not apply if A shows that they did not know, and could not reasonably have been expected to know, that B had the disability." In relation to reasonable adjustment, Schedule 8 paragraph 20

provides that the duty does not arise "if A does not know and could not reasonably have expected to know… that [an employee] has a disability…" When we consider a s.15 claim we must consider whether it has been proved that the "something" in question in the case was the reason for dismissal and arose in consequence of disability. When we consider a s.20 claim we must consider whether a provision criterion or practice of the respondent puts a disabled person at a substantial disadvantage. When we consider that element, we must have regard to the guidance of the Court of Appeal in Ishola v TfL, 2020 EWCA Civ 112, which was to the effect that a PCP must have some element of systematic application, and not just be the application to an individual of a management decision.

15. The principles of an unfair dismissal claim are well known to the Tribunal. The Tribunal must first identify who took the decision to dismiss and when (these two points are rarely contentious, but the latter was in this case). It must then identify the reason for dismissal, namely the factual considerations in the mind of the dismisser which led to dismissal. If the reason is a potentially fair reason among those listed at s.98(2) Employment Rights Act 1996 the Tribunal must then consider whether or not the requirements of fairness have been met, having regard to equity and the substantial merits, and to the size and administrative resources of the employer.

16. If a dismissal is found to be unfair, the Tribunal must at the remedy stage consider whether the claimant has either contributed to dismissal or whether conduct before dismissal is such that it would be just and equitable to reduce compensation. It must also consider the Polkey considerations, which we have explained to the parties; whether, in this case, a fair procedure would have saved the claimant's employment, or whether the claimant's employment might have had a percentage chance of coming to an end, and/or having ended after a period of time.

Disability

17. The claimant, who was born in 1978, was assessed on 27 October 2017 by Dr David McLoughlin, a respected expert in the field of dyslexia. The purpose of the assessment was to enable the claimant to receive appropriate support for Open University studies which she wanted to begin. Mr McLoughlin's report can be read in full (113-121). He confirmed a diagnosis of dyslexia and identified a number of areas of difficulty which, in this public judgment, we do not repeat.

18. The claimant gave evidence that whatever issues had arisen in her earlier education, receipt of Dr McLoughlin's report was the first occasion when dyslexia was formally diagnosed. In evidence, the claimant described difficulties in retaining large pieces of information, organising them and organising her reply; and difficulties in working to timetables. In the field of education, she has been given additional time to complete tasks and assessments. She said that she struggled when helping the respondent's children with some aspects of homework, particularly maths.

19. For every day communication, she found text and WhatsApp easier than handwriting, particularly using the spellcheck functions. She spoke very

warmly of the support which she has received in her studies from Ms Cullen; we were confident that her gratitude was genuine and well founded. She referred to software made available to her for her studies, notably Dragon and Mindmapping.

20. The Tribunal referenced the guidance on learning disabilities, including dyslexia, given in the Equal Treatment Benchbook, and the reference to learning difficulty at paragraph B6 of the EHRC Code. It seemed to us that the claimant had demonstrated an impairment, the effect of which met the test of more than minor or trivial required by the statute.

21. It seemed to us that Mrs Gupta's submissions in reply on disability in fact were properly focused on knowledge, to which we come later. We had little difficulty in finding that the claimant was at the material time (ie her employment with the respondents) a person with disability for the purposes of s.6 as a result of dyslexia.

Findings

22. The parties were introduced by Koru Kids Ltd. Its terms of business were in the bundle (58). It seemed to us to provide two main services. The first was an introduction agency, introducing domestic workers to employers. The second was as a payroll company. It provided a range of services relating to pay, HMRC, payroll, payslips and the like. We accept that it provided both of those services to both parties in a satisfactory manner.

23. The third service was that it appears to have provided what we would describe as a human resource service. However, that service was less than satisfactory. There was ambiguity in the terms of business (4F, 4G, page 59) around the boundaries of what it offered to do and what it did not. The template contract of employment which it provided, adopted by the respondents (71) was curiously deficient: it contained no grievance or disciplinary procedure (as required by statute). It therefore failed to address precisely the problem which might arise in any employment relationship when things become difficult.

24. The claimant began working for the respondents in September 2017. Her contract (71) was to work two set days per week, three and a half hours per day (71). The job title was "After School Nanny," from which we infer that the employment was in term time only. It was common ground therefore that the claimant did not work during school holidays or half-term, and had no entitlement to be paid for those periods.

25. The payment system was that the claimant reported her worked hours to Koru Kids. Koru Kids asked the respondents to verify the reported hours. When the respondents verified, Koru Kids sent the respondents an invoice for the claimant's working hours, plus Koru Kids' administrative fee. Koru Kids retained its fee, and then issued a payslip on behalf of the respondents. There were examples of both in the bundle and this system appears to have worked without any difficulty throughout the employment.

26. The contract provided as follows on two material points:

> "You will accrue annual leave at the rate of 12.07% per hour, inclusive of any public holiday entitlement. You will be paid at your basic salary in respect of periods of annual leave. Annual leave will be paid out monthly alongside your basic pay."

27. The notice provision was:

> "Six weeks' notice period, if both parties are happy. The employer may exclude these notice provisions in the event of dismissal for gross misconduct. The employer reserves the right to make payment in lieu of notice."

28. Every payslip which we saw in the bundle contained separate elements for basic pay and for holiday pay. In the claimant's final year of employment, the total payment was £9.00 per hour, including holiday; that ensured that basic pay was above National Minimum Wage rates.

29. The claimant's job was to meet the children (born 2007 and 2012) after school, and look after them. This would involve escorting them from transport, helping them with homework, and the other routine tasks of home life, including an evening meal and bedtime. Despite the binary approach of the parties, we find that this arrangement worked harmoniously until about February 2020. There may have been occasional frictions, as in any domestic setting. We accept that there was an occasion in 2018 when Mrs Gupta gave the claimant a warning, which was not recorded in writing. By and large matters worked successfully between them. We noted that in February 2020 there was a truly affectionate exchange between the claimant and Mrs Gupta, when Mrs Gupta thanked the claimant for the very generous birthday present which she (the claimant) had given to the elder child.

30. The working arrangement between the parties was that the claimant was to work on the two set days stated in her contract. That enabled her to make her own arrangements for her children, her other job or jobs, her study commitments, and other aspects of her life.

January 2020 onwards

31. We find that the trail of events with which we were concerned began on 4 January 2020, when Mrs Gupta informed the claimant that her set days of work had changed and that from January onwards, she would inform the claimant week by week on which days she was required. It is no wisdom of hindsight to say that this arrangement would be a challenge for the claimant. We accept however that when difficulties arose (eg 22 and 29 January) both parties did their best to circumvent them (212 and 214).

32. On 20 February Mrs Gupta informed the claimant that her work arrangements had changed, and that from mid-May she planned to be working two set days per week and would therefore propose to revert to the claimant working only on those two days from then on.

33. The claimant replied:

> " I would much prefer the set days as previously as this week by week thing you mentioned since the beginning of January isn't really working… I much prefer set

days so I know what I'm doing each week."

34. On 23 February at 10:21 Mrs Gupta replied:

> "This hasn't been working for me either. So keep it Tuesday Wednesday from now on?" (337)

35. The claimant's reply was significant. It was sent an hour later (23 February at 11:19):-

> "That's fine but I have already got things booked for March" (338)

36. The rest of that email was poorly expressed. It tried to explain that the claimant would not be available on 25 February, and on a number of dates in March including 24 and 26 March. There was no reply from the respondent. As mentioned earlier, at about the same time (February 27) there was the exchange about the generous birthday present.

37. Matters were therefore harmonious up to about the end of February 2020. Clearly there was going to be a short term problem, which was that the respondents from 20 February wanted to go back to set days immediately, and while the claimant wanted to go back to set days eventually, she had made arrangements over the next few weeks, which would not sit harmoniously with the set days which the respondent wanted to go to straight away.

38. A major consideration was the onset of the Covid pandemic, and the imposition of national lockdown by the Prime Minister on the evening of Monday 23 March 2020. We were well aware of the strains and uncertainties which existed for everyone at that time; particularly for parents; particularly in families where there appeared to be health issues; and particularly for workers within the NHS. We understood also that public knowledge and understanding at that time was fast moving and fast changing, and we must remember that what was known at the time was that there was no identified cause or cure; no vaccination; and diagnosis was not as quick or readily available as it has since become. All of those factors were present in the context which we had to consider.

39. From the beginning of March awareness of Coronavirus had arisen, and began to be expressed as a concern (340). At the same time, 3 March, the claimant wrote (3:40) to express a disagreement, which was that she felt that she was being asked to work outside paid time by doing shopping for the respondent. The tone of her email was perhaps unfortunate, and more aggressive on paper than the claimant had intended; it was not in keeping with the harmony which had preceded it.

40. Mrs Gupta and the claimant had a short meeting in the kitchen on 4 March. There was no documented record of it or confirmation of it afterwards. We accept that it was awkward. It was clearing the air and no more. We find that no formal warning was given, although Mrs Gupta expressed her concern with the tone of the claimant's email of the previous day. Matters were resolved and were on a harmonious footing by the end of the meeting, when the two ladies hugged. We accept that the shopping arrangement

was that the claimant was not expected to do the family shopping; but that if her ordinary duties (eg meeting a child or children to escort them home) took her past a shop, she might be asked to buy a routine item, such as a bottle of milk, or an ingredient or ingredients for the children's evening meal.

41. The claimant did not come to work on 9 and 10 March, because she was unwell (341). On the morning of 16 March she texted the respondent to say: "We all have colds in this house. Kids are coughing and sneezing. I've got a head cold." (342) Mrs Rupali replied: "Then I'd rather you don't come. There is so much panic now." (342) On the morning of 16 March, the parties exchanged 15 texts between 8am and 12.

42. Later that day, Mrs Gupta sent the claimant a text with an important attachment. The text was at 344 and the attachment at 361. The attachment was no more than one page. It was a request to formalise a change in the working arrangements. The changes were to confirm two set afternoons per week, and a total of six hours per week rather than seven as before. The duties were slightly modified, and the shopping obligation was formally expressed: "Occasionally pick up grocery for the kids' dinner only, during working hours." That was thoughtful drafting which met the claimant's two concerns, which were first that she was being asked to shop in unpaid time and secondly that she was being asked to shop for more than just the children.

43. The proposal also addressed Covid issues, and set out a number of precautions, including: "I would like you to remain downstairs only" and other social distancing arrangements. It concluded:

> "Please have a good think. If you're not happy doing this job, please feel free to make your decision… We would still be happy to continue with you but need clarity on the duties etc… Please give me a response by midweek as in our plan and inform the agency accordingly."

44. On 19 March the claimant partly replied, raising a question about whether she would be paid for time not worked the previous week, stating she had been in isolation (345). This introduced a new area of disagreement, and another potentially emotive one.

45. The claimant was in theory due to work on 24 March. However, when in February Mrs Gupta had offered Tuesdays and Wednesdays, the claimant had written that she had booked "night out with my Mum" (338), to go to a Van Morrison concert. On 20 March however, the claimant had written "Next Tuesday's concert has been cancelled so I am now free," (347) but the respondents had already made other arrangements to cover. The claimant therefore did not work on 24 March.

46. Wednesday 25 March was the first day of the school holidays. There was no evidence as to whether that had always been the set working day, or had been brought forward because of the Prime Minister's announcement on the Monday evening. The claimant had no entitlement to work or pay throughout school holidays. Easter was 12 April, and the children's school was due to re-open on Monday 20 April.

47. There was then a period of uncertainty. Mrs Gupta was hoping to hear back from the claimant in reply to her formal proposal for a change in arrangements, in which she had flagged up the realistic possibility that the claimant might not want to continue working for her. Mrs Gupta sought advice from Koru Kids, who in turn tried to make contact with the claimant, but seemed unable to do so (364-365). Both parties were stressed by the acceleration of the pandemic. It would have been very helpful if at that time Koru Kids had explained to both parties what precisely it could offer each of them by way of service and what it could not offer them. That did not happen. Equally, it might have offered some form of express mediation, but that did not happen.

48. The next the respondents knew, the claimant wrote a lengthy reply dated 5 April but sent the following day (367-368). The documents should be read in full. The claimant explained delay in replying, which she attributed to stress, including the distress of an unexpected bereavement. She replied to the proposed new working arrangements, and agreed them in principle. She raised again the dispute about pay:

> "ACAS have assured me that you do indeed have to still pay me for those shifts that I have missed out on coming up to the Easter holidays."

49. She then wrote about the period when her days of working had not been set but had been flexible and wrote this sentence:

> "By March you decided to offer the set days of Tuesdays and Wednesdays **despite already knowing I had appointments booked up in March on those days.**"

50. The portion in bold was factually wrong. The text trail at 337-338 showed quite clearly that Mrs Gupta had offered the set days, and that in reply, an hour later, the claimant had stated that while she agreed the principle, there were a number of Tuesdays and Wednesdays over the next few weeks for which she had already made commitments. Furthermore, the sting of the claimant's language was that Mrs Gupta had knowingly done something wrong, ie offered her work in the knowledge that she would be given dates which were not available. There was no basis for that suggestion. The parties had always managed to rub along flexibly, and there was no reason to believe that that could not continue if both were willing.

51. The final portion of the 5 April letter was one, which in evidence the claimant correctly and frankly admitted was factually wrong and badly expressed. The claimant wrote that in light of Covid it was:

> "(I)mperative that my place of work follows a high priority hygiene regime in addition to the usual health and safety at work policies. A 100% Covid 19 free workplace is imperative and I would need written assurance of this, together with a list of the extra health and safety measures you have put in place and how you intend to implement the social distancing rules within your home. If these reasonable conditions can be met, and if my services are ESSENTIAL, then I'll be prepared to return after the Easter holidays."

52. The word 'imperative' implies a demand. The demand was neither reasonable nor rational. At that time no-one could guarantee that their private home was 100% Covid free, let alone a parent, let alone a parent

working in the healthcare sector. It was a condition or demand which simply could never be met.

53. In reply, Mrs Gupta wrote later the same day (370):

> "I hereby like to serve notice with immediate effect. I have been in touch with Koru Kids for some time now and they are aware that I would have liked to serve my notice at the beginning of school Easter holidays. There is a huge amount of uncertainty with redeployment and I require clarification from you. There has been a delay at your end to respond. I have asked Koru Kids to look into your email and advice for the payments due."

54. Over the two following weeks, which were school holidays, the respondents were in touch with Koru Kids and Koru Kids tried to be in touch with the claimant. We repeat our above observations about the involvement of Koru Kids.

55. The claimant's next scheduled working day was Tuesday 21 April. There was correspondence on 20 April about whether the claimant would attend work, and the respondents made a proposal for the claimant to work remotely, which the claimant did not accept (she cited the same technical difficulty which led her to be reluctant to accept CVP). The claimant did not attend work on 21 April. On 22 April Mrs Gupta wrote that she had "no other choice but to terminate her of her duties for gross misconduct" with immediate effect (371). When asked in evidence what gross misconduct the claimant had committed, Mrs Gupta referred to three broad headings: the failure to maintain effective communications over the previous weeks; the failure to maintain a reliable service including not attending on 21 April; and what she considered the false allegations in her letter of 5/6 April, the falsehood being the allegation that Mrs Gupta had imposed Tuesday and Wednesday working in the knowledge that this was in part at least not suitable to the claimant.

56. The claimant appealed against dismissal. We deal with this point very briefly. In the course of late April and throughout May, the two sides exchanged lengthy paperwork with attachments about a possible appeal arrangement. Their correspondence was an indication of the inexperience of both. Advice from Koru Kids or some other source would surely have been helpful in directing them towards a common sense problem solving approach. Instead of compiling attritional piles of paper, all that was needed was a calm dialogue, whether by conference call, Teams/Zoom, or even by a meeting in the fresh air, to talk over whether their working relationship could be put back together and if so how and on what terms.

57. The stress of compiling the paperwork, and the focus on acrimony and dispute, did not help either party and probably made things worse. Mrs Gupta offered two dates for an appeal meeting. The claimant did not attend and declined to engage further with an appeal process. In the end, Mrs Gupta wrote to the claimant to say that her dismissal stood (412).

Disability discrimination

58. When we come to consider the claim for disability discrimination, the first

question before us is whether the respondents had actual knowledge or constructive knowledge of the claimant's disability. We have no hesitation in preferring the respondents' case, and saying that they did not. That is determinative of the claim although we make other findings below.

59. The claimant alleged that in a conversation in early 2018 with Mr and Mrs Gupta, she mentioned that she had just had a diagnosis of dyslexia. She said that there was no particular response or interest from either respondent. In her statement of January 2022, Ms Cullen wrote that the claimant had told her in early 2018 that she was disclosing her condition to others, and had disclosed it to Mr Gupta.

60. Mrs Gupta denied that any such conversation had taken place. Mr Gupta, who was present throughout the hearing, confirmed that the denial was given on behalf of both of them.

61. In answer to questions, Mrs Gupta made a very telling point: if she had been told of disability, she would have been concerned about her children's wellbeing, and would at least have asked for more information.

62. We approach this point with care. During Mrs Gupta's evidence on it, the claimant became distressed. It was obvious to us that she had misunderstood Mrs Gupta's evidence, as implying that as a result of her dyslexia, she could not be trusted with the safety of children. We reassure the claimant here, as we did at the time, that that was not the point of Mrs Gupta's evidence.

63. Our finding is that if the respondents, as loving, responsible parents, had been told that the claimant had had a formal diagnosis of dyslexia, they would at least have asked for more information and reassurance. At that time the claimant had worked in their home for only a matter of weeks. They might have asked to read the diagnostic report. They would at least have wanted reassurance about a range of matters which might have occurred to them. Fundamental to those would be the welfare of their children. The issues which might arise would include the claimant's ability to communicate; her punctuality and organisational skills; her safety to drive; her ability to help with homework; and management of technology such as the household security system. There was no line of enquiry about any of those, and no evidence of it.

64. In the subsequent two years of messages between the parties which we saw, there was not a single reference by either side to any form of dyslexia or reading or communication issue. We saw nothing in the claimant's written language which would have alerted the respondents on a reasonable basis to any such issue.

65. We attach no weight to Ms Cullen's written statement, and disregard it. It was submitted well beyond the deadline for exchange of evidence; it was written four years after the purported conversation; it repeated second-hand what she said she had been told; and was in any event inconsistent with the claimant's own evidence to us; the claimant said the conversation was with both respondents, Ms Cullen said with Mr Gupta only.

66. Although our finding of lack of knowledge is determinative of all disability discrimination claims we add that we would not find that the claim under s.15 was made out on its facts. We accept that one of the reasons for dismissal was communication. There was no evidence that the gap in communication in late March and early April 2020, which was part of the reason for dismissal, was related to dyslexia. The claimant did not say that it was. It was plainly a matter of stress, emotion and the other personal matters which the claimant herself identified at the start of her letter of 5 April.

67. We do not find that the respondent had a provision criterion or practice of submitting lengthy demands to the claimant in writing with short timeframes for response. We accept that in late March 2020 Mrs Gupta submitted a one-page request (361) with a requested deadline for reply. We accept that during the appeal process, Mrs Gupta sent paperwork to the claimant and asked for replies within a stated deadline. We consider that even though there was more than one instance, those are not evidence of a practice, but fall within the heading of individual management decisions identified in Ishola.

Unfair dismissal

68. We turn now to the discussion of unfair dismissal. We ask first which dismissal we consider this case focuses on, that of 6 April or 22 April. The answer is the latter, because that terminated employment, although the claimant was already under notice. We accept that the decision was made solely by Mrs Gupta.

69. We then ask what was the reason for the dismissal and we find that it was a combination of factors which presented to her on 22 April. We find that they were the following, and this list is not exhaustive, and is not in order of priority:

    69.1 The normal channel of communication with the claimant, which had been fluent and quick, had slowed up or broken down altogether;

    69.2 The claimant's reliability had altered dramatically, and she had not attended any scheduled shift since 4 March 2020;

    69.3 She had made what Mrs Gupta considered to be the false allegation that she, Mrs Gupta, had knowingly scheduled her to work at times when she was unavailable;

    69.4 She had placed on her return to work a condition which neither Mrs Gupta, nor indeed any employer (perhaps short of an intensive care unit), could offer to fulfill;

    69.5 In consequence of all of the above the trust and confidence implicit in an employment relationship, but particularly important in a relationship which involved unsupervised working in the family home with the respondents' children, had been severely damaged or broken down.

70. Our next question is to ask whether taken together that constitutes a potentially fair reason for dismissal. We find that it was, relating to conduct, although potentially to capability and potentially to be classified as some other substantial reason (we do not understand the categorisation to be as important as the factual basis).

71. We then ask whether the requirements of procedural fairness have been met in light of those factors, and in light of the respondent's size and administrative resources as employer. We fully acknowledge that this was a workplace of one employee, and it was a private home, not just a workplace.

72. In our judgment, the standard of fairness set out in Employment Rights Act 1996 s.98(4) has not been met. At the very least it was the respondents' responsibility to enter into dialogue with the claimant, predicated on the understanding that the claimant's employment was at risk. The claimant had the right to prepare for a dialogue with a clear written summary of the respondents' concerns and why they placed employment at risk. She had the right to be offered accompaniment (although we appreciate that as the statutory right is limited to fellow employee or trade union official, that may not have been effective in practice); and she had the right to be offered an effective appeal process. We do not agree with Dr Hewlett that an effective appeal process required an independent hearer, or a neutral venue. What was required was the opportunity for a fresh mind, which could have been undertaken by Mrs Gupta alone, or for example by Mrs Gupta with another person, such as Mr Gupta or an advisor provided by Koru. We did not, giving judgment on liability on 20 January, make any finding on contribution or Polkey.

Pay claims

73. The claim for holiday pay fails: the claimant was contractually advised of her holiday pay rights and they were met in full. It was not a case where holiday pay was rolled up into pay, or not clarified to the claimant.

74. The claimant's claims for pay for three missing days fail. We find that she was not entitled to be paid for 17 March 2020 because she was off sick, had no contractual right to sick pay and was below the SSP threshold (342); she was not entitled to be paid for 24 March because she had made herself unavailable for that shift, and although she became available on 20 March (347) we do not find that her late availability placed the respondent under any obligation to cancel their alternative arrangements; and she had no entitlement to work or be paid on 25 March which was school holiday.

75. The claimant was entitled to six weeks' notice. However, her rights during that period was limited. The first two weeks were school holiday when she had no right to work or be paid.

Remedy

76. In light of our above findings, our material findings on remedy are the following.

77. As to notice pay, the claimant was entitled to notice pay from 22 April to 18 May. The earlier date was the date on which she was summarily dismissed. The latter date was the date on which the six weeks' notice given to her earlier on 6 April would have expired. We find that that is the period (and not a period of six weeks from 22 April) which represents the loss suffered by the claimant as a result of the respondents' breach of contract.

78. The notice period consists of three full weeks during which the claimant would have earned £54.00 per week; and one day on which she would have at most earned £27.00. The award is therefore for loss of seven days' work at £27.00 per day, a total of £189.00.

79. We add that we gave consideration to the question of whether, in light of the demand made by the claimant on 5 April (368) for a Covid free workplace, she was to be considered willing and able to work. Although the point is not straightforward, we think it right to give the claimant the benefit of the doubt and to find that she was available. We accept that she might have worked remotely during the notice period.

80. When we came to consider the award for unfair dismissal, the Tribunal found that the claimant had contributed to her dismissal for the purposes of s.123(6) and that her conduct before dismissal was such that it was just and equitable to reduce the basic award in accordance with s.122(2). We approach that finding on three bases: that before dismissal the claimant had been unreliable in communication; secondly sometimes unreliable in attendance; and thirdly that she had made the impossible demand, expressed inappropriately, for a Covid free workplace. In so finding, we place weight on the unusual factors of this employment. This was employment, working unsupervised, in the home of strangers, with their children. It is difficult to think of an area of work which demands a higher degree of trust and confidence. We also are alive to the unexpected burdens of the first Covid lockdown, and in particular the burdens on patient facing NHS staff, who included both Mrs and Mr Gupta.

81. The basic award represents in our view past service. Most of the claimant's 31 months of service had been successful and it does not seem to us right in principle that a breakdown in relationships extinguishes accrued rights. We therefore limit the basic award reduction to 25%. The calculation is 2 years @ £54.00 pw, reduced by 25%, a total of £81.00.

82. When it comes to the compensatory award, it seems to us right to reduce by 75%, which more obviously can be stated as a three to one reduction. It seems to us that the respondents very much needed and wanted a nanny, and repeatedly told us that they did not have close relatives close at hand to help with childcare. They were not looking to end the relationship between the parties.

83. Dr Hewlett proposed a figure of £350.00 for loss of statutory rights. We appreciate that that is an almost normalised figure, but in this case it would represent just under seven weeks' pay, which seems to us wrong in principle. We have set the award at two weeks' pay, £108.00.

84. When we consider the Polkey chance, we accept that if not dismissed, the claimant would have continued work until 7 July, and the start of the summer holidays. The summer holidays lasted three days short of two months. We attach considerable weight to the fact that the respondents have reconfigured their home and work lives so that they do not have a nanny, and have not employed anyone in the claimant's place. It seems to us in particular in light of the special circumstances at the time that the respondents would have reached that conclusion during the summer holidays of 2020.

85. We therefore find that we award the claimant as a compensatory award loss of income for the six working weeks between 19 May and 7 July (not including the one week of half-term); subject to a reduction of 75%. The calculation is therefore 6 weeks @ £54.00 = £324.00; plus £108.00 for loss of statutory rights; the total reduced by 75%, is therefore £108.00. The claimant did not claim benefit, and no recoupment applies.

86. The total of basic award and compensatory award is therefore £189.00. Added to the notice pay, the total award is £378.00.

87. Dr Hewlett applied for uplift at 25% in light of the total absence of procedures which might constitute compliance with the ACAS Code on disciplinary cases at work. That is the maximum award, which seems to us should be reserved for the most serious cases. A most serious case might for example be a large organisation, well advised and well resourced, which deliberately chose not to adhere to the Code. It seems to us right in principle to make allowance for the reality that the respondents had never employed anyone before (or since) and were not well advised by the organisation who they thought had advised them. Nevertheless, compliance with the ACAS Code is a matter of principle, because it represents one of the fundamentals of fair employment. The award is 10%, ie £37.80.

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Employment Judge R Lewis

Date: 27 April 2022

Judgment sent to the parties on

13 May 2022

For the Tribunal office