EMPLOYMENT TRIBUNALS

Claimant: Pamela Alty

Respondent: Links Waste Management Ltd. t/a JM Waste Management

Held at: London South (by CVP) **on:** 4 July and 3 November 2022

Before: Employment Judge Hart

Representation:
Claimant: In person
Respondent: In person

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1 The correct name of the respondent is Links Waste Management Ltd. t/a JM Waste Management.

2 The claimant was an employee of the respondent from 29 April 2019.

3 The claimant has continuous service from 29 April 2019 under the 'associate employer' provisions of section 218(6) of the Employment Rights Act 1996

4 The respondent unfairly dismissed the claimant on the 1 June 2021.

5 The claimant is entitled to loss of earnings up to 5 September 2022.

6 The compensatory award from the 13 September 2021 is to be reduced on a 'just and equitable' basis, to account for the 50% chance that the claimant would have terminated her employment with the respondent.

7 There was a failure to comply with the disciplinary and grievance provisions of the ACAS Code, and the claimants claims for unfair dismissal, notice pay and holiday pay is to be uplifted by 10%.

8 The respondent failed to provide the claimant with a written statement of employment particulars. Two weeks' pay is to added to the compensatory unfair dismissal award.

9 The claimant contributed to her dismissal, and the basic and compensatory unfair dismissal award is to be reduced by 10%.

10 In relation to the claim for unfair dismissal, taking into account the above increases and deductions, the respondent is ordered to pay the claimant:
10.1 A basic award of **£1174.50 gross.**
10.2 A compensatory award of **£3809.67net.**

11 The claimant was entitled to two weeks' notice pay, she only received one weeks' pay. Applying the ACAS uplift the respondent is ordered to pay the claimant the sum of **£385.31 net.**

12 That it was not 'reasonably practicable' for the claimant to take leave in the 2020-2021 leave year due to the effects of coronavirus. She is therefore entitled to carry over four weeks' holiday. After, taking into account leave taken in the 2021-2022 leave year and the ACAS uplift, the respondent is ordered to pay the claimant the sum of **£1433.43 net.**

13 The claim for redundancy pay is dismissed.

14 The claim for failure to pay the employer pension contribution is dismissed upon withdrawal.

15 The claim for unlawful deduction of wages in relation to work done in May 2021 is dismissed upon withdrawal.

REASONS

Introduction

1 This is a claim for unfair dismissal, redundancy pay, notice pay and accrued holiday pay arising out of the termination of the claimant's contract on 1 June 2021. The claimant also claimed a failure to provide a written statement of employment. The respondent stated that the claimant was dismissed for a fair reason, not being an 'A' player. In any event the claimant had insufficient service to claim unfair dismissal and / or redundancy pay because she was a casual worker and not an employee prior to 10 June 2019. Further or alternatively the claimant's continuity of employment was broken when the claimant started to work for The Work Cafe Ltd. (a separate company) on 22 June 2020 only returning to work for the respondent from 14 May 2021. The respondent stated that the claimant's notice pay and holiday pay were accordingly calculated in accordance with employment from 14 May 2021. The respondent denied that the claimant did not receive a written contract.

The hearing

2 The hearing was conducted by CVP on 4 July and 3 November 2022. The parties represented themselves and are thanked for their assistance during the hearing.

3 There was no agreed hearing bundle. The parties confirmed that they were relying on the following documents:
- 3.1 Claimant's bundle of 26 pages.
- 3.2 Claimant's witness statement of 13 pages.
- 3.3 Witness statement of Mr Colvin of 2 pages.
- 3.4 Witness statement of Ms Collins of 1 page.
- 3.5 Respondent's bundle of 98 pages. To this bundle was added 2 pages of the claimant's bank statements. The bundle was then paginated by the Tribunal together with the parties.
- 3.6 Respondent's witness statement of 2 pages. His evidence was supplemented by questions from the Judge.

4 In addition to the documents provided by the parties, the Tribunal provided the parties with extracts from Companies House on Links Waste Management Ltd. and The Work Cafe Ltd. (14 pages).

5 The Tribunal heard evidence from three witnesses. First Mr Daniel Stone, Director of Links Waste Management Ltd, on behalf of the respondent. On conclusion of the respondent's case the hearing was adjourned due to insufficient time. At the resumed hearing Ms Pamela Alty and Mr Trevor Colvin gave evidence on behalf of the claimant. The claimant confirmed that she was not calling Ms Samantha Collins, and relied on her statement as hearsay. The Tribunal assisted both parties with the framing of their questions during the hearing. At the conclusion of the evidence both parties made oral submissions. Judgment was reserved.

Respondent's Name

6 By consent the Tribunal agreed to amend the respondent's name under Employment Tribunal Rules 2013, rule 34, from Daniel Stone to Links Waste Management Ltd. t/a JM Waste Management.

Jurisdiction – Illegality

7 During the hearing, the claimant stated that she was paid £400 per week into her bank account and £50 cash in hand for travel 'expenses'. The Tribunal raised with the parties the possibility that the contract was tainted by illegality since no tax or NI was paid on the sum provided for expenses. The claimant stated that she did not provide receipts for this payment and in October 2020 requested that this sum be paid into her bank account. The Respondent was adamant that there was no illegality, that he used accountants who advised him in relation to tax and NI matters and that all expenses were accounted for declared to the Inland Revenue. The Claimant stated that she accepted the payment in the belief that it was lawful and that the respondent was responsible for any tax and NI. The Tribunal notes that the party who benefitted from this arrangement was the claimant and that on October 2020 the claimant requested that all payments go through her bank account. The Tribunal also notes that the pay slips that it has seen after this date record gross pay as £450. The Tribunal concludes, having heard the parties, that they were acting in good faith, and therefore not acting illegally. In any event it would not have been proportionate to prevent the

claimant obtaining relief, given her relative position and lack of culpability, taking into account public policy considerations with reference to the case of **Patel v Mirza** [2017] AC 467 (SC).

Claims and Issues

8 At the outset the claims and issues to be determined were agreed as follows:

Employment Status

8.1 From what date was the claimant employed as an employee? [It was not disputed that the claimant was an employee from 10 June 2019, the issue being whether she was an employee at any point between 1 April 2019 and 10 June 2019.]

Continuity of Employment

8.2 Whether the claimant working for The Work Cafe Ltd. broke her continuity of employment?

Unfair Dismissal

8.3 What was the reason for dismissal? Was it redundancy or some other substantial reason (reorganisation or not being an 'A' player)

8.4 Was the dismissal fair in all the circumstances?

8.5 If the claimant succeeds in her claim for unfair dismissal:

(a) What basic award is the claimant entitled to?

(b) What compensatory award is the claimant entitlement to?

(c) What would have happened had the claimant not been dismissed?

(d) Did the claimant cause or contribute to her dismissal by blameworthy conduct?

(e) Does the statutory cap apply?

ACAS Code

8.6 Does the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

8.7 If so is it 'just and equitable' to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

Notice Pay

8.8 The parties agreed that the claimant was entitled to notice pay.

8.9 How much, if any, outstanding notice pay was the claimant owed?

Holiday Pay

8.10 The parties agreed that the claimant was entitled to outstanding holiday on termination of the contract in relation to the 2021-2022 leave year.

8.11 How much, if any, outstanding holiday was the claimant owed?

8.12 Was the claimant entitled to carry over leave due to it being not 'reasonably practicable' for the claimant to take leave in the 2020-2021 leave year due to the effects of coronovirus?

Written Statement of Particulars

8.13 Did the claimant receive a written statement of particulars?

8.14 If not, what compensation is the claimant entitled to?

9 The claim for pension contribution was withdrawn, the Tribunal having explained to the claimant that it had no jurisdiction to consider a claim in relation to a failure by an employer to pay pension contributions, unless there had been a breach of contract. From the payslips, it became apparent during the hearing that pension contributions had been paid for the period that the claimant had been employed

by Links Waste Management Ltd. but not the period that she was employed by The Work Cafe Ltd.

10 The claim for unlawful deduction of wages was withdrawn, the claimant accepting that she had received the correct payment for work done in May 2021.

FACTUAL FINDINGS

11 The Tribunal has only made findings of fact in relation to those matters relevant to the issues to be determined. Where there were facts in dispute the Tribunal has made findings on the balance of probabilities.

12 The respondent was a waste management company owned by Mr Stone who is its sole director and shareholder. Mr Stone owned a number of companies. The respondent employed approximately 28 employees with an expected turnover £2.1 million in 2022. It operated from two locations: Brett Drive and a weighbridge site in Eastbourne.

13 In 2019 the claimant met Mr Stone through her partner Mr Patrick Gwilliam who owned PJG Group, a skip company. The claimant assisted Mr Gwilliam with his business, working in the office. When Mr Gwilliam ceased trading, he sold his skips to Mr Stone. The claimant, Mr Gwilliam and Mr Stone became friends.

14 In January 2019, the respondent employed Mr Trevor Colvin to work at the weighbridge in Eastbourne. Mr Colvin stated in evidence that during his employment with the respondent he was not provided with a contract.

15 In March 2019 Mr Stone, knowing that the claimant had lost her employment due to the sale of Mr Gwilliam's business, asked the claimant if she would assist him in office management, in particular incorporating smaller companies that he had purchased into the respondent's business. It was agreed that this would be 'casual' employment and would be for an initial four weeks.

16 At no point during her employment did the respondent provide the claimant with a written contract. Mr Stone admitted in evidence that the first page of a contract with a footnote date of 8 May 2021 provided by the respondent as part of these proceedings was never provided to the claimant. Mr Stone admitted that during these proceedings he had added the following information by hand: the claimant's name, start date of '10 June 2019', her position as 'Office Admin', the claimant's pay as '£10 per hour', and date of agreement as '10/6/19'. He stated that he had only done this to demonstrate that the respondent did have written contracts in place, and did not intend to mislead the Tribunal.

17 On 1 April 2019 the claimant started work for the respondent, at his Bexhill office. She worked full-time, Mondays to Fridays for four weeks. The claimant stated that her hours of work were agreed with Mr Stone and she was expected to be in the office during opening hours (8am to 5pm) with a 1-hour break. The timing of the break was determined by Mr Stone, since there were a few staff in the office, and it had to be staggered. When it started to become busy in the morning, Mr Stone changed her hours to 7:30am to 4:30pm. The respondent stated that

it was up to the claimant what hours she worked and that she was paid for the hours that she did. The Tribunal notes that during this period the payments into the claimant's bank account were £400 on 12 April 2019 and £320 on 20 April and 26 April 2019 respectively. From this the Tribunal concludes that there was some variation in the claimant's hours of work reflecting the casualness of the agreement.

18 On 26 April 2019 Mr Stone and the claimant had a conversation during which the claimant stated 'well, that's my month over with you'. Mr Stone responded 'you have been brilliant these past 4 weeks and I was going to ask you if you would like to stay on a permanent basis'. It was agreed that the claimant would be employed 40 hours a week at £450pw. to be paid £400 into her bank account and £50 cash in hand for travel expenses. The claimant stated that she understood that this would mean she would be 'on the books' and that the respondent would pay tax and NI. Mr Stone, in evidence initially could not recall this conversation. When further questioned he did accept that the conversation as described by the claimant had taken place but was unsure as to when it took place. In the absence of any clear evidence that this conversation took place at a later date, the Tribunal finds that it did occur on 26 April 2019 and that the parties agreed that the claimant commence work on a permanent basis, on fixed hours and pay from 29 April 2019. The Tribunal notes that the regular payment of £400 pw into the claimant's bank account reflected this agreement.

19 In May 2019, Mr Stone asked the claimant to work at his weighbridge site in Eastbourne.

20 On 18 May 2019 the claimant raised with Mr Stone that she had not yet received any contract or pay slips following being made permanent. Mr Stone responded that it was 'all in hand'. After a further two weeks the claimant again questioned Mr Stone about the lack of paperwork. In his evidence, Mr Stone denied that these conversations took place, the Tribunal finds that they did. The Tribunal notes that the claimant was not provided with a contract and that her pay slips were only sent to her in January 2021, which suggests that Mr Stone was not always on top of his paperwork.

21 On 10 June 2019 the claimant was put onto the payroll, and tax and NI were deducted at source. The sums paid into her bank account from 21 June 2019 was reduced to £371.92 pw (after deduction for tax / NI) and then further reduced from 5 July 2019 to £365.15 (after deduction for pension). From this Mr Stone claimed that the claimant must have been aware that prior to 10 June her pay had been gross. The Tribunal accepts the claimant's evidence that she was confused about her rate of pay since she did not receive any pay slips until 15 January 2020, and she just assumed that the respondent wwas paying her the correct amount.

22 Around this time the claimant returned to work at the Bexhill office.

23 Between 4 and 17 August 2019, the claimant took two weeks' annual leave. There was an altercation between the claimant and Mr Stone as to how much paid holiday she was entitled to. The claimant considered that it was 9.5 days

based on a start date of 1 May 2019 whereas Mr Stone was of the view that it was only 2.3 days based on a start date of 10 June 2019. In order to maintain the friendship Mr Stone agreed to pay two weeks' pay, although he did not accept at the time that the claimant was entitled to this.

24 In September 2019 Mr Stone again asked the claimant to work at the Eastbourne weighbridge site. The claimant raised with Mr Stone on various occasions that she had still not received any pay slips.

25 In January 2020, the claimant again complained to Mr Stone that she had still not received any pay slips. On 15 January 2020 Mr Stone sent the claimant 29 pay slips attached to a single email.

26 In March 2020 the claimant was placed on furlough. She continued to receive 100% of her pay.

27 In April 2020 the respondent moved to a larger premises which had enough space to open a cafe. Mr Stone incorporated a separate company, The Work Cafe Ltd., with Links Waste Management Ltd. as the sole shareholder and Mr Stone as the sole Director. Mr Stone asked the claimant if she would manage it, it is immaterial whether this offer was prompted by the claimant expressing an interest in the role. Mr Stone accepted that there was no formal application process.

28 The claimant's employment with Links Waste Management Ltd. ended on Friday 19 June 2020 and her first working day for The Work Cafe Ltd. commenced on the Monday 22 June 2020. On termination of her contract with Links Waste Management Ltd., she was not paid notice pay or accrued holiday pay. The claimant was placed on The Work Cafe Ltd. payroll, however her wages continued to be paid by 'JM Waste Management'. Mr Stone explained that this was because The Work Cafe Ltd. had no bank account and no money. Mr Stone accepted that the claimant was not provided with a contract of employment during her employment for The Work Cafe Ltd, since none were in place at the time.

29 The claimant continued to work for the cafe until April 2021. The Tribunal accepts the claimant's evidence that occasionally she would be asked to do work for the respondent by members of the respondent's administration, but that these were not made as a result of any formal arrangement with the respondent.

30 On 4 November 2020 the cafe was closed due to the coronavirus lockdown and the claimant was again placed on furlough. During this period Mr Stone was advised by his accountants that the café was losing money and that he had to reduce the number of staff, or the cafe would go out of business. The cafe employed four full-time staff, including Nathalie, Mr Stone's girlfriend, who was a trained chef. Mr Stone decided to move the claimant and ask Nathalie to run the 'front of house' in addition to doing the catering. Instead of making the claimant redundant Mr Stone decided to ask the claimant to go back to working for Links Waste Management Ltd. The Tribunal considers that these were legitimate decisions for the respondent to make.

31 On 13 April 2021 Mr Stone attended the claimant's home to inform her of his decision. The claimant states that she was told that Nathalie cost less than her; this is disputed by Mr Stone. The Tribunal finds that Mr Stone probably did make a reference to Nathalie being cheaper in the context of her being a chef and therefore able to cover more roles. The claimant made it clear that she was not happy with the decision but agreed to return to Links Waste Management Ltd. and they embraced.

32 The next morning, 14 April 2021, the claimant approached Mr Stone and informed him that she felt as if she had been 'thrown under a bus' and that she would be looking for another job. Mr Stone attempted to show the claimant his bank account in order to explain the financial position of the cafe, but the claimant responded that it was nothing to do with her.

33 Over the next six weeks the claimant continued to express her unhappiness with the decision, which she felt was a demotion, both to Mr Stone and to her colleague Ms Collins. She requested meetings with Mr Stone to discuss the decision, but Mr Stone refused. During this period Mr Stone accepted that the claimant continued to do her job '100%' and he had no criticism of the work that the claimant was doing. However he was in financial difficulties and only wanted to employ staff who he saw as A players i.e. who were committed to working for him. Mr Stone felt that every time he was in contact with the claimant the conversation became heated. The claimant denied this stating that they barely spoke. Either way the working relationship was breaking down.

34 On 1 June 2021 Mr Stone called the claimant into his office and informed her that he had received a request for a reference and on this basis, he was letting her go with one week's notice. He gave her a letter of termination that stated the reason for her dismissal was due to a restructure of the business. Mr Stone accepted in evidence that the claimant was not dismissed due to redundancy or a business restructure. Mr Stone suggested in evidence that one of the reasons the claimant was dismissed was because she was attending interviews in work time. This was denied by the claimant. The Tribunal notes that this was only raised for the first time during the hearing, that the respondent has not adduced any evidence that the claimant was absent from work without permission, and that the respondent did not pursue this point. In his closing submissions Mr Stone stated that it was '*made quite clear to me that the claimant was looking for alternative employment and the decision [to dismiss] was made on that and that alone – a real red flag'*. The Tribunal finds that the claimant was not attending interviews in work time.

35 Prior to the claimant's dismissal there was no warning or meeting. This was because Mr Stone acted on the assumption that the claimant had only been working for the respondent for six weeks and therefore had no employment rights. Following her dismissal the claimant submitted a grievance claiming that she was being dismissed for making a protected disclosure (an issue that has not been pursued before this Tribunal) and requesting a meeting.

36 On 3 June 2021 the claimant drafted a further grievance in which she stated she had been unfairly dismissed, and requesting redundancy pay, notice pay and holiday pay.

37 On 4 June 2021 Mr Stone had a grievance meeting with the claimant who was accompanied by Ms Collins. The claimant read out her grievance of 3 June 2021. The meeting became heated and Mr Stone asked the claimant to leave. Mr Stone did not provide any response to the grievance in writing or provide any right to appeal. In evidence Mr Stone stated this was because the claimant did not have two years' service.

38 On 19 June 2021 the claimant's job was advertised.

39 The claimant commenced ACAS early conciliation on 4 June 2021, and received an ACAS certificate on 21 June 2021. She submitted her claim form on 28 June 2021. The respondent submitted a response on 2 August 2021.

THE LAW

Contract

40 A contract can be oral or in writing.

Employment Status

41 Section 230 of the Employment Rights Act 1006 (ERA 1996) provides that:

(1) an employee *is 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment'.*

…

(3) a worker is *'an individual who has entered into or works under (or, where the employment has ceased, worked under):*

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual'.

Therefore an employee is a worker but not all workers are employees. Workers are to be distinguished from 'independent contractors' in business on their own account.

42 The parties stated intention as to the status of their working relationship is a relevant factor, but tribunals should always consider the true nature of the relationship and not just the intentions of the parties or the wording of any written contract: **AutoClenz Ltd. v Belcher** [2011] UKSC 41; **Uber BV & Others v Aslam & Others** [2021] ICR 657, SC.

43 When considering employment status tribunals should adopt a multi-factoral approach, suggested by **Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance** [1968] 1 All ER 433 (QBD). This in essence involves three questions:

1. Mutuality of obligations: Was there an obligation on the respondent to provide work and pay a wage and an obligation on the employee to accept and perform the work offered?
2. Control: Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employer and employee?
3. Were the other provision of the contact consistent with it being a contract of service (employee)?

Continuity of Employment

44 Under section 108 of the ERA 1996, to claim unfair dismissal and / or redundancy pay, the claimant must have no less than two years' continuous employment ending with the effective date of dismissal. The length of any continuous employment is also relevant to the calculation of entitlements due on termination of the contract.

45 Under section 218(1) of the ERA 1996 continuity of employment normally applies only to employment with a single employer. However there are a number of exceptions where employment with one employer can be carried forward and added to employment with a successor employer. One of these exceptions is under section 218(6) which provides that:

'*if an employee of an employer is taken into the employment of another employer who, at the time when the employee enters the second employer's employment, is an associated employer of the first employer -*

(a) the employee's period of employment at that time counts as a period of employment with the second employer, and

(b) the change of employer does not break the continuity of the period of employment'

46 Under section 231 two employers are to be treated as associated if:

'(a) one is a company of which the other (directly or indirectly) has control, or

(b) both are companies of which a third person (directly or indirectly) has control.

The courts have held that 'company' means limited company: **Merton London Borough Council v Gardiner** [1981] ICR 186 (CA). Control of a limited company in this context has been held to mean legal control based on the shareholding test i.e. control by the majority of votes attaching to shares, exercised in general meetings of the company: **Secretary of State for Employment v Newbold and Anor** [1981] IRLR 305 (EAT).

Unfair Dismissal

47 Section 94 of the ERA 1996 confers on employees with 2 years' continuous service the right not to be unfairly dismissed. Enforcement of the right is by way

of complaint to the Tribunal under section 111. In this case there is no dispute that the claimant was dismissed by the respondent.

48 Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages. First, the respondent must show they had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it has 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.

49 The first stage is determining the reason for dismissal, which has been described as 'set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee': **Abernethy v Mott, Hay and Anderson** [1974] ICR 323 (NIRC). The burden of establishing the reason for the dismissal is on the respondent. It is not a heavy one but if the reason for the dismissal does not fall into one of the fair reasons then the dismissal will be unfair. Where there is more than one reason provided for dismissal the tribunal must identify the principal reason for the dismissal.

50 A potentially fair reason for dismissal includes conduct of the employee, redundancy or some other substantial reason (SOSR). SOSR is a broad category that covers dismissals for business restructures (which do not involve redundancies) and breakdown in working relations (which are not otherwise misconduct).

51 Even if a dismissal is potentially fair, the tribunal must go on to consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason under section 98(4). This 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. The Tribunal is required to determine this issue in accordance with equity and the substantial merits of the case. When considering reasonableness the tribunal must not substitute its view for that of the employer. The overarching test is whether the employer's action fell within the range of reasonable responses.

52 Redundancy, as defined under section 139 of the ERA 1996, arises where the respondent ceased to carry on business or there is a reduction in requirement for employees to carry out work. Where there is a redundancy situation a dismissal for that reason may still be unfair where there has been no consultation, no proper selection process, and / or no offer of alternative employment. A dismissal due to a restructure where there is no redundancy situation is potentially fair for SOSR. As with redundancies a tribunal will still need to consider whether dismissal was fair in all the circumstances, including whether there was meaningful consultation, and whether there was any consideration of alternatives. In both cases the tribunal must not question the commercial decision of an employer to make redundancies or to restructure, as long as it is genuine.

53 A breakdown in working relations may give rise to dismissal for conduct or SOSR. Where the breakdown is due to the fault of the employee then it should be treated as misconduct and a disciplinary process followed prior to dismissal. This is to be contrasted with a relationship that has broken down, where the employee's conduct is incidental to that breakdown. There is a fine dividing line between conduct dismissals and dismissals where there has been a breakdown in working relations and tribunals are required to be on the lookout for employers using SOSR to cover what is really a conduct dismissal: **Ezsias v North Glamorgan NHS Trust** [2011] IRLR 550. Where the dismissal is for SOSR, an employer is still required to act reasonably in dismissing for that reason taking into account all the circumstances. What procedure is used will depend on the nature of the breakdown, but in many cases is likely to involve similar considerations to that for conduct dismissals.

Redundancy Pay

54 Under section 139 of the ERA 1996, an employee is only entitled to redundancy pay if the dismissal was wholly or mainly by reason for that redundancy. Where an employee is claiming statutory redundancy pay under section 163(2) there is a presumption of redundancy unless the contrary is proved.

Unfair Dismissal: Remedy

55 Under sections 118 of the ERA 1996, the award for unfair dismissal comprises a basic award (equivalent to a redundancy payment) and intended to compensate the employee for loss of job security and a compensatory award, intended to compensate the employee for financial loss suffered as the result of the unfair dismissal, subject to the maximum applicable at the time of £89,493 or one year's pay (from 6 April 2021). Under section 123(1) the compensatory award should 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*'.

<u>What would have happened had the claimant not been dismissed.</u>

56 Where there are procedural failures the tribunal may reduce the compensatory award if there is evidence that the claimant would have been dismissed had a fair procedure been followed: **Polkey v E Dayton Services Ltd.** [1988] ICR 142.

57 The Tribunal notes that this is usually referred to as a 'Polkey' deduction, but that **Polkey** is only an example of the broader question as to what would have happened had the claimant not been dismissed: **Contract Bottling Ltd. v Cave & Others** [2015] ICR 146. Whilst this is usually based on what the employer would have done, when considering this question the employee's choice should not be forgotten. This invariable involves speculation by the tribunal, but if there is some evidence that the relationship would have discontinued in any event at some point then tribunals are required to 'grapple' with the issue. It is not an

exact science. Any reduction may be assessed as a percentage or a period of time.

Contributory Fault

58 The tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances provided under sections 122(2) and 123(6) of the ERA 1996. The Tribunal notes that whilst the tests for contribution in relation to any reduction of the basic award and the compensatory award are different, it would only be in exceptional circumstances that the reduction would differ.

59 In order for a deduction to be made there must be a causal link between the employee's conduct and the dismissal. This means that:
(a) the conduct must have taken place before the dismissal,
(b) the employer must have been aware of the conduct, and
(c) the employer must have dismissed the employee at least partly in consequence of that conduct.
The tribunal notes that the behavior in question need not be the main reason for the dismissal, it is sufficient that it played a material part in the dismissal.

60 Whilst it is permissible for a tribunal to make both a Polkey and contributory fault deduction, in deciding whether to reduce for contributory fault the tribunal should take into account the fact that it has already made a Polkey deduction: **Rao v Civil Aviation Authority** [1994] ICR 495 (CA). The Tribunal considers the same approach should be adopted wherever there is a deduction on a 'what would have happened' basis.

Failure to Comply with the ACAS Code

61 Section 207A of Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA 1992) permits a tribunal to increase or decrease an award for unfair dismissal by up to 25% where there is a failure to comply with a provision of the ACAS Code of Practice on Discipline and Grievance Procedures (ACAS Code). This requires considering the following questions:
61.1 Does the ACAS Code apply on the facts of the case?
61.2 Has there been a failure to comply with any provision of the ACAS Code?
61.3 Was any failure to comply unreasonable?
61.4 Is it just and equitable to award an uplift and if so by what percentage (up to a maximum of 25%)?

62 The adjustment for failure to follow the ACAS Code applies to 'any' award that the Tribunal makes except failure to provide written particulars: TULR(C)A 1992 section 207A (2) and (6). Under section 124 of the ERA 1996, the adjustment only applies to the compensatory award for unfair dismissal claims.

What does the ACAS Code apply to?

63 The ACAS Code states in the foreword that it does not apply to redundancy dismissals or the non-renewal of a fixed term contract. At paragraph 1 it states

that it applies to 'disciplinary and grievance situations in the workplace', that 'disciplinary situations *include* misconduct and / or poor performance' (emphasis added) and that grievances are 'concerns, problems or complaints that employees raise with their employers'. It is clear from this wording that the ACAS Code applies to misconduct dismissals, and not to redundancy dismissals, but it is less clear whether it applies to all or some SOSR dismissals. The Tribunal notes that there is contradictory judicial comment on this issue. In **Lund v St Edmund's School Canterbury** [2013], the EAT found that it did apply to a SOSR dismissal (a breakdown in the employment relationship) in a situation where the initial process had been a disciplinary one. In **Hussain v Jurys Inn Group Ltd.** (UKEAT/0283/15) Laing J noted that it is not clear whether the ACAS Code applies to a SOSR dismissal, but suggested (obiter) that the ACAS Code be given a purposive construction and that she would be 'inclined to hold on balance that it should apply' (para 47). In **Holmes v QinetiQ Ltd.** [2016] ICR 1016, Similar J (President) held that the ACAS Code did not apply to incapacity dismissals because of ill health. The distinction made in that case was between a dismissal for culpable conduct or performance which required correction or punishment giving rise to a disciplinary situation and conduct such as incapacity which does not require correction or punishment and therefore does not give rise to a disciplinary situation. However, in **Phoenix House Ltd. v Stockman** [2016] UKEAT [2017] ICR 84, Mitting J disagreed with Laing J in **Hussain** and held that the ACAS Code did not apply in the absence of clear words to a dismissal due to a breakdown in working relations. Mitting J was not referred to the judgment of **Holmes**, and the distinction made in that case between culpable and non-culpable conduct.

64 Most recently **Rentplus UK Ltd. v Coulson** [2022] ICR 1313, Taylor J considered that the ACAS Code did apply to a dismissal where there had been a breakdown in working relationships. Taylor J quoted with approval a passage from Harvey on Industrial Relations and Employment Law, which made the following points (in summary form):

64.1 The ACAS Code only excludes two categories (redundancy and fixed term contracts) therefore as a matter of interpretation it should be applicable to all other categories where there is the necessary culpability / disciplinary connection.

64.2 That the balance of caselaw accepts that it is a matter of substance rather than form, with the 'unfortunate aberration' of the judgment of **Phoenix House**

64.3 **Phoenix House** could be viewed as wrongly decided since it failed to take into account of the judgment of **Holmes**.

Taylor J concluded that '*If an employer considers that an employee is guilty of misconduct or had rendered poor performance, I incline to the view that the ACAS Code is applicable even if it said that dismissal is for SOSR because it resulted from the response of fellow employees to the misconduct or poor performance that had led to a breakdown in working relationships'.* He commented that an employer should not be able to sidestep the applications of the ACAS Code by dressing up a dismissal that results from concerns that an employee is guilty of misconduct or is rendering poor performance by pretending that it is for some other reason. The Tribunal notes that Taylor J's comments in

Coulson are obiter, however it agrees with his analysis and conclusions. Therefore the Tribunal concludes that the ACAS Code could apply to a SOSR dismissal due to a breakdown in working relationships. On the other hand, the ACAS Code would not apply to a SOSR dismissal which is not connected to the conduct or performance of the employee (such as a business restructure).

65 In **Slade & Anor v Biggs and Ors** [2022] IRLR 216, the EAT has provided guidance as to the level of the uplift, and sets out a four-stage test (at paragraph 77):

1. Is the case such as to make it 'just and equitable' to award any ACAS uplift?
2. If so, what does the tribunal consider a just and equitable percentage, not exceeding although possibly equaling, 25%? This involves considering 'all the circumstances' including the seriousness and / or motivation for the breach.
3. Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what in the tribunal's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting? (Not relevant in this case).
4. Applying a final sense-check, is the sum of money represented by the application of the percentage uplift arrived at by the tribunal disproportionate in absolute terms and, if so, what further adjustment needs to be made?

66 The purpose of the uplift is not simply to compensate the employee, there is also a punitive element, reflective of the seriousness with which the tribunal views the failure to comply with the ACAS Code: **Acetrip v Dogra** (UKEAT/0016/20) and **Secretary of State v Plaistow** UKEAT/16/20, quoted in **Biggs** at **para 47-48**.

Notice Pay

67 Section 86 of the ERA 1996 provides that:

'(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—

(a) is not less than one week's notice if his period of continuous employment is less than two years,

(b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years…..

(2) The notice required to be given by an employee who has been continuously employed for one month or more to terminate his contract of employment is not less than one week.

Holiday Pay

68 Under regulations 13 and 13A of the Working Time Regulations 1998 (WTR 1998) workers are entitled to 5.6 weeks' (28 days') annual leave in any leave year. Regulation 13(3)(b) and 13A(4) provides that where there is no contract, the leave year is the anniversary of start date. Regulation 14(2) provides that where a worker's employment is terminated during the course of a leave year the worker is entitled to pay in lieu.

69 Normally, under regulation 13(9), a worker is not permitted to carry over leave from one leave year to the next. An exception has been made due to the coronavirus pandemic under regulation 13(10) and (11) which provides that:

'(10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11).

(11) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due.'

70 This exception only applies to the 4 weeks' leave under regulation 13 and not the 1.6 week's leave under regulation 13A.

Failure to Provide a Written Statement

71 Section 38 of the Employment Act 2002 requires tribunals to award two or four weeks' pay where an employer has failed to provide a full and accurate written particulars of employment under section 1 of the ERA 1996. This provision applies to workers not just employees, but only arises if the claimant is successful in one or more of the listed claims, including unfair dismissal, redundancy pay, unlawful deduction of wages and /or failure to pay holiday pay. Under Section 38(3) the Tribunal must award two weeks' pay and may award four weeks' pay where it considers it is 'just and equitable in all the circumstances'.

72 In an unfair dismissal claim, under 124A of the ERA 1996, any section 38 increase is to be applied to the compensatory award before any deduction for contributory fault or the application of the statutory maximum

DISCUSSION AND CONCLUSIONS

Employment Status

73 It was not in dispute that at all times the claimant was a 'worker' not an 'independent contractor'. The parties agreed that the claimant was employed to provide personal performance and was not in business on her own account. Further it was not in dispute that between 1 April to 29 April 2019, the claimant had been employed on a casual basis for an initial four-week period. Neither party considered that the claimant was an employee and it is not necessary for this Tribunal to determine otherwise, since nothing turns on this period of employment. Nor was it in dispute that from 10 June 2019, when the claimant was placed on payroll, she was an employee. The only period that employment status is disputed is between 29 April and 10 June 2019. This matters because if the claimant was not an employee, she does not have the requisite two years' continuous service to claim unfair dismissal and / or redundancy pay.

74 The Tribunal has found that on the 26 April 2019 there was an express oral agreement that the claimant commence working for the respondent as a

permanent employee from 29 April 2019. She was to work fixed hours of 40 hours pw in return for which she received a fixed wage of £400 plus £50 expenses. This created mutuality of obligations, and the Tribunal notes that the claimant did in fact work 40 hours a week and was paid £400 pw. During this period the respondent determined which site the claimant worked at and the work that she was employed to do. The only feature that is inconsistent with employment status is the fact that she was not placed onto the payroll until 10 June 2019, and therefore her pay was initially paid gross. This is a relevant factor but not determinative. It did not reflect the agreement of the 26 April 2019, nor did it reflect the reality of the relationship between the parties which in all other respects was that of employer:employee. The Tribunal therefore concludes that the claimant was an employee from the 29 April 2019.

Continuity of Employment

75 The respondent's case was that the claimant had only 6 weeks' continuous employment at the date of her dismissal because she had left Links Waste Management Ltd. on Friday 19 June 2020 and commenced working at The Work Cafe Limited on Monday 22 June 2020. She then left The Work Cafe Ltd. on 13 April 2021 and recommenced working for Links Waste Management Ltd. on 14 April 2021. The Tribunal accepts that they are separate limited companies and ordinarily a move from one company to another would break continuity of service. However, the Tribunal finds on the facts of this case that the two companies fall under the 'associate companies' exception provided by section 218(6) of the ERA 1996. Links Waste Management Ltd. controlled The Work Café Ltd., both directly as the majority shareholder and indirectly through Mr Stone as the sole Director of both companies. Therefore, the claimant is able to count continuity of service in both companies.

76 The Tribunal also notes that there was no break in service between the move from Links Waste Management Ltd. to The Work Café Ltd. and back again, since on both occasions the claimant commenced work the next working day.

Unfair Dismissal

77 The Tribunal finds that the principal reason for the dismissal was because the respondent considered the claimant to no longer be a 'A' player. Although at the time of dismissal Mr Stone gave restructure of the business and reduction in staff (redundancy) as the reason for the dismissal, this was not pleaded as the reason in the response form. No evidence has been adduced that there was a genuine restructure or redundancy situation, and Mr Stone accepted in his evidence that this was not the real reason for the dismissal.

78 The Tribunal accepts Mr Stone's evidence that the trigger for the decision to dismiss was that the claimant was applying for other work and he had been asked to provide a reference. The Tribunal does not consider this to be a fair reason. Being unhappy at work and looking for other employment is not misconduct. Mr Stone did not dispute the claimant's evidence that she continued to perform her full role. Whilst Mr Stone did try to suggest in his evidence that the claimant was attending interviews in work time without permission, he did not pursue this and

the Tribunal has found that this was not the case. Mr Stone in his closing submission stated that it was the fact that the claimant was looking for alternative employment that for him was a 'real red flag'. The decision was made on that basis alone.

79 The Tribunal considered whether the dismissal was for SOSR, namely a breakdown in working relations. Whilst there is evidence that the relationship was breaking down, in the Tribunal's view it had not reached the point where it was irretrievable. The claimant was still attending work and Mr Stone made no criticism of the work she was doing. She had made her unhappiness known to Mr Stone and to Ms Collins, with whom she shared an office, but there is no evidence that this was causing disruption to the business. Mr Stone himself did not claim that the claimant was dismissed due to a breakdown in relations, rather it was the fact she was applying for jobs that for him was the 'red flag'. This suggests that he wanted the employment relationship to continue, despite the fact that the claimant was 'making it difficult' and 'berating' him.

80 The Tribunal is puzzled as to why Mr Stone did not simply provide a reference, thereby permitting the claimant to resign as she was clearly intending to do. Instead it was the request for a reference that triggered his decision to dismiss. He then sought to present a different reason i.e. redundancy and business restructure.

81 The Tribunal went on to consider whether, if not being an 'A' player was a potentially fair reason, the dismissal was fair in all the circumstances. The Tribunal has concluded that it was not.

81.1 A reasonable employer would not have dismissed the claimant without warning her that she was at risk of dismissal because she was considered to no longer be an 'A' player.

81.2 A reasonable employer would not have dismissed the claimant without providing her with the opportunity to respond or improve her behaviour.

81.3 A reasonable employer would not have dismissed the claimant without considering alternatives to dismissal, such as a meeting to try to improve the working relationship, or issuing an informal or formal warning.

81.4 A reasonable employer would not have refused to provide any right to appeal or address the claimant's grievance.

Mr Stone accepted with hindsight that he should have gone through a process. The reason he did not is because he thought the claimant did not have sufficient service since she had only been re-employed by Links Waste Management Ltd. for six weeks.

Redundancy Pay

82 Since the Tribunal has found that there was no redundancy situation, for the reasons set out above, the claimant is not entitled to redundancy pay.

Notice Pay

83 It was not disputed that the claimant was entitled to statutory notice pay on termination of her contract. The only issue was what amount of notice pay was the claimant entitled to. This in turn was dependent on what was the length of the claimant's continuous employment. Since the Tribunal has determined that the claimant was employed as an employee from 29 April 2019 and her continuous employment was not broken when she moved to work for The Work Cafe Ltd, she has two years' continuous service and therefore is entitled to two weeks' notice pay i.e. until the 14 June 2021.

Holiday Pay

84 It was not disputed that the claimant was entitled to statutory holiday pay accrued on termination of her contract. However again the issue is what amount of holiday had accrued by the date of termination.

85 The holiday year runs from the anniversary of the commencement of employment which the tribunal has found was the 29 April 2019. The leave year runs from 29 April to 28 April, therefore the claimant is entitled to any outstanding holiday accrued between the dates of 29 April 2021 and 14 June 2021 (the end of her notice period).

86 The claimant also claims accrued holiday for the leave year 2020-2021, because she was unable to take any leave due to coronavirus. The respondent has not disputed that the claimant would have been entitled to carry over leave, if her continuous employment had not been broken due to the changes in her employer. The Tribunal has found that the changes in employer did not break the claimant's continuous service. The Tribunal further finds that it was not reasonably practicable for her to take her leave in the leave year 2020-2021, due to the cafe being closed and being placed on furlough. However, the claimant is only entitled to carry over the 4 weeks (20 days) annual leave provided under regulation 13 and not the additional 1.6 week (8 days) under regulation 13A.

COMPENSATION

Unfair Dismissal

Basic Award

87 The claimant is entitled to a basic award calculated as one and a half weeks' pay for each year in which the employee was 41 or more years old. When she was dismissed she had been employed by the respondent for two full years and was 55 years old (date of birth 14 August 1965), so the multiplier is 3 years. The claimant was paid £450 pw gross, so this provides a sum of £1350 (3 x £450). This sum is to be reduced by 10% to account for contributory fault (see below), resulting in a basic award of **£1174.50 gross.**

Compensatory Award

88 The claimant was dismissed on the 1 June 2021. After taking into account notice pay (to avoid double counting) the claimant's loss of earnings commenced 15 June 2021.

89 The Tribunal considers that the claimant took reasonable steps to mitigate her losses. She was actively applying for work and found temporary employment with Coast Care on 13 July 2021 (within 6 weeks of her dismissal) and found permanent employment with Castle Accommodation on 13 September 2021 (just over 3 months after her dismissal). Although both these employments were at a lower rate of pay, the ongoing loss from 13 September was small and came to an end with her promotion on 5 September 2022, which provided her with a £10,000 pay increase.

90 The Tribunal calculates the compensatory award as follows:

90.1 The Claimant's net rate of pay with the respondent was £350.28 (according to the 14 May and 21 May 2021 payslips).

90.2 The claimant's loss of earnings for the four-week period between 15 June and 12 July 2021 was £1401.12 net (4 x £350.28).

90.3 The claimant's earnings during her employment with Coast Care from 13 July 13 September 2021 (a nine-week period) was £2910.24 net (sums obtained from payslips of £778.20 + £1002.94 + £1129.10). Had the claimant remained with the respondent she would have earned over the same time period £3152.52 (9 weeks x £350.28). Therefore her loss of earnings during this period was £242.28 net (£3152.52 - 2910.24).

90.4 The claimant's earnings with Castle Accommodation between 13 September 2021 and 1 February 2022 (a 20-week period) was £1406.31 net a month, £324.53 net a week. Had she remained with the respondent she would have earned £350.28 pw. Her weekly loss of earnings was £25.75 (£350.28 - £324.53). Therefore her loss of earnings during this period was £515 net (20 weeks x £25.75).

90.5 In February 2022, the claimant's pay with Castle Accommodation was increased to £1439.71 net a month, £332.24 net a week, resulting in a weekly loss of earnings of £18.04 (£350.28 - £332.24). On 5 September 2022 she received a £10,000 pay increase resulting in a monthly pay of £2,500 gross and £2018.21 net. The Tribunal finds that there were no ongoing losses after 5 September 2022. Therefore her loss of earnings between 1 February 2022 and 5 September 2022 (a 31-week period) was £559.24 net (31 weeks x £18.04).

Pension Loss

91 Due to the small sums involved, the limited period of time of the losses and no information having been provided to the Tribunal regarding the pension arrangements of either the respondent or Castle Accommodation, the Tribunal has calculated pension loss according to the simplified model i.e. based on the employer's pension contribution.

92 According to the 14 May and 21 May 2021 payslips the respondent's pension contributions were £19.80 per week. The Tribunal accepts that the respondent was paying pension contributions on behalf of the claimant, albeit no paperwork

had been provided to her. According to the payslips, Coast Care paid employer pension contributions of £34.07 during the claimant's employment with them. Had the claimant remained employed by the respondent the respondent's pension contributions between 8 June (expiry of her 1 weeks' notice period) and 12 September 2021 (a period of 14 weeks) would have been £277.20 (14 weeks x £19.80). The claimant's pension loss over this period is £243.13 (£277.20 - £34.07).

93 The claimant in her schedule of loss has identified that her ongoing pension loss at Castle Accommodation was £8.49 per month. The Tribunal finds that there was no ongoing pension loss after the claimant's promotion on 5 September 2022 since the increase of earnings is sufficient to offset any pension loss. Therefore, the claimant's pension loss between 13 September 2021 and 5 September 2022 (a period of 51 weeks) is £432.99 (8.49 x 51 weeks).

Loss of Statutory Rights

94 The Tribunal awards the claimant £500 for loss of statutory rights.

What would have happened?

95 The Tribunal has considered as best as it can on the basis of the evidence before it as to what would have happened had the claimant not been dismissed. The Tribunal has found that not being an 'A' player is not a fair reason for dismissal. Further that there is no evidence that the claimant's performance at work was affected. However, the claimant continued unhappiness with Mr Stone's decision to remove her from the cafe was resulting in a deterioration of the working relationship. In such circumstances a reasonable employer is likely to have sought to address the situation and this may have resulted in the claimant receiving an informal or formal warning. Had this occurred the claimant is likely to have continued to be unhappy at work and increased her search for alternative employment. There is a chance that the claimant may have continued to express her dissatisfaction and that this could have led to an irretrievable breakdown in working relations, but the Tribunal considers that it was more likely that the claimant would have jumped before she was pushed.

96 On the other hand the claimant was very clear in her evidence that she was actively looking for alternative employment and intending to leave the respondent's employment as soon as possible. The Tribunal notes that it was a request for a reference that triggered her dismissal. The claimant did not obtain this position because Mr Stone did not provide the requested reference. The Tribunal therefore concludes that had she not been dismissed the claimant would have resigned at some point in the future.

97 The Tribunal does not consider that the claimant was so desperate to leave that she would have resigned in order to take up the temporary position at Coast Care. However the Tribunal does consider that there is a real chance that the claimant may have resigned once she had found permanent work with Castle Accommodation. However, the Tribunal notes that this post was at a lower rate of pay. The claimant stated in evidence that she was so unhappy with the respondent that she was prepared to accept employment on lower pay. However the Tribunal considers that there is a chance that had she not been dismissed

and found herself out of work, then she may have decided to hold out for a post at an equivalent rate of pay to that provided by the respondent. The Tribunal also factors in that if the claimant had received a warning that would have increased her unhappiness and sense of unfairness, thereby increasing her desire to leave. Taking all this into account the Tribunal concludes that there was an 50% chance that the claimant would have accepted the Castle Accommodation post, even though it was lower paid, and left at this point.

98 Therefore the Claimant is entitled to her full loss of earnings and pension loss up to 12 September 2021, 50% of her loss of earnings and pension loss from 13 September to 2021 to 5 September 2022, and 50% of her loss of statutory rights since she would have lost these rights had she resigned. The amounts come to:

98.1 From 15 June to 12 September 2021, the sum of £1886.53 (£1401.12 +.£242.28 + £243.13)

98.2 From 13 September 2021 to 2 September 2022, the sum of £1003.62 (50% of £515 + £559.24 + £432.99 + £500).

The Tribunal calculates the claimant's total losses as £2890.15 (£1886.53 + £1003.62).

ACAS Uplift

99 The Tribunal is of the view that the ACAS Code does apply in this case. The Tribunal has found that the dismissal was because the respondent considered the claimant to be not an 'A' player. Whilst the Tribunal does not consider that this was a fair reason to dismiss, nevertheless the respondent perceived the claimant's actions to be 'culpable' conduct which he considered needed to be addressed. It therefore gave rise to a disciplinary situation to which the ACAS Code applies.

100 The Tribunal notes that there has been a failure to comply with a number of provisions of the disciplinary section of the ACAS Code. In particular the respondent failed to:

100.1 Inform the claimant of the problem.

100.2 Hold a meeting with the claimant to discuss the problems. The respondent had a meeting but simply told the claimant she was to be dismissed.

100.3 Allow the claimant to be accompanied.

100.4 Provide the right to appeal.

The Tribunal considers that these failures to comply were unreasonable. Even if the respondent did not consider that the claimant had any employment rights, nevertheless simple natural justice would suggest that the claimant be informed of the reason for dismissal and given the chance to respond. Moreover Mr Stone should have sought advice prior to dismissal rather than just assume that he could dismiss the claimant without any process.

101 The Tribunal also notes that there has been a failure to comply with the grievance section of the ACAS Code. The claimant submitted a grievance on the 1 June 2021 in which she complained about her dismissal, notice and holiday entitlements. The respondent did agree to hold a meeting to discuss the grievance and allowed the claimant to be accompanied. The claimant read out

her concerns at the meeting, but following the meeting Mr Stone took no further action, he did not determine the grievance, did not communicate any decision with the claimant and did not permit the right of appeal. The Tribunal does not consider the respondent's approach to the grievance to be reasonable.

102 Given the number of failures to comply with both the disciplinary and the grievance sections of the ACAS Code, the Tribunal considered that it is 'just and equitable' to award an ACAS uplift. The claimant has sought an uplift of 10%. The Tribunal considers this to be a modest amount and proportionate to the failures identified above. The Tribunal accepts that the failures were not deliberate and that the respondent was not acting maliciously. Further the Tribunal takes into account that Mr Stone in his evidence did appear to appreciate that he could have handled the situation better.

103 Applying the ACAS uplift of 10% to the compensatory award for unfair dismissal, the Tribunal awards an additional £289.02 (10% of £2890.15)

Written Statement of Particulars

104 The Tribunal has found that the claimant was not provided with a written statement of particulars at the commencement of her employment or at all.

105 The Tribunal is troubled by the respondent adducing in these proceedings a contract that Mr Stone admitted was not that provided to the claimant, although it appeared to be on its face. The Tribunal accepts that this was not done with the intention to deceive. The Tribunal notes that Mr Colvin was also not provided with a written contract, but also takes into account that Mr Stone admitted in evidence that due to these proceedings he has improved how he runs his business. In all the circumstances the Tribunal concludes that it would be just and equitable to award two weeks' pay, rather than the four weeks sought by the claimant. Had Mr Stone not shown insight into the way in which he runs his business then the higher amount may well have been appropriate. Therefore the amount to be awarded for failure to provide a written statement of particulars is £700.56 net (2 x £350.28).

Contributory Fault

106 The Tribunal finds that there should be a small deduction for contributory fault. The Tribunal takes into account the fact that the claimant was unhappy with Mr Stone's decision to move her from the cafe but refused to look at the financial data that Mr Stone had tried to show her to support his reason for making this decision. She refused to accept that this was a legitimate decision for him to make. Moreover she continued to make her discontent known over the six-week period which resulted in a deterioration in their relationship. Mr Stone accused the claimant or berating him, she accused Mr Stone of ignoring her. The Tribunal concludes that it was probably a bit of both. The Tribunal considers that this was a factor in Mr Stone forming the view that the claimant was not an 'A' player, however it is only a factor and was not the main factor (which was the claimant applying for jobs). The Tribunal would have reduced the award by 20% but takes into account that a significant deduction has already been made to reflect the possibility that the claimant would have left the respondent's employment in any

event, and therefore limits the deduction for contributory fault to 10%. This is to be applied to both the basic and the contributory award.

Total compensatory award

107 The total compensatory award applying the ACAS uplift and the section 38 uplift is £3879.73 net (£2890.15 + £289.02 + £700.56. Applying the 10% deduction for contributory fault, the final award is **£3809.67 net** (£3879.73 x 90%).

Notice Pay

108 The claimant states that she was only paid three days' notice. The respondent states that the claimant was paid one week's notice. The Tribunal notes that one week's notice would have been in accordance with the respondent's belief that this was all the claimant was entitled to due to only having been employed for 6 weeks. The Tribunal also takes into account that the dismissal letter refers to the claimant receiving one week's notice, the claimant's grievance and claim form refers to her being given one week's notice. Further, the respondent's bank account records that the last payment to the claimant was for £350.28 on 11 June 2021; this is equivalent to a week's pay, and therefore inconsistent with the claimant's claim that she only received three days' notice pay.

109 Since she had two years' continuous service the claimant should have receive two weeks' notice pay (i.e. 10 days). She received 1 week's notice and therefore is owed a further week's pay of £350.28 net. In addition the respondent is to pay an additional 10%, for failure to comply with the ACAS Code, amounting to £35.03 net. Therefore total outstanding notice pay is **£385.31 net**

Holiday Pay

110 The Tribunal has found that the Claimant is entitled to 20 days annual leave carried over from the 2020-2021 leave year. Her daily rate of pay is £70.06 (£350.28 divided by 5). She is therefore entitled to £1401.20 net (20 days x £70.06).

111 In relation to the holiday year 29 April 2021 to 28 April 2022, the claimant's accrued holiday entitlement by 14 June 2021 was 3.6 days (28 days statutory holiday entitlement x (47 days divided by 365)). According to her schedule of loss the claimant had taken 5 days and therefore owed the respondent 1.4 days. The parties agreed that this would be deducted from the outstanding 2020-2021 entitlement. Therefore, the claimant owed the respondent £98.08 (1.4 days x 70.06).

112 The outstanding holiday pay owed was £1303.12 net (£1401.20 - £98.08). In addition the respondent is to pay an additional 10%, for failure to comply with the ACAS Code, amounting to £130.31 net. Therefore total holiday pay owed is **£1433.43 net**

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Employment Judge Hart
Date: 12 December 2022

Sent to the parties on
Date: 15 December 2022

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