Case No: 1310785/2020

EMPLOYMENT TRIBUNALS

Claimant: Ms P Brooks

Respondent: Sandwell Community Caring Trust Ltd

Heard at: Midlands West

On: 25 May 2022

Before: Employment Judge Faulkner
Ms S Bannister
Mr P Wilkinson

Representation: **Claimant** - in person
Respondent - Ms J Duane (Counsel)

JUDGMENT - REMEDY

1. The Claimant is awarded the total sum of £926.67 by way of compensation for unfair dismissal.

2. This amount shall be paid by the Respondent within 14 days of the date of this Judgment.

REASONS

1. Judgment and reasons were given orally at this Remedy Hearing and the written Judgment signed on 25 May 2022. These written Reasons are provided in response to the Claimant's request made by email on 7 June 2022. Although the Respondent had requested written reasons for the judgment on liability, that request was withdrawn at the conclusion of this Hearing and there are therefore no written reasons for that part of our decision. My wanting to be sure that the Claimant understood that these Reasons would be placed online, I arranged for a letter to be sent to her seeking confirmation of her request. The Claimant confirmed her request on 23 June 2022 in an email that was not referred to me, and again by email after I arranged for a further letter to be sent, today, 5 July 2022. I apologise for the short delay in these Reasons being provided, resulting from that exchange of correspondence.

2. This Hearing was concerned only with compensation for unfair dismissal, the parties confirming that compensation for breach of contract had already been paid.

Issues

3. It was agreed that the issues for the Tribunal to determine were as follows:

3.1. In relation to the basic award, whether it should be reduced on account of the Claimant's conduct before dismissal and if so, to what extent.

3.2. In relation to the compensatory award, whether the Claimant had complied with her duty to mitigate her financial loss, whether and to what extent the award should be reduced on the basis that even in the absence of unfairness she would have been dismissed in any event, and whether and to what extent it should be reduced on the basis that the dismissal was to any extent caused or contributed to by any action of the Claimant.

Facts

4. We heard oral evidence from the Claimant, and were taken to documents in a bundle prepared specifically for this Hearing. Our findings of fact were as set out below, made on the basis of that evidence, on the balance of probabilities, and as necessary on the basis of the evidence we heard at the Liability Hearing. It was appropriate to begin by repeating some of our findings of fact and conclusions from that earlier Hearing.

Key findings and conclusions from liability hearing

5. The Respondent is a charity providing services to vulnerable adults. The Claimant accepted that the clients at Pedmore House where she had worked for the Respondent were extremely vulnerable, and that she had a duty to inform her manager if she was unwell so that the manager could decide whether she should stay away from work. She also accepted that going into work in this setting, at the time of the Covid-19 pandemic, with Covid symptoms, could put colleagues and service users at risk.

6. At pages 175 to 176 of the liability hearing bundle, there were in the Respondent's disciplinary rules examples of gross misconduct which included, "serious breaches of safe working practices, regulations or procedures endangering other people".

7. We held that the Respondent had a reasonable suspicion of misconduct, when it discovered that the Claimant had been working for it at Pedmore House on a bank basis, prior to her substantive employment contract transferring to it under the Transfer of Undertakings (Protection of Employment) Regulations 2006, whilst she was absent from her employment with her previous employer (the transferor, Affinity) in April 2020, with the recorded reason for absence having been Covid-19. The Respondent discovered this after the transfer.

8.. We also held that the Respondent had conducted a reasonable investigation. Judged in the round, by the time of forming the decision to dismiss, it had considered all of the documentation that was likely to be relevant. This included that supplied by the Claimant. We were satisfied that it spoke to the relevant parties

and eventually had available to it all the conceivably relevant evidence, so that whilst most investigations can be improved, this one was within the range of reasonable responses.

9. We also held that the Respondent essentially followed a reasonable procedure in dismissing the Claimant, and complied with the ACAS Code.

10. The dismissal was unfair because the dismissing officer, Geoff Walker (the Respondent's Chief Executive), clearly relied on three pieces of evidence in reaching his conclusions as to what happened (and based on that, reached the decision to dismiss), which were not shared with or shown to the Claimant so that she could comment on them. These were Tracey Hamilton's diary entries, a record of a return-to-work meeting with Ms Hamilton, and the Claimant's timesheet entries. Tracey Hamilton was the Claimant's line manager at Affinity before the transfer to the Respondent.

11. We concluded that the Respondent reached a reasonable conclusion that the Claimant had committed misconduct. In summary, the decision came down to Mr Walker preferring Tracey Hamilton's evidence. It may be that not all employers would have reached the same conclusion, but we viewed Mr Walker's conclusion as to what had taken place as carefully reasoned, and thus well within the range of reasonable responses.

12. Finally, we concluded that the decision to dismiss the Claimant based on Mr Walker's conclusions was also within the range of reasonable responses of a reasonable employer. It is helpful to say something more about that conclusion.

13. The context of the Respondent's activities, the nature of its service users and of the pandemic were crucial in answering this question. As Mr Walker said at paragraph 29 of his witness statement for the Liability Hearing, he (and the colleague who sat with him on the disciplinary hearing panel) considered the Claimant's clean record and long service, but uppermost in their minds was that she had placed colleagues and particularly service users at risk. Particularly in the context at that time, they decided that dismissal was the appropriate sanction. At paragraph 30 of his statement Mr Walker said that he concluded there had been a direct contravention both of national guidelines regarding the need to self-isolate and of the Respondent's expectations.

14. Both of the Respondent's witnesses, Mr Walker and Tracy Graham (the Respondent's Company Secretary) made clear that the Respondent had a zero-tolerance approach to breach of Covid rules. They gave some examples of other employees who had been treated in a similar way in similar circumstances. We also noted that case law has made clear that there does not have to be materialisation of a risk in order for an employer to be able to fairly dismiss where it concludes an employee has taken steps that created that risk – **Wincanton plc v Atkinson [2011] UKEAT/0040/11**. Of course, in this case the Respondent would not necessarily have known if the risk had materialised.

15. We concluded that whilst again not all employers would have dismissed the Claimant in these circumstances, especially given the paramountcy of safety for this Respondent, and especially in the specific context of April 2020 (the very early stages of the Covid-19 pandemic), and given also its disciplinary procedure and the obvious importance of not breaching safety requirements, it could not be said

that dismissal was outside of the range of reasonable responses once the Respondent had reached its factual conclusions.

16. In summary, although distinguishing substantially and procedurally unfair dismissals is not always helpful, it was fair for the Respondent to submit that this case was very much in the latter category.

Data

17. The core data on which any awards were to be based was eventually agreed to be as follows:

17.1. The effective date of termination was 28 October 2020.

17.2. The Claimant's gross weekly pay with the Respondent was £639, so that the basic award before any deduction was £10,222.

17.3. Her net weekly wages with the Respondent (from both jobs, that is her bank work and her substantive role) totalled £504.

17.4. The Respondent made net weekly pension contributions, again from both jobs (the NEST scheme for the Claimant's bank work, and the NHS scheme for her substantive contract) of £70.

17.5. An appropriate figure for loss of statutory rights would be £500.

Mitigation

18. We accepted that there were many jobs the Claimant could have applied for in the care sector. The Respondent took us to examples within the remedy bundle of jobs with pay of between £9.50 and £11.28 per hour, for example. There was some confusion about the Claimant's rate of pay with the Respondent. It seemed likely to us that her basic hourly rate for her employed (not bank) role was around £10.50, based on her Affinity payslips, taking her standard monthly pay and a pre-overtime week of 35 hours, though the Claimant said the rate was £11.14. She received higher rates at the weekends.

19. The Claimant told us that she looked at some roles elsewhere but did not apply for them. Instead, she resumed bank work with the NHS from 1 November 2020, which was work she had been doing since 2006 but not whilst with the Respondent. Her hourly rate for this bank work was originally £9.20, rose to £9.48 from August 2021 and then to over £11.00 from November 2021.

20. The Claimant could not say what employer pension contributions were being paid in respect of her NHS bank work. Employee contributions could be seen from her payslips in the remedy bundle to be 7.1%. Employer contributions, although of course depending on actual pay, would inevitably have been at a much higher rate. We were content, as was the Claimant, with the Respondent's suggested figure of 14.38%. The Claimant had been employed on NHS terms with the Respondent for her substantive contract transferred from Affinity.

21. The Claimant had a period of sick leave from January to April 2021. She told us that her sickness was caused by the Respondent's actions in dismissing her. She pointed us to the letter dated 12 January 2021 from a consultant psychiatrist at page 383 of the liability bundle. The letter does not say what the Claimant

alleges, but she told us that it shows she had been to the doctors. The letter goes on to say at page 384 that the Claimant was fixated with her disputes with the Respondent.

Claimant's conduct prior to dismissal

22. In respect of both the basic award and the compensatory award, given that the Respondent contended for reductions in both, it was necessary for us to make findings of fact regarding the Claimant's conduct prior to dismissal. These were our findings as to what took place, not an assessment of what the Respondent concluded took place.

23. We noted first of all the following, which was evidence indicating that the Claimant had committed the misconduct in question:

23.1. The Claimant in fact carried out no work for Affinity between 13 and 20 April 2020, and so was off work during that period.

23.2. The return-to-work notes in the liability bundle (pages 155 to 157) for Wednesday 22 April 2020, referred to the Claimant being abroad on annual leave, isolating on her return, then displaying flu like symptoms.

23.3. The Claimant's evidence at the liability hearing was that this meeting did not take place. There is the note – we accept the Respondent's case that it would not have been signed in person because of the working arrangements during the pandemic. We also had in the liability bundle a text message from Tracey Hamilton to the Claimant on 17 April 2020 referring to the meeting. Although that text of itself was inconclusive as to why the Claimant was off work and due to return on 21 April, it was supportive of the fact that the meeting took place and we concluded that it did as recorded. The note was very detailed on other matters, and we found it highly unlikely this was composed as anything other than a genuine record.

23.4. Tracey Hamilton was categoric in her evidence during the Respondent's internal procedures about what was said to her and had no conceivable reason to make up any such account. We heard no evidence of any difficulty in the relationship between her and the Claimant.

23.5. There was also Tracey Hamilton's diary. We found at the liability hearing that Mr Walker saw it before making his decision. Even though we did not see it, we were satisfied that the note of the disciplinary hearing referring to it, first of all made clear that it did exist, and secondly made clear that Tracy Graham said at the disciplinary hearing that the diary referred to the meeting between Ms Hamilton and the Claimant.

23.6. The HR record from Affinity (page 205 of the liability bundle) recording the Claimant's absence between 13 and 20 April 2020 as being because of "Covid-19", which we accept was likely to have been based on information supplied to Affinity by Ms Hamilton at the time.

23.7. The Claimant's timesheet (at pages 158 to 159 of the liability bundle) indicating, albeit not wholly clearly, that the Claimant was off sick on the days in question.

23.8. What the Claimant said at the disciplinary investigation meeting on 27 August 2020 and what she did not say – she did not say she did not have Covid-19, she said she had told Tracey Hamilton her son had Covid-19 symptoms, and when asked if she had told Tracey Hamilton that she had symptoms herself, she said she did not know of the conversations.

23.9. What her union representative said at the same meeting after an adjournment, namely that the Claimant did make telephone calls to Ms Hamilton (during which the Respondent said she had reported Covid-19 symptoms), but not on one of the occasions in question.

23.10. The Claimant making some reference at the disciplinary hearing on 2 October 2020 to having spoken with someone about her son being ill, albeit she said this was before 13 to 20 April.

24. Against that we noted in addition:

24.1. The Claimant's subsequent denials of the case against her and indeed her denial of any wrongdoing during her evidence before us, saying that Ms Hamilton made it all up.

24.2. Her long record of employment without any misconduct charge, both for the NHS and the Respondent (including her service with Affinity before the transfer).

24.3. The fact that the case against the Claimant was largely reliant on the evidence of Ms Hamilton.

24.4. The fact that the Claimant's personal mobile phone records did not record calls to Ms Hamilton's number on the days she was alleged to have spoken with her around the time of her absence.

24.5. The fact that Ms Hamilton invited the Claimant to carry out a shift towards the end of the 13 to 20 April period.

24.6. Ms Hamilton having said that the Claimant signed the return-to-work meeting document on 21 April 2020 when she actually signed it on 22 April 2020.

24.7. The fact that the Claimant's timesheet did not include a total for days of sickness absence – that column was blank.

24.8. The fact that one of the Claimant's colleagues said she did not have Covid symptoms when working for Affinity in the relevant period.

25. We were not present at the time of course and so can never know for certain what took place, but our task was to weigh up this evidence and reach a conclusion on the balance of probabilities. It is clear the Claimant informed Affinity that she had Covid and that she carried out bank work with the Respondent during the period when she was off sick. That much is obvious from the documentary records. We did not have to find that the Claimant had Covid-19, but on balance, the weight of the evidence leant towards a conclusion that she carried out the bank work in April 2020 at a time when she was aware that she might have, or believed she might have, symptoms of Covid-19 or something like it. The main reasons we reached that conclusion were:

25.1. The contemporaneous records from Affinity and Ms Hamilton.

25.2. Ms Hamilton having no conceivable reason to make up what she told the Respondent during the internal disciplinary process – she could not possibly have known that recording the information on the HR record or in the return-to-work note would lead to a later disciplinary case against the Claimant with a different employer.

25.3. The Claimant's changing case, from something close to an admission at the investigation meeting to something more like a denial at the disciplinary hearing.

25.4. What her union representative said to the Respondent, after an adjournment during which it is safe to assume he discussed the matter with her even if he had not done so before.

25.5. The fact that the Claimant's phone records were not conclusive either way – there were options for speaking with Ms Hamilton other than using her personal mobile phone.

25.6. As Mr Walker said, Ms Hamilton inviting the Claimant to do a shift was understandable confusion on the part of a care home manager dealing with the early days of the pandemic and all that entailed.

25.7. Ms Hamilton getting wrong the date on which the Claimant signed the record of the return-to-work meeting and there being no total sick days on the timesheet are minor matters in the overall scheme of the evidence, particularly when we bear in mind the pressurised environment in which the Respondent was operating at the time.

25.8. It is also clear that the Claimant had been in contact with someone – her son – who had Covid-19 symptoms.

Law

Basic award

26. The basic award consists of one and a half week's pay for each complete year of service at the age of 41 or over and one week's pay for each complete year below age 41. Any basic award should be reduced under section 122(2) of the Employment Rights Act 1996 ("ERA"), "*where the Tribunal considers that any conduct of the complainant before the dismissal … was such that it would be just and equitable to reduce … [it] to any extent*". The Tribunal has a broad discretion to decide whether any such reduction should be made and if so the amount of that reduction.

Compensatory award

Heads/measure of loss

27. Section 123(1) of the ERA provides that subject to certain other provisions, "*the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss*

is attributable to action taken by the employer." The measure of loss is the complainant's net weekly pay and pension contributions in this case. The Tribunal should measure loss of earnings from the effective date of termination up to the date of assessment, i.e., the date of this Hearing. There is then the question of loss of future earnings. Subject to the provisions mentioned below, the Tribunal can award compensation for future loss over such period as it determines is necessary to produce an award that is just and equitable in all the circumstances, so long of course as it is loss which flows from the unfair dismissal.

28. It is standard practice – and just and equitable – to award a sum for loss of statutory rights, to reflect the fact that in any replacement employment the Claimant will have to work for two years before obtaining unfair dismissal protection and indeed more than that to accrue entitlement to the same statutory notice. The amount is at the Tribunal's discretion, again based on what it determines to be just and equitable in all the circumstances. As noted above, it was agreed in this case.

Order of deductions

29. It is vital to be clear about the order in which any adjustments to the compensatory award should be made. In **Digital Equipment Co Ltd v Clements (No. 2) 1998 ICR 258**, as far as relevant to this case, the Court of Appeal made clear that a tribunal should first measure the loss arising in consequence of the dismissal, insofar as it is attributable to the Respondent's actions; it should then consider any deduction for mitigation; then the tribunal should apply such reductions as are just and equitable in the circumstances of the case, including any deduction under the principle in **Polkey** (see below); it should then make any reduction for contributory fault; and finally it should apply the statutory cap.

Mitigation

30. The Tribunal should be conscious of the duty on the Claimant to mitigate her losses as referred to in Section 123(4) of the ERA, whilst noting also that it is for the Respondent to raise questions about and cast doubt upon the Claimant's fulfilment of that duty, that is to show she has acted unreasonably. Whilst the Tribunal should not be too stringent in its demands, the Claimant does have a duty to mitigate her losses, and if the Tribunal is satisfied that she has not fulfilled that duty, it should make the best assessment it can, based on the evidence before it, of when and to what extent, her losses would have been mitigated had she done so.

Polkey reductions

31. As for the duty of the Tribunal to consider whether the compensatory award should be reduced because even if a fair procedure had been followed, dismissal would have taken place in any event, the Tribunal must have regard to the case of **Polkey v A E Dayton Services Limited [1988] ICR 142**. As has been made clear in cases such as **Software 2000 Ltd v Andrews [2007] ICR 825**, this entails asking how long the Claimant would have been employed but for the dismissal, or applying a percentage deduction to reflect the possibility that the Claimant would have been fairly dismissed. Either way, the Tribunal's assessment must be based on the evidence presented to it. As the Employment Appeal Tribunal ("EAT") put it in **Andrews**, the task is for the Tribunal to identify and consider any evidence which it can with some confidence deploy to predict what would have happened

had there been no unfair dismissal. The EAT acknowledged that there will be cases where a tribunal may reasonably take the view that reconstructing what might have been is so fraught with uncertainty that no such assessment can be made, but it must be recognised that in any such judgment an element of speculation is involved.

32. In **Hill v Governing Body of Great Tey Primary School [2013] IRLR 274**, the EAT noted that a **Polkey** reduction has the following features: *"First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done … The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand ... The potential fairness of any decision is not the issue: it is the chances of a particular decision being made at all.*"

Deduction for conduct

33. Section 123(6) of the ERA dealing with the compensatory award is in somewhat different terms to that applying to the basic award, on the question of deductions relating to a complainant's conduct. It says: "*Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding*". In respect of either award, unlike the test for unfair dismissal, if reducing compensation because of contributory fault the Tribunal must find as a fact that the Claimant has actually acted in such a manner as (in relation to the basic award) to render it just and equitable to reduce compensation, and (in relation to the compensatory award) to have contributed to her dismissal. Importantly, the conduct must be in some sense blameworthy. The case of **Hollier v Plysu Ltd [1983] IRLR 260** sets out a familiar (though not prescriptive) range of the degree of blameworthiness that will lead to various percentage reductions from 25% where the employee was slightly to blame, to 100% when the employee was "wholly to blame".

34. We also had regard to **Rao v Civil Aviation Authority [1994] ICR 495** in which the Court of Appeal suggested that in deciding on the reduction of compensatory awards for contributory fault, it may well be appropriate to have regard to any deduction already made principally as a result of **Polkey** considerations.

35. Finally, Ms Duane referred us to the case of **Lemonious v Church Commissioners [2013] UKEAT/0253/12** in which the EAT held that a 100% reduction would be perverse where an employer's failings had been causally relevant to the dismissal, but otherwise 100% reductions were permissible in both the basic and compensatory awards, as long as the Tribunal did not assume that where there was no reason for the dismissal other than the employee's conduct, such a reduction was appropriate.

Analysis

Basic Award

36. The sole question was whether the award should be reduced under section 122(2) of the ERA, and if so to what extent. We were therefore required to consider the Claimant's conduct before dismissal as we determined it to have been.

37. In deciding this question, we took into account the context in which the Claimant's conduct arose. The Respondent serves and has responsibility for the care of highly vulnerable individuals. The conduct in question took place during the very early days of the Covid-19 pandemic, at a time when there was no vaccine and a great deal of fear and ignorance of the virus and its potential consequences. As already noted, the Claimant agreed that it would not have been appropriate to go into work knowing one had, or believing one might have, Covid-19 symptoms, because it could put service users at risk in particular, as well as colleagues. We have found on balance that this is what she did.
That was her conduct before dismissal.

38. It was clear in the light of that conduct done in that context that it was just and equitable to reduce the amount of the basic award. Our conclusion was that it was right to recognise the agreed seriousness of the Claimant's conduct in doing so, noting that we had a wide discretion as to the amount of the reduction.

39. We considered the amount of the reduction very carefully. We considered the nature of the unfairness to the Claimant, namely the fact that she was not shown three documents on which the Respondent relied in reaching its decision to dismiss. They were highly relevant documents, but as the Respondent submitted, their contents were, to some degree at least, stated orally to the Claimant in the course of the disciplinary process. Set against that, the Claimant's conduct – whether calculated or negligent – can only be categorised as very serious indeed in the context we have described and there were no mitigating factors that either were, or frankly could be, put forward. We therefore decided that a 100% reduction was what would be just and equitable in the circumstances of this case. The amount of the basic award was therefore nil.

Compensatory award – mitigation

40. We did not accept that the Respondent had discharged the burden on it of showing that the Claimant acted unreasonably in taking the decision she did to pursue her bank work with the NHS rather than looking for work elsewhere. It was a job she knew; she had been on an NHS contract with the Respondent for her main employment transferred from Affinity and could understandably want to continue to enjoy such terms; there was not a huge difference in the rates of pay in that role and the rates of pay she might have secured in care roles; and there was the additional benefit of NHS pension scheme membership, which is substantial.

41. We accepted that the Claimant did look at some possible roles and did not see jobs paying more than the rate she was on with the NHS. We also noted that at the point at which she was dismissed, the Covid-19 pandemic was still at its height, so that it was an uncertain time for anyone looking for a new role. The Claimant had lost her job after a lengthy period of stable employment, and with the benefit

of hindsight it can be seen that in the longer term, her hourly rate with the NHS has increased to be comparable with what she could have obtained elsewhere.

Compensatory award – Polkey

42. The essential questions under this heading were whether this Respondent would have dismissed this Claimant having eradicated the unfairness we identified, if so whether it could have done so fairly, and if so when that would have occurred or what the chances of it occurring were.

43. We were in no doubt that the Respondent would have dismissed the Claimant. The simple reason for that is that the three documents in question were supportive of the disciplinary allegation against her. The return-to-work meeting note said she had communicated that she had had flu-like symptoms; the timesheet showed that she was signed off sick; and the diary essentially only confirmed that she had the return-to-work meeting with Ms Hamilton.

44. We do not demur from our earlier finding that not disclosing these documents to the Claimant for her consideration before deciding to dismiss her was unfair, in that it is a basic principle of natural justice and therefore of fairness that evidence an employer relies on to dismiss an employee must be shared with them so that they can comment on it. What is crucial to note for remedy purposes however, is that Mr Walker positively took this evidence into account in making his decision and made the decision to dismiss. It is inarguable that if the evidence had been shared with the Claimant – and again we note the Respondent's point that its essence was to some extent explained to her – he would have taken the same decision.

45. The next question was whether the Respondent could fairly have dismissed the Claimant, with the unfairness corrected. The answer to that question was also clear. Our own findings on liability, summarised above, show that it could, having carried out a fair investigation and reached a reasonable conclusion. The context in which the Respondent operates and the nature of the Claimant's misconduct mean that dismissal – as we also found at the liability stage – would have been well within the range of reasonable responses. Importantly, the Claimant was not able to lead any evidence at the remedy stage that materially challenges these conclusions. We thus found that it is certain the Respondent would and could have fairly dismissed her.

46. The final question was when that would that have happened. We were clear that what the Respondent should have done was give this important evidence to the Claimant and allow her time to consider it and prepare to respond to it. That would necessarily have entailed, we concluded, adjourning the disciplinary hearing and rearranging it to continue on another day to ensure the disciplinary process was fair.

47. We agreed with Ms Duane's submission that in that circumstance dismissal would have followed within a period of a few weeks. This is not an exact science. Ms Duane suggested no more than two weeks. We noted that there was a month's gap between the disciplinary investigation meeting and the disciplinary hearing and that this was a period during which the pandemic was creating difficulties for many employers. Furthermore, the Respondent did not obtain the Claimant's timesheets from Affinity until 20 October 2020 – see page 237 of the liability bundle. We concluded that a similar length of time would have been taken to resume the

disciplinary hearing and thus that the appropriate measure of loss was in our judgment three weeks.

48. At this juncture, the relevant calculation of the compensatory award was as follows in the light of the conclusions set out above:

48.1. Three weeks' net pay at £504 was £1,512.

48.2. Three weeks' employer pension contributions (plainly the appropriate method of calculation in this case) at £70 was £210.

48.3. The agreed figure for loss of statutory rights was £500.

48.4. This produced a total of £2,222.

48.5. To 20 November 2020, approximately three weeks after dismissal, the Claimant earned wages of £322.32 and received 14.38% of pension contributions of £46.35.

48.6. This gave a net loss of £1,853.33.

Compensatory award – contributory fault

49. We have set out above our conclusions as to the Claimant's conduct. The question for us to determine was whether the compensatory award should be further reduced because her conduct contributed to or caused her dismissal.

50. It clearly did and essentially wholly so, for all the reasons we have set out above. That said, and whilst we accept that the unfairness was not causally relevant to the dismissal (**Lemonius**), there was some unfairness to the Claimant, even if only of a procedural nature. Having regard to **Rao**, which makes clear that tribunals may have regard to what reduction should be made by way of contributory conduct where there has been a substantial **Polkey** reduction, but being of the view that some further reduction was appropriate given the grave seriousness of the Claimant's conduct, we concluded that a further 50% reduction under s123(6) of the ERA was just and equitable. The total compensatory award was therefore £926.67.

51. Given our conclusions set out above, it was of course unnecessary for us to consider the further question of whether the calculation of the Claimant's compensation should be limited to the date on which she was absent from her work in the NHS because of sickness.

Employment Judge Faulkner
05 July 2022

Note

All judgments and written reasons for the judgments (if provided) are published, in full, online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties in a case.