EMPLOYMENT TRIBUNALS

Claimant:	Mr Aaron Robinson		
Respondent:	Puma Solutions IT Consultancy Limited		
HELD AT:	Manchester	**ON:**	8 & 9 September 2022
BEFORE:	Judge Miller-Varey (sitting alone via CVP)		

REPRESENTATION:
Claimant: Mr Jones (Counsel)
Respondent: Did not attend and was not represented

JUDGMENT

The judgment of the Tribunal is that:

1. The Response is struck out pursuant to rule 37(1)(c) on grounds of the Respondent's non-compliance with orders of the Tribunal which have made a fair hearing within the trial window of 8 and 9 September 2022 impossible.

2. The Claimant was unfairly dismissed with his effective date of termination being 5 October 2021.

3. The Respondent unreasonably failed to comply with the ACAS Code of Practice in relation to grievance and consequently the compensatory award due to be paid to the Claimant is uplifted by 25%.

4. The Respondent is accordingly ordered to pay compensation to the Claimant for unfair dismissal in the total sum of £7119.71 (comprising £738.46 for the basic award and £6,381.25 for the compensatory award).

5. The Employment Protection (Recoupment of Jobseekers Allowance and Income Support) Regulations do not apply to the compensation.

6. The Respondent has also made unlawful deductions from the Claimant's wages and is ordered to pay to the Claimant the net sum of £4566.57 in respect of the amount unlawfully deducted.

7. The Respondent has also failed to pay the Claimant in respect of accrued but untaken holidays and is ordered to pay to the Claimant the sum of £158.14 net.

8. The sums at paragraphs 6 and 7 are each payable in addition to the total sum due for unfair dismissal under paragraph 4.

REASONS

1. These are my reasons given orally at the final hearing that took place on 8 and 9 September 2022. In accordance with rule 62(3) of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the rules") written reasons will not be provided unless they are asked for by any party at the hearing or by a written request presented within 14 days of the sending of the written record of the decision. The reasons have been prepared at the request of the Claimant.

2. Unless otherwise appears, references to page numbers are to the correspondingly numbered pages of the hearing bundle.

The Claim

3. The Claimant's complaint as formulated in his ET1 is that he was unfairly dismissed. He makes that case on three alternate bases. He also brings claims for breach of contract and unauthorised deductions from wages. The Respondent entered an ET3 denying liability.

4. The final hearing was held via CVP on 8 and 9 September 2022. The Respondent did not attend on the first morning of the hearing or seek to join the link at any time subsequently. The hearing concluded at 11.40am on 9th September 2022.

Preliminary matters

5. Following the Respondent's non-attendance, the Claimant sought an order that the Response be struck out on the basis that a fair trial was no longer possible in the allotted window. The Claimant requested that I should then go on to determine remedy. That twofold application followed on the heels of previous alleged non-compliance by the Respondent with directions (despite extensions of time), and a prior written application by the Claimant to the Tribunal on 30 August 2022. Unfortunately, this had not been determined by the Tribunal prior to the final hearing.

6. Alternatively, Mr Jones requested that the Tribunal proceed to deal with liability in absence under rule 47. The Claimant accepted that, in neither case, would the Respondent be precluded from participating on the question of remedy, if at some point during the trial, the Respondent attended.

7. In support of his submission, Mr Jones referred to the costs incurred, that the Claimant was fully prepared and had fully complied and progressed the case. In contrast, there had been little to no communication from the Respondent and no sufficient medical evidence regarding why the Respondent's director dealing with the matter, Mr Bryan Ella, was too unwell to participate. Mr Jones also urged regard to be had to available, open-source information via an up-to-date Companies House check, conducted online via "gov.uk". He argued that this supported that whilst the lead in the proceedings had been taken by Mr Ella, his wife, Isabella Ella had only recently ceased to be a person with significant control. The Claimant made the point that there was no explanation of why she could not have advanced the defence on the Respondent's behalf.

8. I am satisfied that I was entitled to take judicial notice of this. I will report my findings below.

9. I determined that it was appropriate to proceed in the Respondent's absence and, directly thereafter, to strike out the response as reflected in paragraph 1 of my judgment.

Findings of fact

10. I find the following facts relevant to the Claimant's application as set out above.Many of the matter are demonstrably true from the documents and ET records before me. Where there is any room for doubt, I have found facts based on what I think is more likely than not to have occurred.

11. Following the service of the Response disputing the claim, the original directions provided on 27 January 2022 [p.23] provided for a one-day hearing to take place on 23 June 2022. The following directions were also made [p.23]

    - The Claimant was to serve a schedule of loss by 10 March 2022
    - Mutual disclosure (by way of sending copies) should take place by 24 March 2022
    - A trial bundle was to have been agreed by 7 April 2022
    - Witness statements were to be exchanged by 21 April 2022 .
    - The original hearing was postponed on 24 March 2022 and relisted for a two-day hearing on 8 and 9 September 2022.

12. There has been non-compliance by the Respondent with every Tribunal direction. I set out the history chronologically.

13. By 25 March 2022 the Respondent had not undertaken disclosure which was due. The Claimant therefore highlighted the lack of compliance with the

Respondent and asked (in a further email of 19 April 2022) for disclosure by 26th April 2022 at the latest.

14. On 19 April 2022, Mr Ella replied by email to the Claimant's solicitors saying said that he had just got out of hospital. He requested more time on account of coming out of hospital due to complications with a broken femur. He said he had not been able to comply with the requirements because he was not mobile. The day following the Claimant's solicitors indicated they would take instructions.

15. The Claimant's solicitors picked up the matter again on 21 July 2022, repeating that Respondent's disclosure was still outstanding and this was a roadblock to the preparation of the hearing bundle which they were willing to do, despite it not being their obligation. The Claimant's solicitors proposed a new timetable of: 28 July 2022 for disclosure, 11 August 2022 for an agreed bundle and exchange of witness statements by 25 August 2022. The email stressed the importance of compliance as the last deadline was only two weeks prior to the final hearing.

16. Mr Ella replied on 14 August 2022, asking for a phone call and claiming to have left messages for the Claimant's solicitors seeking a call back. He said that he had been in hospital due to testing for bowel caner and might have to go back in for an operation. He said this was the reason he had not had time to get everything put together.

17. The Claimant's solicitors proceeded to prepare the bundle, using, since this was all they had, the Claimant's documentary evidence only. They then emailed the Respondent, via Mr Ella, on 16 August 2022 as follows:

"Further to your email, I note that I have not heard from you regarding any disclosure of documentation on behalf of the Respondent. I note that we spoke on the phone previously and had a difficult discussion, following your misunderstanding of my position and what you were required to do within the Tribunal proceedings. I explained that I am on record for the Claimant and that I could not assist you with your compliance to the Tribunal's orders, however I informed you why these orders were important and that I would need documentation from you in order for the Respondent's documents to be included in the final hearing bundle.

I sent an updated email on 21 July 2022, explaining that the Final Hearing is upcoming and I had not heard from you with any update and/or documentation. In light of your failure to disclose any documentation, we will shortly send the finalised bundle for your review and I note that this will only

include documentation from the Claimant, save for your response which was submitted at the start of proceedings.

Given the proximity of the final hearing, we are now unable to make any amendments to this bundle as both parties need to prepare their witness statements for mutual exchange using the finalised bundle. We propose the mutual exchange of witness statements at ***4pm on 26th August 2022****. Following this email, we will send the finalised bundle and upon receipt, we would be grateful if you could confirm your position for witness statement exchange by return.*

We note your reasoning for the failure to comply with the orders as directed by the Tribunal. Whilst I am unable to advise you in relation to this, you are able to seek your own legal advice and/or legal representation"

18. The Claimant's solicitors sent the final hearing bundle to the Respondent on 17 August 2022.

19. On 25 August the Claimant's solicitors attempted contact in order to confirm the mutual exchange of witness statements could take place. They reiterated the impending hearing. This was not successful. They then emailed on 26 August saying that has they had not heard further, they assumed the Respondent was not ready to exchange and offered to reschedule for 10am on 30 August 2022.

20. On 27 August the Respondent emailed to say:

"sorry I missed the witness statement but I was taken back into hospital yesterday morning.I don't know how long I am in for but I will contact you as soon as I am out"

This was clearly less than two weeks prior to the scheduled final hearing.

21. By 30 August 2022 nothing further was heard from the Respondent and the Claimant accordingly made an application for an order that unless the Respondent provided a witness statement by 2 September, the Response be struck out without further order. The application email rehearsed the history as set out above. The application was copied to the Respondent.

22. The Respondent sought postponement of the final hearing via an email to the Tribunal sent within 2 hours of receipt of the Claimant's application. Mr Ella said that he had been in and out of hospital. He had been diagnosed with liver failure and now bowel cancer. He said that because of his poor health he had

not had the opportunity to put together bundles or witness statements. He said he was "*bed bound, unable to walk and in need of 24/7 care from his wife"*. He attached two hospital appointment letters which did not say anything about his diagnosis. They related to an x ray and scan.

23. The Claimant opposed the application by an email of 6 September. This was a lengthy objection which cited numerous grounds, including:

"It is also noted by the Claimant that the Respondent has reviewed and signed-off company accounts to Companies House during the period of hospital appointments (10 August 2022 to 21 August 2022). The Respondent has also removed his wife as a person of significant control from the business on 31 August 2022, and this action appears to have taken place immediately upon receipt of our application for an Unless Order on 30 August 2022. Companies House also shows that the Respondent set up two new companies in April and May of this year and the Claimant's position is that the Respondent has been well enough to make influential business decisions and operate the business in full capacity up until the recent hospital appointments. In this way, the Respondent ought to have complied with the Tribunal's directions up until this point but failed to do so. With the above in mind, the Claimant notes that the Respondent has two directors who are both equal shareholders within the business. The two shareholders of the Respondent are married and both were involved within the circumstances of the Claimant's claims. It is the Claimant's position that one of the Respondent's shareholders is well-enough and familiar with the case facts, and would therefore be able to attend the hearing on 8 and 9 September 2022 on behalf of the Respondent."

24. On 6 September Mr Ella again emailed the Tribunal and the Claimant's solicitors. He responded chiefly to the Claimant's position in relation to potential involvement from the other director and his wife. He said:

Isabella is no longer a Director of the company as we are now separated and is no longer connected to Puma Solutions IT Consultancy LTD,although she is still acting as a carer for Me so she wouldn't be able to go to the hearing anyway. I'm sorry the appointments were not enough to delay the hearing but theirs nothing more I can say to that.I am incapable of going to the hearing as the only way I can get to my hospital appointments is with an ambulance as I can't walk and have to be streachered [sic] everywhere. As for saying that I have been able to set up new companies and work etc,my accountant has seen to all of this for me

25. Employment Judge Cookson declined the Respondent's application. This was relayed in a letter of 7 September 2022 sent by email in which she commented as follows:

"[EJ Cookson].. notes what the respondent says about his health which would, on the face of it suggest an adjournment is required. However, she also notes

the respondent has provided no medical evidence to support his application. It is not in accordance with the overriding objective for the hearing to be delayed and in the absence of any evidence she agrees with the claimant that the application to postpone should be refused. The hearing will proceed as listed. At the outset the employment judge can consider the position in relation to the respondent's health and whether a fair hearing is possible in the circumstances"

26. Mr Jones confirmed to me that his instructing solicitors had received no further communication from Respondent since 6 September 2022 and that they had not attempted telephone communication with the Respondent that morning i.e. the first day of the hearing.

27. I enquired into the absence of the Respondent by obtaining sight of and checking the email which the clerk sent the day previously which included the link to join the CVP hearing. I confirmed this was the same email address as that from which the postponement request had come and to which the decision of EJ Cookson had been notified. I did not instruct that further contact (whether by telephone or email) be attempted with the Respondent.

28. I considered available information at Companies House which confirmed the factual position advanced by the Claimant.

29. I identified through questioning of the Claimant's Counsel that the remedy information had been provided to the Claimant initially by way of the schedule of loss at p. 886.The letter first serving this on the Respondent was not before me but I am satisfied that it was served in accordance with the original directions and before 4 April 2022 in any event. I say that because it had since been revised to reflect that, on that date, the Claimant had secured a second job. It is also intrinsically unlikely that the Claimant would be pursuing the Respondent to comply in circumstances where he was knowingly in breach. It follows that the Respondent was on notice of the value of the claim (then £27,372) and its component elements, from not later than March 2022. The Respondent had also received a further copy in the trial bundle sent on or around 16 August 2022.

30. A downwards revised schedule of loss had been prepared. This was further refined during the hearing, leading to a total claimed amount across all heads of loss of £12, 498.10.

Applicable Rules and Law

31. The relevant rules are rules 47, 6 and 37 (as well as rule 2, the overriding objective which it is not necessary to repeat)

Non-attendance

47. If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.

Irregularities and non-compliance

6. A failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following—

(a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37;

(c) barring or restricting a party's participation in the proceedings;

(d) awarding costs in accordance with rules 74 to 84.

Striking out

37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

32. **Weir Valves & Controls (UK) td v Armitage2004 ICR 371 EAT** makes clear the following factors are relevant to the exercise of the power to strike out based on non-compliance:
    - The magnitude of the non-compliance
    - Whether the default was the responsibility of the party or his or her representative
    - What disruption unfairness or prejudice has been caused
    - Whether a fair hearing would still be possible
    - Whether striking out or some lesser remedy would be an appropriate response.

33. Further, following **Emuemukoro v Croma Vigilant (Scotland) Ltd 2022 ICR 327** where an application is made at the outset of a trial the focus must be on the contemplated trial i.e., is a fair trial possible in the trial window that has been allocated, not whether a fair trial might be possible at any point. If a trial cannot take place in the allocated window, strike out is not automatic. A lesser penalty may in some circumstances be appropriate.

34. The effect of making an order striking out a response is, as Counsel submitted that the Respondent could participate in the remedy hearing to the extent permitted by the me (rules 37(3) together with r.21(3))

35. Relevant Guidance regarding postponements is set out in Presidential Guidance given in 2013. It provides at paragraph 7 and example 1

When a party or witness is unable for medical reasons to attend a hearing. All medical certificates and supporting medical evidence should be provided in addition to an explanation of the nature of the health condition concerned. Where medical evidence is supplied it should include a statement from the medical practitioner that in their opinion the applicant is unfit to attend the hearing, the prognosis of the condition and an indication of when that state of affairs may cease.

Discussion and reasons for proceeding in absence

36. The logical first point was whether to proceed in any respect given the Respondent's absence. I was amply satisfied this was appropriate.

37. First, it was clear that the Respondent was on notice of the hearing. This was evident from its own recent application but moreover, notice was given in June 2022. There had also been reminders in the various emails of the Claimant's solicitors. Despite the reference by Mr Ella to his physical impairments in his final communication of 6 September (see paragraph 24 above), the notice of hearing from June 2022 and the email of 7 September 2022 sending links to join, all made clear that the hearing was proceeding via video.

38. The only material before me to excuse non-attendance was that in support of the application to postpone and Mr Ella's subsequent email of 6 September. Those documents indicated Mr Ella was well enough to read and to respond, cogently, to relevant correspondence up to 6 September at least. Despite the comments from EJ Cookson regarding the absence of medical evidence and the comments of the Claimant's solicitors which he had also clearly read, no medical evidence of his unfitness (quite different to appointment letters) had been furnished. The Respondent had not sought to renew its application for an adjournment which had also been spelled out by EJ Cookson as an avenue still open to it. From this, I deduce no medical evidence of lack of fitness was available nor did the Respondent see merit in renewing its request, with information as to why providing such evidence was could not feasibly be obtained or otherwise.

39. The material available at Companies House showed that the Respondent's accounts had been approved by the board of directors (Bryan Ella, formerly Brian Ella, and Isabella Ella) at a meeting of 31 August 2022, leading to the filing of the same on 4 September 2022. This was anomalous and incompatible with the level of functioning Mr Ella described.

40. Isabella Ella was both a director and a person having more than 25% of the shares but less than 50% until 2 September 2022. She still remained a director at the date of the hearing, as did Mr Ella.

41. The Claimant also had clear dealings with Mrs Ella in respect of his employment complaints [p.658 and 661 being a transcript in which Mrs Ella is noted as engaging the Respondent's accountant over the Claimant's allegation of breach of contract and later, p.666, possibly a solicitor too].

42. The information at paragraphs 25 and 29 made sound the Respondent's contention that Mr Ella was not, taking a reasonable approach, the only person capable of dealing with the matter on behalf of the Respondent. Mrs Ella retained actual and ostensible authority as director at the date of the hearing. Moreover, on the evidence of Mr Ella, she was in close personal daily contact with him such that relevant information could be shared and actions implemented. The cessation of her share interest would not preclude this. She was not ill. If – which the evidence did not support - she had somehow been stripped of her directorship prior to the hearing, then there was still no reason why she could not, on Mr Ella's instructions, represent the interests of the Respondent. That could even have been confined to dealing with an oral application to adjourn, rather than substantive matters. Mr Ella was clearly asserting that their relationship was sound, else she could not be acting as his 24/7 carer.

43. A feature of the case was that Mr Ella has repeatedly referenced health difficulties since the very beginning of the defence of the proceedings. This started with needing to walk with a frame in February 2022 because of his femur [p.54] and further problems in April [paragraph 13 above]. The Tribunal is not unsympathetic to the potential impact this might have. However, he and his wife had chosen to trade through a corporate vehicle and in those circumstances, it behoved them both to ensure that, acting reasonably, they placed the company in a position to deal with its obligations, including those flowing from its defence of legal proceedings.

44. It is not required of a judge to enquire of a non-attending party why they are not present (*cf Dimitriu v Testerworld (t/a De Pharmaceutical) (PRACTICE AND PROCEDURE - appearance/striking out) [2020] UKEAT 0088-19_1601,* which points out at paragraph 14 that it is not for the Tribunal to remind parties of the hearings if they fail to attend.)

45. I further judged that telephoning or emailing the Respondent via Mr Ella was not a necessary or proportionate step, given notice had so demonstrably been given. The Respondent could fairly be deemed to have absented itself. Also, having regard to the Presidential Guidance, there was no indication about prognosis and although the conditions cited are serious, Mr Ella had left matters completely oblique about how and when he would ever expect the Respondent to be able to deal with the tribunal directions and hearing. He had made no suggestion of delegating management of the proceedings to anyone else.

Discussion and reasons about strike out and proceeding with remedy

(a)Notice

46. In my judgment the Respondent had been given a reasonable opportunity to make representations on the strike out application. The opportunity was by attending the final hearing. Although the application to strike out had not been formerly intimated prior to the first day, that was not to the point. A detailed unless order application had been both notified and made which proposed dates for final compliance. By the date of the hearing, these had elapsed without compliance from the Respondent. The position faced by the Respondent and the Tribunal was one of abject and complete non-compliance.

47. A party is always susceptible to an oral application at a final hearing for a case management order, or indeed strike out. The background meant this was highly likely and predictable, even to a lay person. The Claimant put its position very plainly and fully in correspondence sent on 30 August. Moreover, it was only the Respondent's unjustified non-attendance which meant it was not there to hear it and oppose it. Sufficient notice depends on the facts of the case. There had been ample notice here.

(b)Strike out

48. I was satisfied that grounds existed upon which to exercise the power to strike out. These included the breaches of the Tribunal's directions. Most materially however, the Claimant's non-compliance (no disclosure of documents, no witness statement) was not capable of being remedied on any feasible basis, in the two-day trial window. Assuming, at best, that the Respondent appeared at the video hearing at some point armed with statements and copies of additional documents, the Claimant could not reasonably be expected to deal with these and for matters still to be disposed of, including delivering judgment, in the time allotted. This would be unacceptably prejudicial to the Claimant who had had complied, had incurred the costs, including of Counsel's attendance, and had done nothing at all to contribute to the impasse. In fact, the tone of the Claimant's solicitors throughout had been constructive and forbearing towards the Respondent. The Claimant's costs of the hearing would all be abortive. Further, the Claimant had already suffered a prior adjournment of the hearing owing to lack of court space in Carlisle. It was unfair for him to have his hearing further delayed.

49. Although the power should be used sparingly the balance of prejudice favours striking out the response, meaning the Respondent could still challenge on liability with my permission. Judgment was accordingly entered for the Claimant, and he was found to be unfairly dismissed.

50. So far as dealing with remedy in absence is concerned, the final hearing was always intended to deal with both liability and remedy. The directions made clear that matters of loss were to be dealt with. Most materially, I am satisfied that full disclosure had taken place and the Respondent was on notice of the value of the claim and its component elements, having had the original schedule of loss in hand for some months and there only having been a downwards variation since that time.

51. I took into account too that the absence of the Respondent did not mean there would be no scrutiny *at all* of the compensation to be ordered, or the amount due under the other claims of unlawful deductions. Although I am under no obligation to turn myself into an investigating forum, I still made enquiries to understand the remedy sought so that I was satisfied it remained within the statutory ambit of just and equitable compensation, and there was a proper lawful basis on which the alleged unpaid salary and holiday pay was due.

52. In those circumstances, it was appropriate to deal with remedy in the Respondent's absence.

Remedy – introduction and issues

53. I received into evidence all of the documents in the 923 page bundle together with an updated schedule of loss which was subject to some revision during the hearing. A final schedule of loss was provided after the hearing, reflecting the findings that I made.

54. I heard evidence from the Claimant who affirmed. He adopted his witness statement as accurate and answered some supplementary questions via evidence in chief, including a number of questions from me. He was not seeking reinstatement or reengagement.

55. The issues to be decided on compensation for unfair dismissal are as follows:
    - What is the basic award?
    - Should any sum be awarded for loss of statutory rights?
    - What steps did the claimant take to replace his lost earnings?
    - For what period of loss should the claimant be compensated?
    - What other financial losses has dismissal caused the claimant?
    - Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
    - Did the respondent or the claimant unreasonably fail to comply with it?
    - If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

- Is it necessary to gross up any part of the award if it will be subject to tax?

Compensation for unfair dismissal – relevant law

56. An award of compensation is the most common result in unfair dismissal cases. It is assessed under two heads; the basic award and the compensatory award (see section 118 of the Employment Rights Act 1996 ("ERA")).

57. The provisions relating to the basic award are contained in ERA sections 119 to 122 and in section 126. The award is calculated according to a formula based on age, length of service and gross weekly pay. A week's pay is subject to a statutory maximum which, at the time of the claimant's dismissal stood at £544 (see ERA section 227). As the claimant was aged 24 when he was dismissed, the relevant rate is one week's gross pay, capped at £544, for each full year of service.

58. The provisions relating to the compensatory award are contained in ERA sections 123, 124, 124A and 126.

59. A compensatory award is intended to compensate for loss actually suffered and not to penalise the employer for its actions.

60. The relevant questions are: whether the loss was occasioned or caused by the dismissal; whether it is attributable to the conduct of the employer; and whether it is just and equitable to award compensation.

61. Permissible heads of loss include: past and future loss of earnings, loss of pension and fringe benefits, expenses incurred in looking for other work, and compensation for loss of statutory rights. The award for loss of statutory rights reflects the fact that the dismissed employee will have to work for 2 years in new employment to reacquire the right not to be unfairly dismissed.; The award is generally for a conventional amount, at present somewhere in the region of £500.

62. Arguments about contributory fault by a Claimant or that the dismissal would still likely have resulted had a fair process been followed (the Polkey adjustment) are those which require to be taken actively by a Respondent facing a claim. Supporting facts and caselaw must be marshalled.It is typically

pursued by way of an alternative defence and dealt with at the liability hearing.

63. An employee who has been unfairly dismissed must mitigate his loss by taking reasonable steps to reduce her losses to the lowest reasonable amount. This does not mean he has to take 'all possible' steps. The burden of proving a failure by a Claimant to mitigate lies on the Respondent

64. ERA section 124 places a cap on the compensatory award for unfair dismissal which, at the date of the Claimant's dismissal, was the lower of £89, 493 or 52 weeks' pay.

Calculation of unfair dismissal compensation

65. I have set out below my calculation of the compensation I awarded. I accepted the Claimant's evidence and found this supported the figures I have set out.

66. The Claimant was born on 8 July 1997 and was aged 24 when he was dismissed on 5 October 2021.

67. A week's pay was at all material times £369.23 gross and £326.84 net. In that regard, I accepted the submission of counsel and behalf of the Claimant regarding the status of what are referred to in the written contract as travel expenses £250; namely they that they were part of the contractual remuneration. Mr Jones invites me to look at the practicality of what happened, to have regard to the agreement as formed orally with the Claimant. Three points are relevant here. The clear evidence of the Claimant was that the payment was not subject to the provision of itemised receipts or referenced to his actual travel. They therefore did not operate by way of direct and exclusive reimbursement. His evidence too was that absent the sum, his wages would in effect have been on a par with working in a bar and there would be limited incentive for him to accept the position.

68. Thirdly, there is in addition a payslip [p.888 for August 2020] in which the £250 is aggregated with the other basic pay. This was for a period when the Claimant was not travelling into the Respondent's office [Claimant's witness statement p.24 - he returned on 1 September 2020].

69. I remind myself that is not my function to take on a critical investigative analysis beyond these unchallenged points and I am therefore satisfied that the £250 though styled as expenses in reality was part of the Claimant's remuneration.

70. The basic award reflects the age of the claimant and the two weeks pay to which he is therefore entitled. That is correctly stated in the schedule £738.46 (2 x net weekly pay of £369.23)

71. There is then loss of earnings. As counsel for the Claimant accepts, here it's appropriate here for the tribunal to consider what efforts have been made to mitigate the loss. The evidence I heard from Mr Robinson was that from termination into November 2021, he pursued self-employed work. He was not as successful as he would have liked and so began searching for employed roles too. He commenced part-time work with Halfords in Workington whilst he tried to develop self-employment. He also sought alternative employment in this period. This extended to an interview with Lakes College in which, unfortunately, he was not successful. However, he then pursued opportunity in early 2021 with Pioneer Food Services which went through a number of interview stages resulting in the offer of the job which he accepted on 4 April 2022 Thereafter he continued to work both for Halfords and Pioneer but in circumstances where his aggregated earnings exceeded those which would have been paid by the Claimant had he not been dismissed. His claim for loss ends at that point, and he has given full credit for the earnings of £3,892.84 he achieved in mitigation, consistent with the corroborative payslips he disclosed [pp. 888 - 894]

72. I take into account the specialism of the Claimant and see nothing glaringly wrong or unconscionable in the efforts which he made to seek employment. In particular self-employment would, I expect, have obvious attractions and is a common working model for those undertaking web development work for individual clients. I see no manifest unreasonableness in his management of his employment situation and am satisfied therefore that the 26-week period over which loss is claimed (subject to mitigation) is just and equitable.

73. So far as the ACAS uplift is concerned, I ordered this at 25% by reference to the serious failure to deal with the Claimant's grievance as referred to in the Claimant's witness evidence and exemplified in the transcripts he adduced as part of it. His grievance was comprehensively put in writing. There was not then an invite to a grievance meeting where the Claimant could be accompanied. I also observe that the Respondent's own case in the ET3 was substantially that the Claimant had resigned. It did not present any case that it had ever really dealt with his grievance.

74. The Claimant confirmed via his Counsel that he did not receive any welfare support for the period 5 October 2021 – 4 April 2022. Accordingly, the Recoupment Regulations do not apply.

Calculation of compensation for unfair dismissal

Awards under the ERA

Basic award (2 weeks gross salary of £326.84):	£738.46
Compensatory award:	£6381.25*
Total	**£7119.71.**

*Explanation of compensatory award:

Lost earnings (6/10/21 - 4/4/22 i.e. 26 weeks x £326.84);	£ 8497.84
Loss of statutory rights	£ 500.00
Subtotal	**£ 8997.84**
LESS	
Earnings in alternative employment	£3892.84 ;
PLUS	
Uplift of 25% following the Respondent's unreasonable failure to follow ACAS codes of practice in relation to grievance.	£ 1276.25

Unlawful deductions, holiday pay and training expenses - relevant law

75. The Claimant brings claims of unlawful deductions from wages.

76. Section 13 enshrines the right not to suffer an unauthorised deduction from wages other than in prescribed circumstances. So far as relevant, it provides as follows:

13.— Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—
(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
…..
(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

77. As to wages:

27.— Meaning of "wages" etc.
(1) In this Part "wages" , in relation to a worker, means any sums payable to the worker in connection with his employment, including—
(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

78. A claim for holiday pay may be made by an employee by way of an unlawful deductions from earnings claim. This extends to holiday pay which, as a matter of contract, accrues but has not been paid on termination.

79. The total ordered here is £**4724.71** comprising:

80. **Three days salary from October 2021**. The Claimant was not paid 3 days salary between 1 October and 5 October 2021 (paragraph 39 of the Particulars of Claim, p.15 and p.872 showing his last date of payment by the Respondent). This amounted to **£196.10.**

81. **Backdated shortfall in wages from November 2020 to termination**. It was the Claimant's clear evidence to the Tribunal at the hearing (and in his witness statement – paragraph 19) that the Claimant never consented to go onto furlough or to suffer any reduction in his wages. His remuneration remained as per the terms of the contract. The Claimant before me sought to claim his full pay from his dismissal back to November 2020. This was based on a true monthly salary (as I found was correct) of £1600 per month. **The total amount due here to the Claimant in respect of this was £2709.19 (11 x £246.29).** No limitation issues arose since this is unbroken series of deductions.

82. **Training expenses.** These were sought on the basis of breach of contract. I found them substantiated by the Claimant's evidence of a verbal agreement with the Respondent that he could educate himself using Udemy. This is an online site for education in a variety of fields and provides courses including website design /development, server maintenance etc. It was corroborated by his diary entry [p.63]. I also received live evidence from the Claimant that he identified courses that were helpful for the server used by the Respondent. The interface was Plesk. The details of the courses were set out on p. 817 and had been notified to the Respondent prior to proceedings [p.100 and the related attachment]. Although no supporting invoices were placed before me, I was satisfied by the Claimant's unchallenged evidence that he had genuinely and honestly incurred the sums on the basis of a promise of reimbursement. The Respondent is accordingly liable in damages to the Claimant for breach of the contract. No limitation point arose here because the claim could not be brought whilst the Claimant was still employed. **The amount due here is £269.82**.

83. **Unpaid pension contributions**. The Claimant's evidence, supported by the documents [pp.878-885], was that on numerous occasions the Respondent through Mr Ella assured him that he was paying into a pension scheme (witness statement at paragraph 42). Pension deductions are shown on the Claimant's payslips between September 2019 and December 2020 in the amount of £42.37 (for 13 months) and £28.87 (for 4 months). However, when the Claimant requested details of where these contributions had been paid to and why they had ceased – a fact only revealed with belated payslips in August 2021 - there was no response. The Respondent in the ET3 did not furnish any answer. On the balance of probabilities, the deductions were not contributed to a pension scheme and represent unlawful deductions from earnings. The total value of the unlawful pension deductions is **£666.23.**

84. Mr Jones properly identified that these deductions were made in a series but the last in time was outside of the primary limitation period (set down by s.23(2)(a) of ERA 1996) given the date on which the claim was issued. The purported pension deductions stopped by January 2021 and the claim was brought on 6 January 2022 [p.2-11]. The Claimant, however, had only become aware of the cessation of deductions – and thus had cause to query and doubt their earlier legitimacy – when eventually on 10 August 2021, after many requests, the Claimant received payslips for the period of 1 February to 31 July 2021.

85. I accordingly found that it was not reasonably practicable for the Claimant to bring a claim for these deductions sooner (he was out of time by the discovery

in August 2021, already) and he then brought the claim within a period of time I considered, on the unchallenged facts, to be reasonable. I took into account here that ACAS started in October 2021.

86. **Underpaid Holiday pay (£725.23) and holidays not taken (£158.14)** I was satisfied that as at termination the Claimant had accrued leave as provided for under the holiday year set out in clause 8 of the contract [p.59-60]. The Claimant, when he had actually taken leave, had also been paid less than the applicable rate as the Respondent purported to have varied the Claimant's remuneration to dovetail with furlough received from the government by the Respondent when there had been no such arrangement. It has also treated the Claimant as being entitled to salary of £1350 per month only and had calculated holiday pay on that erroneous basis. **The combined total due here is £883.37.**

87. In aggregate therefore, the Claimant is entitled to receive £4566.57 in respect of unlawful deductions from earnings, in addition to the award for unfair dismissal.

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Tribunal Judge A Miller-Varey
(Acting as an Employment Judge)

14 December 2022

Sent to the parties on:

21 December 2022

For the Tribunals Office