EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr E. Grazioli	**v**	**Charles Gregory Solicitors Limited**

Heard at: London Central

On: 14 July 2022
(+ 01 September 2022 in chambers)

Before: Employment Judge B Beyzade

Members: Mr A Adolphus, Tribunal Member
Ms J Cameron, Tribunal Member

Representation

For the Claimant: Mr M Sprack, Counsel
For the Respondent: Mr A Korn, Counsel

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The unanimous judgment of the tribunal is that:

1.1 The respondent shall pay to the claimant a monetary award amounting to Twenty Thousand Three Hundred and Ninety-Nine pounds and Forty-Eight pence (£20,399.48) consisting of a basic award of £7,875.00 and a compensatory award of £12,024.48 (loss of earnings) and £500.00 (loss of statutory rights). Unless any objections are received in accordance with the Tribunal's directions in paragraph 83 below within 14 days of the date that this Judgment is sent to the parties, the claimant shall also be paid by the

respondent the additional sum of £2,039.95 which reflects an ACAS uplift pursuant to section 207A of the *Trade Union and Labour Relations (Consolidation) Act 1992*.

1.2 The *Employment Protection (Recoupment of Jobseekers' Allowance & Income Support) Regulations 1996* apply to this award. The prescribed element is £12,024.48 (this increases to £13,226.93 when the ACAS uplift referred to in paragraph 1.1 of this Judgment is taken into account) and relates to the period from the claimant's effective date of termination on 11 December 2019 to 31 May 2020.

1.3 The respondent shall pay the claimant the sum of Five Thousand Two Hundred and Fifty pounds (£5,250.00) as compensation relating to the complaint of failure to inform and consult pursuant to Regulations 13 and 15 of the TUPE Regulations 2006.

1.4 The respondent shall pay the claimant the sum of Three Thousand Three Hundred and Thirty-Two Pounds and Eighty-Four pence (£3,332.84) and in addition the respondent shall pay any required tax and national insurance to His Majesty's Revenue and Customs in respect of arrears of pay between October 2019 and December 2019 (and shall account to the claimant in respect of the same).

1.5 The respondent shall pay the claimant the sum of Nine Hundred and Seventy-One Pounds and Twenty-Five Pence (£971.25) as accrued but untaken holiday leave up to and including 11 December 2019 and in addition the respondent shall pay any required tax and national insurance to His Majesty's Revenue and Customs in respect of the said holiday pay amount (and shall account to the claimant in respect of the same).

REASONS

Introduction

1. The Employment Tribunal issued a Judgment dated 08 February 2022 sent to parties on 10 February 2022 upholding the claimant's application for a finding that he had been unfairly dismissed, failure to inform and consult pursuant to Regulations 13 and 15 of the TUPE Regulations 2006 ("TUPE"), unauthorised deduction from wages (arrears of pay between October 2019 and December 2019), and unauthorised deduction from wages (holiday pay that had accrued at the termination of the claimant's employment).

2. The case proceeded to a hearing on remedy which took place by Cloud Video Platform on 14 July 2022 and the Tribunal met in chambers (in private) on 01 September 2022 to deliberate and make its decision.

3. The parties prepared and filed a Joint Index and Bundle of Documents in advance of the liability hearing consisting of 419 pages and in addition to this we were provided with a remedy hearing file of documents (152 pages).

4. At the outset of the remedy hearing the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, both parties being in agreement with these:

Unfair Dismissal

1. *Should a compensation payment be made to the claimant in respect of a basic award and/or compensatory award, and if so in what amount(s)?*

2. *If so, should any award be reduced under Section 123(6) or Section 123 (6A) of the Employment Rights Act 1996 ("ERA 1996") and if so by how much?*

3. *Should the basic award be reduced by reason of the claimant's conduct under section 122(2) of the ERA 1996?*

4. *Should any award be increased due to the respondent's failures to comply with the ACAS Code of Practice?*

5. *Would the claimant have been dismissed in any event even if the process had been fair and/or would the claimant have been dismissed at some future date and if so when? If so, should the Tribunal exercise its discretion to reduce damages in the circumstances?*

Failure to inform and consult

6. *What award of 'appropriate' compensation shall be payable to the claimant pursuant to Regulation 16(3) of TUPE and who shall be liable to pay that award?*

Unlawful Deduction of Wages

7. *What was the amount of the claimant's wages that was unlawfully deducted in:*
    a. *Relation to October (£1982.04), November (£1982.04) and December 2019 (£703.30); and*
    b. *Respect of his outstanding annual leave on termination?*

5. The claimant gave evidence at the hearing on his own behalf, and he provided a witness statement and a supplementary statement. Ms R Hussain gave evidence on behalf of the respondent, and she produced a written statement.

6. Both parties were represented by counsel and made oral closing submissions, in addition to producing written submissions for the remedy hearing. The Tribunal were also supplied with a Bundle of Authorities containing key cases.

Findings of Fact

7. We have not sought to set out every detail of the evidence which we heard, nor to resolve every difference between the parties, but only those which appear to us to be material to the task of determining an appropriate remedy for the claimant. Our material findings, relevant to the issues before us for judicial determination, based on the balance of probability, are set out below, in a way that is proportionate to the complexity and importance of the relevant issues before the Tribunal.

8. On the basis of the evidence led before us, from the claimant, and the respondent, and after considering the various documents included in the Bundle sent into the Tribunal, we have found the following additional essential facts established:-

Information required to determine basic award

9. The claimant is aged 50 years (date of birth: 26/06/1972) and he started employment with the respondent on 31 May 2007 (although this is the date the claimant started working for Rider Support Services Limited, his employment transferred to the respondent by operation of the TUPE Regulations 2006 on 01 October 2019). His weekly gross pay was £525.00. His employment with the respondent ended on 11 December 2019.

Unlawful deduction from wages – wages and holiday pay

10. The claimant presented fit notes to the respondent in respect of the periods between 26 September 2019 – 11 October 2019 and 18 October 2019 – 22 October 2019. This amounts to 16 days' during the month of October 2019 during which the claimant was certified as being unfit to work by his GP. During this time the claimant was entitled to receive Statutory Sick Pay.

11. Between 12 and 14 October 2019 the claimant was not certified by his GP as off sick from work and he did not attend work. The claimant continued to be absent due to ill health during this time. Following the meeting with Mrs Wheatley on 15 October 2019 and a subsequent telephone conversation on 16 October 2019, the claimant was suspended from work on full contractual pay. Ms Hussain did not advise the claimant that his suspension was lifted (including the date his suspension was lifted) until 14 November 2019.

Holiday pay

12. The claimant was on pre-booked annual leave between 18 November 2019 and 10 December 2019.

13. He returned from annual leave on 11 December 2019, and he attended the disciplinary hearing on that date.

Earnings from the respondent

14. The claimant produced some copy payslips and bank statements to the Tribunal vouching his earnings from the respondent, including some for the 12 weeks prior to his dismissal.

Compensatory award

15. When the claimant was dismissed by the respondent, on 11 December 2019, he did not work any period of notice and he did not receive a payment in lieu of notice.

16. While, at the time of lodging his ET1 claim form, on 25 March 2020, he had not found any new employment with a new employer, and he was in receipt of State benefits, through Universal Credit (which he applied for on or around 13 December 2019).

17. The claimant had purchased a policy of insurance through the use of his own personal funds, pursuant to which he claimed monies in respect of loss of earnings, following the termination of his employment with the respondent.

18. The claimant advised the Tribunal that he had started working in a new role on around 1 January 2021, and he continued working in that position as at the date of this Remedy Hearing. He advised the Tribunal that he accepts that he is not entitled to loss of earnings from that date. No vouching documents were produced to the Tribunal as regards earnings from this new employment for the claimant.

19. The claimant provided job search documents relating to the period after 03 January 2020 in the Remedy Hearing Bundle **(see pages 71 – 85)**. The claimant said that his job search was made much more difficult because of the Coronavirus pandemic, which meant that firms were more reluctant to hire new staff, albeit he did not state the period to which he was referring to or the firms in question, and no supporting evidence was provided.

20. Ms Hussein was aware of vacancies at Levenes Solicitors and Broadgate Legal for Brazilian Portuguese speaking personal injury solicitors, and that Gibson Young Solicitors were advertising through agents for personal injury solicitors (and secured a candidate in December 2020). She found it difficult to secure a replacement for the claimant's post.

21. The claimant's weekly net pay was £462.48.

Polkey and Conduct

22. The Tribunal made findings following the liability hearing about how the constructive dismissal took place, which were both of a procedural and substantive nature. The Tribunal noted that the claimant was not informed until 14 November 2019 that his suspension had been lifted, and he was due to go on holiday shortly afterwards. Ms Hussein's position that the claimant was absent without leave is therefore difficult to decipher.

23. The Tribunal did not find that the claimant made any allegation that his health and safety had been, was being or was likely to be endangered. There was no basis for concluding that the claimant would not have been willing to work on the basis of health and safety.

ACAS

24. The Tribunal made findings of fact relating to the respondent's handling of the claimant's grievance and the disciplinary process in its liability judgment.

TUPE

25. The Tribunal made findings of fact relating to the respondent's handling of any relevant TUPE matters in its liability judgment.

<u>Observations</u>

26. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –

27. In considering the evidence led before the Tribunal, and the various documents produced to us, at this Remedy Hearing, we have had to carefully assess the whole evidence heard from both the claimant and the respondent and we made our findings based on the totality of the evidence.

28. The claimant was clearly aggrieved at his treatment at the hands of his former employer, the respondent, and about the way in which he had been treated by the respondent.

29. The Tribunal observed that in terms of the witness evidence it heard, different witnesses were able to assist with or comment on specific aspects of this case. Where there was a conflict of evidence, the Tribunal made findings of fact on the balance probabilities based on the documents, and having considered the totality of the witness evidence, and accepted the evidence that set out the position most clearly and consistently.

Relevant law

30. To those facts, the Tribunal applied the law –

Unlawful deduction from wages

31. Section 13 of the ERA 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised by statute, or by a provision in the worker's contract advised in writing, or by the worker's prior written consent.

32. Under Section 27(1) of the ERA 1996 "wages" means any sums payable to the worker in connection with their employment including salary and holiday pay.

33. Section 23 of the ERA 1996 states that a worker may present a complaint to a Tribunal that his employer has made a deduction in contravention of section 13.

34. Regulation 30(1)(b) of the *Working Time Regulations 1998* states that a worker may present a complaint to a Tribunal where his employer has failed to pay him

the whole or any part of any amount due to him by way of payment in lieu of accrued but untaken leave upon termination of employment. In such circumstances, the Tribunal is required to "*order the employer to pay to the worker the amount which it finds to be due to him*". Claims for underpaid holiday pay are pursued under the provisions of the ERA 1996 (above).

Unfair dismissal (constructive)

35. Under section 113 of the 1996 Act, if the Tribunal finds that the claimant has been unfairly dismissed, it can order reinstatement or re-engagement, or where no award for reinstatement or re-engagement is made, it can award compensation under section 112(4) of the ERA 1996.

36. Section 118 of the 1996 Act states that compensation is made up of a basic award and a compensatory award. A basic award is based on age, length of service and gross weekly wage (section 119). The amount is a one week's pay (ages 22 to 40) and one a half week's pay between the ages of 41 and 65.

37. Section 123(1) of the 1996 Act states that the compensatory award is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer. This generally includes loss of earnings up to the date of the hearing (after deducting any earnings from alternative employment), an assessment of future loss, if appropriate a figure representing loss of statutory rights, pension loss etc.

38. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the ERA 1996.

39. Section 122(2) of the ERA 1996 provides as follows: "*Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic*

award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."

40. Section 123(6) of the ERA 1996 states "*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*."

41. We have been invited to consider whether the claimant's dismissal was caused by or contributed to by his own conduct. In order for a deduction to have been made under these sections the conduct needs to have been culpable or blameworthy in the sense that it was foolish, perverse, or unreasonable. It did not have to have been in breach of contract, equivalent to gross misconduct or tortious (*Nelson-v-BBC [1980] ICR 110*)

42. We have applied the test recommended in *Steen-v-ASP Packaging Ltd [2014] ICR 56*; we have had to: a) Identify the conduct; b) Consider whether it was blameworthy; c) Consider whether it caused or contributed to the dismissal; d) Determined whether it was just and equitable to reduce compensation; e) Determined by what level such a reduction was just and equitable.

43. We have also considered the slightly different test under s. 122 (2) of the ERA 1996; whether any of the claimant's conduct prior to his dismissal made it just and equitable to reduce the basic award, even if that conduct did not necessarily cause or contribute to the dismissal.

44. Where a Tribunal finds that the claimant was unfairly dismissed the Tribunal should consider whether any adjustment should be made to the compensation on the grounds that that the claimant would have been dismissed in any event in accordance with the principles in *Polkey v AE Dayton Services Ltd [1987] UKHL 8, Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; and Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604*.

45. The decision in *Polkey-v-AE Dayton Services [1988] ICR 142* introduced an approach which requires a Tribunal to reduce compensation if it finds that there was a possibility that the employee would still have been dismissed even if a fair procedure had been adopted. Compensation can be reduced to reflect the percentage chance of that possibility. Alternatively, a Tribunal might conclude that a fair procedure would have delayed the dismissal, in which case compensation can be tailored to reflect the likely delay. A Tribunal had to consider whether a fair procedure would have made a difference, but also what that difference might have been, if any (*Singh-v-Glass Express Midlands Ltd UKEAT/0071/18/DM*).

46. It is for the employer to adduce relevant evidence on this issue, although a Tribunal should have regards to any relevant evidence when making the assessment. A degree of uncertainty is inevitable, but there may well be circumstances when the nature of the evidence is such as to make a prediction so unreliable that it is unsafe to attempt to reconstruct what might have happened had a fair procedure been used. However, a Tribunal should not be reluctant to undertake an examination of a *Polkey* issue simply because it involves some degree of speculation (*Software 2000 Ltd.-v-Andrews [2007] ICR 825* and *Contract Bottling Ltd-v-Cave [2014] UKEAT/0100/14*).

TUPE -Failure to inform and consult

47. Regulation 13 of TUPE obliges transferors and transferee to inform and consult in respect of affected employees. This term is defined in regulation 13(1) and includes employees of the transferor or the transferee who might be affected by the transfer or may be affected by measures taken in connection with it.

48. Regulation 13A sets out circumstances in which a micro-business "…*may comply with regulation 13 by performing any duty which relates to appropriate representatives as if each of the affected employees were an appropriate representative*."

49. Regulation 15 of TUPE contains provisions about the circumstances in which an employee can present a complaint to a Tribunal in relation to a breach of Regulation 13 of TUPE. Regulation 15(7) provides: "*Where the tribunal finds a complaint against a transferee under paragraph (1) well-founded it shall make a declaration to that effect and may order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award*."

50. Thereafter Regulation 16 of TUPE contains supplemental provisions including Regulation 16(3) which provides the following definition ""*Appropriate compensation" in regulation 15 means such sum not exceeding thirteen weeks' pay for the employee in question as the tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty*."

ACAS Uplift

51. Section 207A *Trade Union and Labour Relations (Consolidation) Act 1992* provides in relation to certain claims including unfair dismissal, that where an employee or employee has failed to comply with an applicable ACAS Code relating to the resolution of the dispute, and that failure was unreasonable, the Tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce or increase any award (as the case may be) it makes to the employee by no more than 25%.

Submissions

52. Parties' representatives set out their submissions in their written documents, along with the authorities they relied on. Those submissions were supplemented by oral submissions, which the Tribunal found to be informative.

53. The claimant's representative submitted that the claimant is entitled to a basic award of £8,653.00, the claimant took sufficient steps to mitigate his loss and he is entitled to loss of earnings between 11 December 2019 and 01 January 2021 totalling £25,473.00, it is not appropriate to make any deductions for

contributory fault or a *Polkey* deduction, that the claimant claims £4323.00 for net wage arrears and £971.21 net accrued holiday pay, and that the claimant is entitled to receive the maximum award up to £6,825.00 in relation to his TUPE claim for failure to consult (or alternatively a high award).

54. The respondent's position is that the claimant had failed to mitigate his loss. The Tribunal would, in the respondent's submission, have to take this into account when assessing what sums if any the claimant was due. As part of the failure to mitigate his losses the respondent's representative refers to paragraphs 8 and 9 of the respondent's remedy statement. This is a significant factor the Tribunal should have reference to. On the issue of contributory fault pursuant to s 123(6) of the ERA 1996 he says the Tribunal should reduce the compensatory award and reference is made to both *Polentarutti v Autocraft Ltd [1991 IRLR 457* and *Frith Accountant v Law [2014] IRLR 510* and that there should be a *Polkey* reduction (he refers to paragraph 25 of Ms Hussain's statement at the liability hearing (page 67 00)). It is submitted that full credit should be given to any insurance payments received by the claimant. The respondent's representative says the Tribunal should also reduce the basic award and the power to do so under s 122(2) of the ERA 1996 is wider than the power to reduce the compensatory award. Paragraphs 9-13 of the respondent's submissions sets out the respondent's position on the claimant's wage arrears and holiday pay claims. Finally the respondent's representative refers to the cases of *Susie Radin Ltd v GMB [2004] IRLR 400 and Sweetin v Coral Racing Ltd [2006] IRLR 252* and he submits that it is just and equitable to award 4 weeks' pay as appropriate compensation pursuant to Regulation 16(3) of TUPE.

55. We have referred to any essential aspects of parties representatives' submissions below, although we found the totality of parties' submissions to be informative and we considered these as a whole.

Discussion and decision

56. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

57. In carefully reviewing the evidence led in this case, and making our findings in fact, and then applying the relevant law to those facts, we have had to consider the appropriate remedy for each of the claimant's successful heads of claim against the respondent.

Unfair dismissal

58. On the first question, what is the claimant entitled to, by way of compensation for unfair dismissal by the respondent, we start by making a few general observations.

59. The claimant has indicated that he seeks an award of compensation only. The claimant does wish the Tribunal to make an order for reinstatement or re-engagement. Having considered the relevant factors in section 116 of the ERA 1996, we exercise our discretion not to make an order for reinstatement or re-engagement considering the claimant's wishes, and in any event we have not heard any clear evidence so as to satisfy us in relation to the matters contained in sections 116(1)(b-c) and 116(3)(b-c) of the ERA 1996.

60. Compensation, in terms of section 118 of the ERA 1996 is made up of a basic award and a compensatory award. A basic award, based on age, length of service and gross weekly wage, in terms of Section 119 of the ERA 1996, can be reduced in certain defined circumstances. Section 122(2) states that where the Tribunal considers that any conduct of a claimant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly. Further, Section 123(1) provides that the compensatory award is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the claimant in consequence of dismissal insofar as that loss is attributable to action taken by the employer.

61. Subject to a claimant's duty to mitigate their losses, in terms of Section 123 (4), this generally includes loss of earnings up to the date of the Final Hearing (after deducting any earnings from alternative employment), an assessment of future loss of earnings, if appropriate, a further figure representing loss of

statutory rights, and consideration of any other heads of loss claimed by a claimant from the respondent employer.

62. Where, in terms of Section 123 (6), the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, then the Tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

63. We do not consider it just and equitable that we should reduce, on account of any contributory conduct by the claimant, the amount of the basic or compensatory award otherwise payable to the claimant for his unfair dismissal by the respondent. As we stated in our findings of fact, we found it difficult to decipher on what basis it was asserted by the respondent that the claimant had displayed culpable conduct. On the evidence, we did not find that there was any culpable or blameworthy conduct on the part of the claimant insofar as section 123(6) of the ERA 1996.

64. We also did not consider that based on the evidence we read and heard that any conduct of the claimant before his dismissal was such that it would be just and equitable to reduce the amount of the basic award.

65. Further, the claimant provided the Tribunal with evidence as regards some attempt on his part to mitigate his losses, following his constructive dismissal from the respondent's employment. Having regard to the relevant legal principles established by the Court of Appeal, in *Wilding v British Telecommunications plc [2002] IRLR 524*, which were reaffirmed by Mr Justice Langstaff, then President of the Employment Appeal Tribunal, in *Cooper Contracting Limited v Lindsey [2015] UKEAT/0184/15*, now reported at *[2016] ICR D3*, and more recently by the Scottish EAT Judge, Lady Wise, in *Donald v AVC Media Enterprises Limited [2016] UKEATS/0016/2014*, the burden of proof is on the wrongdoer; a claimant does not have to prove that they have mitigated loss, and the standard of proof on mitigation of loss is that of a reasonable person and the Tribunal must not apply too demanding a standard on the victim; the claimant is not to be put on trial as if the losses

were their fault when the central cause is the act of the wrongdoer; and the test may be summarised by saying that it is for the wrongdoer to show that a claimant has acted unreasonably in failing to mitigate.

66. On the evidence before us, we are satisfied that the claimant has taken reasonable steps to mitigate his losses up to and including 31 May 2020. However, and by way of example, we noted that in June 2020 the claimant's job search portal showed that he applied for not more than two jobs (we were not provided with any or any sufficient details about those jobs). Therefore, after 31 May 2020, a reasonable person in the position of the claimant should have taken steps to explore other avenues or strategies in terms of his job searches. We considered the above point that the burden of proof is on the wrongdoer. We took into account Ms Hussein's evidence that she was aware that there were relevant solicitor jobs available at other firms, including jobs for Brazilian Portuguese-speaking solicitors. There was no evidence before the Tribunal that the claimant took any steps to apply for work at the relevant law firms. We also did not have before us copies of the claimant's documentation showing the jobs he applied for and their outcomes, other than the lists of jobs and documents included in the Hearing Bundle.

67. The claimant has been fortunate in that he has eventually managed to secure new employment. The issue which now arises is what is the appropriate amount of compensation that the Tribunal should order the respondent to pay to the claimant for his unfair dismissal.

68. We have carefully considered the facts, as per our findings in fact detailed above, and we have concluded that the claimant should receive the appropriate basic award, and the appropriate compensatory award for his unfair dismissal, and that without any reductions or deductions.

69. The claimant was employed by the respondent from 31 May 2007 until 11 December 2019, a period of twelve continuous years' employment with the respondent. Taking that length of service, together with his age at effective date of termination, being then aged 47 (date of birth : 26/06/1972), that

produces a basic award of 15 weeks' gross pay at £525 gross per week (the claimant's gross weekly basic pay was £576.92) totalling £7,875.00.

70. Next, we turn to the compensatory award for unfair dismissal. Whereas the claimant states he should be awarded £500.00 (and the respondent does not specify any figure in its Counter Schedule), we are satisfied that an award of £500.00 is appropriate for loss of his statutory employment rights, following termination of his employment with the respondent, and to recognise that he will have to work two years with a new employer to regain protection from unfair dismissal.

71. As such, and as an award at that level is within generally recognised bounds for an Employment Tribunal to make such an award, we have no difficulty with awarding that amount to the claimant as part of his compensatory award.

72. Turning then to look at his loss of earnings, we require to consider that having regard to past loss of earnings, to the date of this Remedy Hearing (there is no claim for future loss of earnings from date of this Remedy Hearing), going forward. The Tribunal's duty, under Section 123 of the ERA 1996, is to assess the amount of the compensatory award as being such amount as the Tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of dismissal insofar as that loss is attributable to action taken by the respondent as the former employer.

73. In determining the compensatory award, the Tribunal must proceed on the basis of the claimant's weekly net pay when employed with the respondent. The respondent states in its submissions that subject to the issues of Polkey, mitigation and contributory fault, the respondent does not challenge the claimant's calculation of the compensatory award at 54 week's net pay at £24, 973.92. The claimant based its calculation on a weekly net pay amount of £462.48. Based on the payslips with which we have been provided, we accept that this is a reasonable computation of the claimant's weekly net pay.

74. The period between effective date of termination, being 11 December 2019 and the date up to which we found the claimant had taken reasonable steps to mitigate his losses (being 31 May 2020) is 26 weeks. The claimant has not received any earnings in that period from any new employment. The claimant is entitled to 26 weeks' pay at £462.48 net per week, equalling £12,024.48 in that regard. It is appropriate that we award him that sum for past loss of earnings. We have considered the jobs market, and the parties' evidence relating to mitigation.

75. The claimant did not make any other claim for loss of any employment benefits, or pension loss, so taking all of the above matters into account, as detailed earlier in these Reasons, the Tribunal orders that the respondent shall pay the following monetary awards to the claimant, calculated as per this summary breakdown:
Basic award: £7,875.00
Compensatory award: Past loss of earnings: £12,024.48 ("prescribed element")
Future loss of earnings: - £NIL
Loss of statutory rights: £500.00
Sub-total: £20,399.48

Polkey reduction

76. As we indicated above, as we have found that the claimant was unfairly dismissed we should consider whether any adjustment should be made to the compensation on the grounds that the claimant would have been dismissed in any event, and it is for the respondent to adduce evidence on this issue (although we should take account of any relevant evidence before us).

77. We therefore turn to this issue now and the respondent invites us to find that employment would have ended in any event one month after the claimant's dismissal on 11 December 2019 by reason of his unauthorised absence.

78. We have decided not to make any reduction to the compensation on the grounds that we are not satisfied that the claimant would have been dismissed

in any event. Our findings in the liability judgment in terms of the claimant's unfair dismissal were of both a procedural and substantive nature. In any event having heard the oral evidence from the claimant and the respondent we had insufficient evidence before us to determine that the claimant's purported conduct of refusing to attend the respondent's offices would have led to his dismissal. Furthermore we did not accept that the claimant had raised any health and safety issues (or indeed that at the time of dismissal any purported health and safety issues were live).

ACAS uplift

79. The respondent does not seek to argue that there should be any reduction of compensation by reason of any alleged breach of the ACAS Code by the claimant, whereas the claimant asserts that the respondent breached the ACAS Code of Practice. It was not clear on what basis the claimant claimed an ACAS uplift from reviewing the list of issues or the claimant's submissions which did not address this issue. The claimant's representative did not specify any particular breach that was relied upon by the claimant. Additionally the respondent did not make any submissions relating to this matter.

80. We consider that the ACAS Code of Practice on Disciplinary and Grievance Procedures applies in respect of this claim by reason of the fact that the claimant raised a grievance prior to his resignation. Having heard evidence from the parties at the liability hearing, we concluded that the respondent failed to take steps to consider the claimant's grievance dated 09 December 2019 until after the disciplinary hearing on 11 December 2019. There was no appreciation during the disciplinary hearing on 11 December 2019 that the claimant's grievance could be important enough to pause the disciplinary matter, in order to consider the issues that the claimant were raising. We are satisfied, in the circumstances that the respondent failed to comply with the ACAS Code of Practice and that such failure was unreasonable in the circumstances.

81. We considered all circumstances referred to in the liability judgment including the date the grievance was raised (09 December 2019), the date of the

disciplinary hearing (11 December 2019), and the parties' correspondences relating to the claimant's grievance. Our findings on liability make clear that the respondent should have considered the claimant's grievance fairly and reasonably, and furthermore they should have followed the steps outlined in the ACAS Code of Practice.

82. We are entitled in the circumstances to increase the amount of compensation we have awarded by up to 25%. However taking into account all the circumstances we have reached the provisional view that an increase in the compensation payable by 10% (i.e. £20,399.48 + £2,039.95 = £22,439.43) is just and equitable. This considers all the circumstances including the fact that the respondent had acknowledged the claimant's grievance albeit this was not a step that was taken until after the disciplinary hearing had taken place. By that stage, the claimant's trust and confidence in the respondent had been destroyed. As the respondent failed to acknowledge the claimant's grievance and set up a grievance meeting before the disciplinary hearing took place, the respondent missed an important opportunity to discuss the claimant's issues with him and thereafter to take any appropriate remedial action.

83. If either party wishes to object to the Tribunal's provisional award to the claimant of an ACAS uplift of 10%, they shall write to the Tribunal copied to the other party confirming that they object and providing any grounds in respect thereof **by not later than 14 days from the date that this Reserved Judgment and Reasons is sent to the parties by the Tribunal**. In the event that the Tribunal does not receive any objections from the parties within 14 days of the said timeframe, the Tribunal's award of a 10% ACAS uplift to the claimant shall be final.

Insurance

84. The respondent's representative says the relevance of the case of *Smoker v London Fire and Defence Authority* in paragraph 7 of the claimant's counsel's submissions is not understood and that this concerned the issue of whether pension insurance benefits should be taken into account in the calculation of personal injury damages. He says that the House of Lords ruled that this was

a collateral benefit and should not be taken into account because this reflected past contributions to pension benefits and that the case has no application or relevance to the present circumstances. The respondent submits that the claimant should give credit for all insurance payments received in the same way as an employee would give credit for all earnings received or, but for the Recoupment Regulations, would give credit for benefits received.

85. The claimant's representative says that payments to a claimant under a private contract of insurance between the claimant and an insurer, to which contract the tortfeasor is not a party, are not deductible from any award in damages payable by the tortfeasor to the claimant (*Bradburn v Great Western Railway Co (1874) LR 10 Ex 1* ; *Smoker v London Fire and Civil Defence Authority [1991] 2 AC 502*).

86. The Tribunal declined to give credit for any insurance payments received by the claimant as suggested by the respondent's representative. The principle applicable was that the claimant's insurance benefit were the fruits though insurance of a benefit he obtained as a result of premiums he privately paid, and these cannot be appropriated by the respondent (the tortfeasors). Payments under an insurance policy are deductible in full if the employer alone has paid for the policy, but not where an employee has paid for the policy in full (we have considered authorities cited by parties and in addition the cases of *Colt Technology Serviced Ltd v Brown UKEAT/0023/17/BA* and *Gaca v Pirelli General Plc [2004] 1 WLR 2683*). Considering the authorities, we concluded that any benefits derived from insurance payments (which in this instance all premium payments were wholly made by the claimant) were not deductible from the damages awarded to the claimant for loss of earnings.

Recoupment Regulations

87. As the claimant has been in receipt of Universal Credit, the relevant department will serve a notice on the respondent stating how much is due to be repaid to it in respect of Universal Credit. In the meantime, the respondent should only pay to the claimant the amount by which the monetary award exceeds the prescribed element, if any.

88. The prescribed amount consists of the loss of wages from the date of dismissal until those losses ceased, less sums earned. On the basis of the evidence we heard, we have found that past losses should accumulate only until 31 May 2020. The dismissal took effect on 11 December 2019 and losses ended on 31 May 2020, that is 26 weeks. The prescribed amount is therefore £12,024.48 (increasing to £13,226.93 to take into account the ACAS uplift of 10% [subject to paragraph 83 above]). The balance falls to be paid once the respondent has received the notice from the relevant department.

Failure to inform and consult

89. "Appropriate compensation" in Regulation 15 means such sum not exceeding thirteen weeks' pay for the employee in question as the Tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty.

90. We consider that the respondent is liable to pay appropriate compensation. We therefore assessed the amount that we consider is just and equitable in the circumstances. Our starting point was to consider whether an award of 13 weeks' pay was appropriate. Having considered this and the circumstances as a whole, we determined that it was just and equitable to award 10 weeks' pay capped at £525.00 (10 weeks' pay x £525) which results in an award of £5,250.00 to the claimant.

91. We considered all the circumstances including the fact that Mrs Wheatley was not a solicitor (and she was a business owner by virtue of her late husband's legacy), and that Ms Hussein was not an employment or commercial lawyer (albeit we considered that it was reasonable for her to seek appropriate advice), the size and administrative resources of the respondent, the timing and manner of the TUPE transfer, the claimant's knowledge about the client files being transferred to the respondent, and the information that was provided to the claimant by the respondent in writing (albeit this was provided significantly after the date of the TUPE transfer).

92. The Tribunal were mindful that the amount awarded had to reflect the seriousness of the failure. The claimant was not provided with details about the terms of his employment with the respondent in writing until significantly after the date of the TUPE transfer. The respondent initially pleaded that there was no TUPE transfer in its response to the claim and the respondent's representative states that this simply demonstrates the respondent's ignorance. Based on the facts we heard and considered, we are satisfied that this award reflects the seriousness of the failure on the part of the respondent.

Wage arrears

93. We accept the respondent's calculation to the extent that the payments received for October totalled £429.62 and consisted of:
1-11 October: 9 days SSP at £19.27= £173.43
16-17 October: Full pay on suspension £198.38
18-22 October: 3 days SSP = £58.71

94. The claimant was not at work between 12 and 15 October 2019 and we find on the balance of probabilities that he was unwell during that time (although there was no fit note presented). As he did not present a fit note he was not entitled to SSP or any other sick pay for those dates. However we find that the claimant should have received full pay between 23 – 31 October 2019. The claimant is entitled to £647.50 (£92.50 x 7 working days), and the respondent is required to account for tax and national insurance contributions in respect of those dates. The claimant's claim for unlawful deduction of wages in respect of October 2019 succeeds to that extent.

95. The claimant states that he is owed £1982.04 net pay in respect of November 2019 and £703.30 net pay for the month of December 2019.The respondent says the amount of £1982.04 is owed in respect of November 2019 including annual leave leave payment and that £647.08 is owed in respect of December 2019. Having reviewed the evidence we find that the claimant is owed the sums he claims in respect of November (£1982.04 net) and December 2019 (£703.30) by way of wages, and we award judgement in that amount. The

respondent must properly account to HMRC in respect of those payments and intimate to the claimant any amounts that are payable to HMRC.

Holiday pay

96. In our liability judgment we noted that the claimant claimed 19 days' holiday pay. In his Schedule of Loss the claimant claims 10.5 days' holiday pay based on £92.50 per day. The respondent's Counter Schedule states that the November 2019 figures are agreed including the claimant's holiday leave payment and December's figures at £94.44 per day net x 7 working days holiday pay are also agreed.

97. The claimant stated in his witness statement that his holiday entitlement were 25 working days plus bank holidays per year. The claimant says he had 19 days' holiday left for the year ending in November 2019 (1.12.2018 until 30.11.2019), and his holidays were pre-booked from 18 November 2019 until 10 December 2019.

98. 15 days' holiday were taken by the claimant between November 2019 and December 2019.

99. The holiday year was between 1 December and 30 November in each holiday year.

100. The claimant had 10 days' holiday remaining in the year 2018/2019. We accept that these 10 days were carried over by agreement. We accepted the claimant's evidence and that in accordance with the agreement made with the respondent his 10 days' paid holiday entitlement could be carried over. The claimant also had pre-booked holiday that formed part of the new leave year.

101. In the following leave year starting on 1 December 2019 the claimant had accrued 0.5 days' annual leave.

102. We accepted the claimant's evidence that he was owed 10.5 days' holiday pay as at the date his date of dismissal, 11 December 2019. We therefore award

the claimant the sum of £971.25 net pay (that is, £92.50 x 10.5 days). The respondent must properly account to HMRC in respect of those payments and intimate to the claimant any amounts that are payable to HMRC.

Overpayment

103. There was no counter claim before the Tribunal in respect of any overpayment. In any event an employer cannot bring a counter claim in respect of unlawful deduction of wages claims. In terms of s 13 of the ERA 1996 we are not satisfied that any purported overpayment was required or authorised to be deducted by statute, or indeed, pursuant to the employee's contract. Furthermore we were not satisfied that the claimant previously signified his agreement or consent to the making of the deduction in writing.

Conclusion

104. In summary, the claimant is awarded the following sums for each claim:
105.1 Unfair dismissal: Basic award: £7,875.00; Compensatory award: £12,024.48 (loss of earnings 11.12.2019-31.05.2020); Loss of statutory rights: £500.00 subject to ACAS uplift of £2,039.95 (provisional ACAS uplift assessment - see above) and Recoupment Regulations (see above);
105.2 TUPE: £5,250.00;
105.3 Wage arrears: £3,332.84 net pay + tax and national insurance; and
105.4 Holiday pay: £971.25 net pay + tax and national insurance.

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Employment Judge B Beyzade

Dated: 28 October 2022

Sent to the parties on:
31/10/2022

For the Tribunal Office