EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs S Willmott	**v**	**Pioneer Learning Trust**

Heard at: Watford **On**: 13,14, 15 December 2021
Before: Employment Judge Forde

Appearances
For the Claimant: Mr Francis, counsel
For the Respondent: Mr Griffiths, counsel

JUDGMENT

1. The claimant was unfairly dismissed by the respondent.

2. The claimant contributed to her dismissal to the extent that she is to be held 50% culpable for her dismissal.

3. The respondent is ordered to pay the claimant the sum of £8836.82 comprised of the following constituents:

    3.1. Basic award £1,157,
    3.2. Compensatory award, past loss £14,621.17,
    3.3. Compensatory award, future loss £1445.46
    3.4. A sum representing an amount for loss of statutory rights namely £450.
    3.5. contributory reduction of 50%

4. The claimant was in receipt of recoupable benefits within the period The Prescribed Period. The Prescribed Element is £7,310.56. The amount by which the monetary award exceeds the prescribed element is £2,104.73

REASONS

Introduction

1. The claimant, Mrs Willmott, was employed by the respondent, Pioneer Learning Trust, within one of the respondent's schools namely Whitefield Primary School, at the time of her dismissal on 17 July 2020 when she was summarily dismissed.

2. The claimant claims that her dismissal was unfair within s.98 of the Employment Rights Act 1996.

3. The claimant was represented by Mr Francis, counsel, and gave sworn evidence. The respondent was represented by Mr Griffiths, counsel, who called upon the sworn evidence of Mrs Christy, Head of School at the time of the claimant's dismissal and Mrs Bateman, the respondent's Chief Executive, who was also the de facto Executive Head Teacher of Whitefield School at the time of the claimant's dismissal.

Preliminary matters

4. At the beginning of the hearing I had to deal with a single preliminary issue, namely the admissibility or otherwise of witness evidence from the claimant's husband, Mr Ian Willmott. Having read Mr Willmott's statement I expressed the view to both representatives that I felt that the content of Mr Willmott's statement did not address issues that were to be addressed within the claim. Mr Francis, on behalf of the claimant, submitted that advice had been provided to the claimant to this effect but nonetheless, maintained that Mr Willmott's evidence may remain relevant for the tribunal to hear particularly in respect of the issue of mitigation in the event that the claimant was successful. Mr Griffiths on behalf of the respondent, identified that he had the issue of Mr Willmott's statement as the only matter that he wished to raise before the tribunal prior to the commencement of the hearing for the same reason that I had outlined.

5. I explained that on reading Mr Willmott's statement it was clear to me that his statement contained material that was almost entirely irrelevant as regards the issues that I had to determine. Notwithstanding the potential impact that Mr Willmott's evidence might have in respect of matters pertaining to remedy, I was of the view that the witness statement was more of an impact statement as opposed to anything which could be usefully ventilated before the tribunal and consequently I ruled that the statement would not be admitted into evidence and did so on the basis that:

    5.1 It contained irrelevant material

    5.2 that I was able to as it fell within my discretion to manage the hearing effectively and

    5.3 that it was in accordance with the overriding objective to do so.

Issues for the tribunal to decide

6. Having decided the preliminary matter, I agreed with the parties the issues for me to decide. They were as follows:-

   Unfair dismissal

   6.1 What was the principal reason for the claimant's dismissal and was it a potentially fair reason under sections 98(1) and 98(2) of the employment Rights Act 1996? The respondent asserted that it was a reason relating to the claimant's conduct.

   6.2 If so, was the dismissal fair or unfair within s.98(4), and, in particular, did the respondent in all respects act within the band of reasonable responses? The claimant stated that the dismissal was unfair because the respondent followed an unfair process by reason of failing to conduct a reasonable investigation of the claimant's alleged misconduct.

   6.3 Did the respondent hold a genuine and reasonable belief that the claimant had committed misconduct?

   6.4 Or the alternative, was that the process by which the claimant was dismissed was otherwise unfair?

Findings of fact

7. The relevant findings of facts are as follows. Where I have had to resolve any conflicts of evidence, I indicate how I have done so at the material point.

8. The claimant, Mrs Willmott, was employed by the respondent, Pioneer Learning Trust as a Level 1 Teaching Assistant from January 2016 to 17 July 2020 when she was summarily dismissed.

9. The respondent is an education trust comprising 3 schools and approximately 300 staff in total. The respondent received human resource support from Luton Borough Council during the disciplinary investigation that concerned the claimant's dismissal.

10. In October 2019 the claimant was assigned to a child in the school's nursery who required support form a teaching assistant because of his special needs. It is common ground that the child in question had presented with challenging behaviour. It was the claimant's case that when the child was in the school's nursery he required one-to-one support from a teaching assistant because of his special needs and had three teaching assistants assigned to him for what was described as his "destructive and abusive behaviour" . However, for the purposes of this judgment, I did not feel the need to make any finding as to the nature of Pupil A or indeed the level of one-to-one care and attention that he required from teaching assistants within the respondent and in any event, the extent of contact and support that the child required was disputed by the respondent.

11. Specifically, in her evidence, Mrs Bateman on behalf of the respondent disputed the assertion that the child should have been supported by Level 3

Teaching Assistants who it was argued on behalf of the claimant would have had the qualifications to deal with his challenging behaviour. Mrs Bateman pointed to the claimant's training that she had received which included special needs teaching assistant training in 2016. This evidence was available within the bundle as part of the claimant's training record. Consequently, I find that the claimant was in terms of her training, suitably equipped to care for the child although I also found that the claimant's training record appeared to be patchy in parts.

12. On 20 January 2020, as a result of Pupil A's behaviour, the nursery teachers asked that he be removed from the main room to the separate "Nest" room to be supervised. The claimant was asked to continue to work with the child from 21 January 2020 in this way.

13. The key date is Thursday 23 January 2020. This is a date in which the claimant was with the child in the Nest area. It is the claimant's case that the she asked the child to do something and he reacted badly to this request. The claimant was concerned that he was going to physically harm himself and then placed her arms around him in a hug to prevent a physical outburst to intervene before an outburst commenced. Either way, I have little doubt and do find that the claimant did hug the child as she admitted so at the earlier stage during the course of the disciplinary investigation that followed and because she admitted to doing so in the hearing before me.

14. On Monday 27 January 2020 the claimant was called to a meeting with Mrs Christy, Head of School. The meeting was attended by Rebecca Mason the school Safeguarding Officer and Megan Hankey, Human Resources professional. In evidence, Mrs Christy admitted that this meeting had been called following a discussion that she had had with a local authority safeguarding officer (LADDO) that the claimant had not been pre-warned as to the purpose of the meeting, the nature of the allegations, the number of attendees, the identity of the attendees and the purpose behind the attendees being in the meeting. Mr Francis described the meeting to Mrs Christy as an ambush. I have considerable sympathy for this description of the meeting.

15. In the meeting, the claimant was told for the first time that an allegation had been made against her on 23 January 2020 namely that she had behaved inappropriately towards the child by hugging him and kissing him. The claimant strongly and vehemently denied that she had kissed the child but admitted hugging him. The notes of this meeting set out what a no more than cursory enquiry of the claimant as to what had happened. At this time, the claimant's case was that she had hugged the child to calm him down because he was really upset and no more

16. It should be noted that following her discussion with the LADDO prior to the meeting with the claimant, Mrs Christy was aware that she could offer the claimant a letter with words of management advice provided that there was an acceptance on the claimant's part as to what had happened in respect of the hug. I find that that it was this that led to Mrs Christy to state during the course of the meeting that the hugging was not a disciplinary matter, that a

letter of management advice would be offered to the claimant and that the claimant would be offered some more "In Safe Hands training". Specifically, Mrs Christy stated the following:

> "It's not a disciplinary matter we will deal with it through management advice at this stage."

17. It should also be noted that it was the claimant's belief that she was entitled to hug in circumstances where a physical intervention was required and that she relied on this belief and having read and understood the respondent's Restricting Intervention and Positive Handling of Pupils Policy.

18. The claimant attended a meeting on 28 January 2020 with Mrs Bateman and Mrs Christy. In that meeting, the claimant strongly refuted the kissing allegation but confirmed that she had hugged the child. For the first time, the claimant raised a possibility that the allegation of kissing was a malicious one on the basis that it was entirely unfounded as far as she was concerned. Furthermore, the claimant expressed the view that the motivation for making the allegation was perhaps the fact that the claimant, being the only Chinese member of staff within the respondent's employment at that time may have been racially motivated. The claimant then received the letter from Mrs Bateman dated 29 January 2020 confirming that there would be an investigation into the allegation that on 23 January 2020 the claimant acted inappropriate towards the child by kissing and hugging him. Kirsty Voller, HR Advisor was the investigating officer.

19. It was not disputed that the claimant remained very distressed by the allegation of kissing not least because of the very serious ramifications that that attached to the possibility of a finding that she had in fact kissed the child. In due course, the claimant was signed off work by her GP with acute stress.

20. The respondent continued with its investigation albeit and what I found to be a glacial pace.

21. On 14 February 2020 Ms Voller met with Bernadette Robertson, another Teaching Assistant. In the note of that interview which was before the tribunal, Ms Robertson stated that between 12.10 and 12.20 on 23 January the claimant got on her knees, put Pupil A's coat on, talked to him, did up his coat and gave him a kiss on the right cheek. Ms Robertson said that she did not see anything else and added that the claimant was very touchy-feely, that the claimant had cuddled the child and that it was usual for her to do so.

22. The claimant received a letter from Ms Voller on 28 February 2020 inviting her to an investigatory meeting. The claimant responded by email on 4 March 2020 that she would not be able to attend due to poor health. The email also advised that it was not possible for the claimant to be accompanied by a union representative or work colleague and that she was being unfairly penalised by the respondent for refusing to allow her to be accompanied by her husband. However, it was clear from the respondent's

workplace policy that it was entirely within the bounds of that policy for the claimant to attend the meeting with a workplace colleague but chose not to do so. While it was suggested by Mr Francis that the attendance of Mr Willmott at a previous meeting justified his attendance at the disciplinary meeting proposed, it did not to my mind follow that this should have been allowed in the way that Mr Francis suggested, ie, in the same way that night follows day. The meeting was rearranged to 20 March 2020 due to the claimant's ill health. Ms Voller suggested that the claimant could respond to questions in writing if she did not wish to attend the meeting.

23. The issue of the husband's attendance continued without resolution. In evidence, Mrs Bateman candidly disclosed that she sought HR advice around this request and was advised that it would be, "unsafe" to allow Mr Willmott to attend. As I have already said, the respondent was entitled to follow this course although I do think that Mrs Bateman could have been better supported by HR and could have allowed Mr Willmott to attend the meeting if she wanted to.

24. On 18 March 2020 Ms Voller suggested that the claimant responded to questions in writing and she enclosed these in her correspondence. She was provided with a deadline of 27 March to respond to the questions.

25. On 27 March 2020 the claimant provided her responses to the questions and in doing so, specifically denied the kissing allegation and providing an explanation as to what happened on the day. By this time, the claimant's account of what had happened had expanded beyond that provided to Mrs Christy in the meeting that took place on 27 January 2020 and I find that that is entirely in keeping with the fact that the purpose and tenor the questioning during the course of the formal disciplinary investigation as opposed to the very informal, ad hoc, an announced and cursory meeting that took place in January was not one in which detail would be discussed.

26. In due course Mrs Christy (15 June 2020), Rebecca Mason (23 June 2020) provided evidence to Ms Voller's investigation. Then, six months after the original allegation was made, the claimant received a letter from Ms Voller dated 25 June 2020 asking her to attend a disciplinary meeting via Zoom on 13 July 2020 to hear allegations of gross misconduct. The allegations contained within that letter were that the claimant had asked the child for a hug and then hugged him. The claimant noted that the kissing allegation had been omitted and she expressed her dissatisfaction and upset at the fact that she had not been alerted sooner that the kissing allegation was no longer part of the disciplinary investigation. Ms Voller responded on 2 July 2020 confirming that there was insufficient evidence regarding the kissing allegation and that no further action would be taken in respect of that allegation. Understandably, the claimant was upset by the delay in communicating this information to her.

27. In the meantime, the position with regards to Mr Willmott's attendance at the disciplinary meeting remained unresolved and consequently, the disciplinary hearing took place over Zoom on 13 July 2020 in the claimant's absence who at the same time was suffering form acute anxiety and stress and did

not attend for health reasons as well. The hearing was conducted by Ms Bateman and attended by Mrs Christy, Ms Voller and Laura Deloughrey, HR professional.

28. The outcome of the disciplinary hearing was that the claimant was dismissed and this was communicated to her in a letter dated 17 July 2020. It was found that the claimant had asked for and had given the child a hug. It was stated that it was the responsibility of all staff to ensure that they did not abuse or appear to abuse their position of trust and extend relationships beyond what was considered to be professional and acceptable. It was asserted that the claimant's actions had been in direct contravention of the respondent's Behaviour Policy and that in addition, what had occurred was that the claimant had embellished accounts in March 2020 which displayed a lack of insight and destroyed all trust and confidence that existed between the respondent and the claimant justifying the claimant's dismissal.

29. In particular, Ms Bateman had decided that the strategy that the claimant had deployed was a safeguarding concern and was not an approved de-escalation strategy. As I have said, she also found that the claimant's conduct was inconsistent with the school's Code of Conduct and found no evidence of racism or bullying from another member of staff as asserted by the claimant although it is very difficult to see in what way either Mrs Bateman or Mrs Christy considered whether or not the conduct of the person making the allegation, Ms Roberston, could have been tainted by any form of bias whatsoever as no evidence was placed before the tribunal to show that the claimant's concern in this regard had been reviewed, considered or investigated. I find that the respondent simply dismissed the concern without reason or cause to do.

30. The claimant emailed Ms Bateman on 22 July stating that she would not be appealing the respondent's decision to dismiss her due to what she considered to be improper and unfair manner in which the investigation and dismissal had occurred.

31. It is my view and finding that the respondent first fell into error in January 2020. Mrs Christy had received advice from the LASDDO. It had been explained to her that it was open to her to offer a letter of management advice. In advance of doing so, Mrs Christy was aware that she would have to undertake and investigation and fact finding as regards the hug and the kiss. It is my undoubted view that the respondent fell into error. By considering that the allegations made against the claimant were capable of being resolved by way of the administration of a letter of management advice, the respondent was prepared to offer the same and was going to do so provided the claimant accepted that the allegation of kissing had been made. It should be noted that the claimant by this stage admitted the two limbs of the hugging allegation made against her.

32. What I find is that the respondent failed to do what the LADDO had advised in order to make this proposed process effective, namely investigate and fact find at this stage. Instead, it appears that what was offered was a compromise solution, namely that a letter of management advice was to be

offered which made mention of the kissing allegation which the claimant vehemently denied and which ultimately was determined to have been unfounded. It was entirely possible for an investigation at that time to have determined that the alleged kiss was not capable of being supported by evidence meaning that there was no finding in respect of that allegation.

33. I do not apply the benefit of hindsight and note that Ms Voller's determination of the kissing allegation reached the claimant in July 2020 but nonetheless, it wasossible for the respondent to have determined the kissing allegation far sooner and incorporate it into an investigation if it had conducted one when letters of management advice were considered capable of being offered to the claimant. I find that the respondent effectively avoided its responsibility to conduct a fair investigation or an investigation of any kind at this stage. Further, I find that despite the claimant raising concerns over the propriety of the kissing allegation and the person who had made it, no effective investigation was conducted into the claimant's grievance that she was being targeted maliciously by the making of the kissing allegation.

Relevant law and conclusions – unfair dismissal

34. Section 94 of the Employment Rights Act 1996 confirms an employee has the right not to be unfairly dismissed. Enforcement of the right is by way of a complaint to the tribunal under s. 111. The employee must show that she was dismissed by the respondent under s.95, but in this case the respondent admits that it dismissed the claimant (within s.95(1)(A) of the 1996 Act) on 17 July 2020.

35. Section 98 of the 1996 Act deals with the fairness of dismissals. There were two stages within s.98. First, the employer must show that they had a potentially fair reason for the dismissal within s.98(A)(2). Second, if the respondent shows that they had a potentially fair reason for the dismissal, the tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

36. In this case it is not in dispute that the respondent dismissed the claimant because it believed she was guilty of misconduct. Misconduct is a potentially fair reason for dismissal under s.98(2). The respondent has satisfied the requirements of s.98(2).

37. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with the equity and substantial merits of the case.

38. In misconduct dismissals, there is well established guidance for tribunals on fairness within s.98(4). In the decision of Burchell [1978] IRLR 379 and Post Office v Foley [2000] IRLR 827. The tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within s.98(4), the tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the tribunal would have handled the events or what decision it would have made, and the tribunal must not substitute its view for that of the reasonable employer.

39. Mr Francis and Mr Griffiths provided me with oral submissions and Mr Francis provided me with written submissions which I have considered in reaching my conclusions.

40. The first matter I had to determine is the reason for dismissal. Here I rely on the oral evidence of Mrs Bateman who stated that the principal reason for the dismissal was gross misconduct and not a separate reason namely for the breach of mutual trust and confidence as alleged.

41. Mrs Bateman was clear in evidence that the respondent's perception of the claimant's conduct in providing more detailed reasons in her responses to questions were inconsistent, embellished and possibly untruthful. It was felt that the claimant was no longer to be trusted. In Mrs Bateman's view, the consequent effect of the claimant's conduct in this regard was to "tip" the claimant's conduct into a summary dismissal.

    Mr Griffitths on behalf of the respondent had submitted that the respondent was entitled to rely on the nature of the claimant's responses as a standalone limb for dismissal, namely some other substantial reason (SOSR). I find that the respondent dismissed the claimant for the sole reason given by Mrs Bateman namely gross misconduct and that the SOSR reason was an adjunct to this reason. in any event, I find that it was unreasonable for Mrs Bateman to have compared the claimant's accounts as given in January and March 2020 and determined that the material inconsistency between the two was down to the claimant shifting in the emphasis as opposed to any other reason. I have found that the meeting held with Mrs Christy 23 January 2020 was cursory. I find that it was highly unlikely that this meeting would have captured the detail that was elicited in March 2020 and that this was through no fault of the claimant.The respondent did not have reasonable belief the claimant had committed the misconduct

    41.1 I have found that at the outset, the respondent considered the claimant's actions as misconduct. I am reinforced this view by Ms Bateman's admission that the second limb relied upon for the claimant's dismissal, namely some other substantial reason was

really in fact at the tipping point between the misconduct and the gross misconduct allegation which when combined, justified the claimant's summary dismissal.

41.2 It follows that the respondent was incapable of forming a reasonable belief of the claimant's misconduct..

41.3 I find that the time taken to dismiss the kissing allegation was inordinately long. No credible explanation was provided as to why that was the case and in my view nor could there be. This is what I would describe as a "he say she say" allegation and in an evidential dispute of this nature, once one applies the principles of natural justice and the failure to make further enquiries of Ms Robertson, it is a wonder why it took so long for this allegation to be dismissed particularly given the claimant's vehement denial of it.

Reasonable responses

41.4 I accept that it is likely that the claimant should have been wary of inviting the child for a hug and that the claimant was aware of the risks associated with doing this. But I find that this conduct was considered by the respondent to be misconduct as opposed to gross misconduct. I reject that finding and find. I do not accept that hugging would always amount to gross misconduct as postulated by Ms Bateman.

41.5 Accordingly, I find that the claimant was unfairly dismissed.

Contribution

42. S.123(6) ERA 1996 states that:

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

43. The Court of Appeal in Nelson v BBC (No.2) [1980] ICR 110, CA say that three factors must be satisfied if the tribunal is to find contributory conduct:

- The conduct must be culpable or blameworthy
- The conduct must have actually caused or contributed to the dismissal, and
- It must be just and equitable to reduce the award by the proportion specified.

44. It is also the case I do have to consider the claimant's conduct in any event and I have cause to consider a finding of contributor fault on the claimant's part because I find that the claimant had attended training and had, in all likelihood, been provided with guidance with regards to the factual issues central to this claim and in particular hugging which clearly concerned the respondent.

45. In particular I found in evidence the claimant was entirely dismissive and rejected the notion that hugging could be considered wrong in any circumstance. There was evidence before the tribunal which contradicted the claimant's position. I find it somewhat odd that the respondent would have gone so far as to disciplining and dismissing the claimant where it not the case that safeguarding issues the issue of physical contact with children were not ones which were to be placed at the forefront of a teaching assistant's mind.

46. I find that during the investigatory and disciplinary process, the claimant became entrenched in her position as regards hugging and was prepared to adopt the position that she did that she was employing a hugging as a de-escalation technique and was entitled to do so when she determined it appropriate to do so as opposed to following recognised or prescribed guidance for example. I found her responses to be a consistent theme in her evidence before the tribunal and that she displayed what I will describe as a mind set of righteous indignation such that the claimant appeared to be unprepared to be flexible or considered in her outlook or with regards to reviewing her own conduct. As such, I find that the claimant is culpable; that her conduct contributed to the dismissal and that it is just and equitable to reduce her award.

47. Accordingly. I find that the claimant was unfairly dismissed by the respondent, that the claimant contributed to her dismissal. I assess the claimant's contribution as being 50%.

Remedy

48. Compensation for unfair dismissal is set out in two parts. First is the basic award and that is calculated according to a formula within the Employment Rights Act 1996 based upon multiples of age against length of service and gross pay. At the date that her employment ended, the claimant had four complete years of service and in each of those years she was aged 41 or over. Therefore, she is entitled to a total of six weeks at £192.92 which equals **£1,157**.

49. Turing to the compensatory award, s.123(1) requires me to award such compensation as is just and equitable to compensate her in respect of her losses arising from her unfair dismissal. As was submitted to me by the respondent, the landmark case of Polkey v A E Dayton Services Limited requires the tribunal to engage in a degree of speculation about what would have happened had the respondent acted fairly when assessing what is just and equitable. In this case, the claimant asks for 73 weeks of past loss and a further 16 weeks of future loss. The respondent submits that the claimant's loss should be limited to 12 weeks post termination and makes the point that the claimant could have obtained employment outside education and in doing so, relies on the fact that the claimant's search for roles outside of education and in roles for similarly remunerated to her teaching assistant role. In essence, it should have been a relatively simple matter for the claimant to have found a new job whereas at the time of the hearing, the claimant had not done so.

50. Mr Francis on behalf of the respondent, contended that the claimant had been unwell and remained so and that the finding of gross misconduct has had a significant impact on her job prospects to the effect that she is frankly unemployable. The claimant made this point in evidence before the tribunal pointing to a telephone conversation that she had had with a recruitment consultant that makes this very point. Mr Francis advanced this argument on the claimant's behalf against the backdrop of a patchy reporting of the claimant's recent health before the tribunal and little or no evidence of a job search.

51. However, weighing all of the above factors, I determine that the claimant was and remains at the time of the hearing affected by both her health and the finding of gross misconduct and the impact that has had on her ability to be recruited into education. Accordingly, I find in all of that the claimant is entitled to 73 weeks of past loss, namely the gross sum of **£14,673.67**.

Future loss

52. Put simply, the claimant says that she would like to or need time to get a new job. If it is to be in education, Mr Francis contended that she may well have difficulty in getting a new job arising from the fact that we are in the middle of the academic year, a point that I have considerable sympathy with. I am also mindful that at the time of the hearing we were 10 days away from Christmas Day and that it would be unrealistic to assess that were a job search to commence on the day of hearing that it would conclude before the new year. However, I found that it would be reasonable and just that the claimant's future losses are limited to 10 weeks and, accordingly, **I order that the respondent should pay the claimant lost salary and pension contributions for 10 weeks which amounts to £1445.46 in total. further, I award the claimant £450 for loss of her statutory rights.**

53. The above figures total £17,673.82. This falls to £8,836.82 once contribution (see above) is applied.

54. The claimant was in receipt of recoupable state benefits during the period 17.7.20-13.12.21 (the Prescribed Period) following her dismissal namely Job Seekers Allowance. Accordingly, the tribunal identifies that the sum of £7310.56 is the amount of the Prescribed Element and is subject to an assessment of an amount to be recouped by DWP in accordance with the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996. The amount by which the award exceeds the Prescribed Element is £2104.73

Polkey

55. The respondent submitted that the claimant's award should be reduced further on the basis that the claimant would have been dismissed had a fair process been followed. That application was made in accordance with the principles in Polkey v A E Dayton Services Limited [1997] UK HL 8. In my

view and I have found that the respondent first fell into error and then reached the wrong determination in respect of the claimant's conduct. I do not find that dismissal would have followed and therefore I decline to make a reduction in the claimant's award.

Acas uplift

56. The claimant applied for an uplift to be made to be applied to the claimant's award on the basis of it is open to tribunals to award an uplift, where applicable, to awards of compensation. Mr Francis on behalf of the claimant submitted that there had been a procedural breach in the way in which the respondent dealt with the investigation and dismissal of the claimant and that it would be just and equitable to increase the claimant's award on that basis. Having weighed up the factors, I declined to make such an award. In my judgment, the respondent's error was only in relation to its evaluation and treatment of evidence as opposed to a procedural breach. Accordingly, it would not be appropriate to make any further adjustments of the claimant's award.

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Employment Judge Forde

Date: 3 March 2022

Sent to the parties on:

4 March 2022

For the Tribunal Office