EMPLOYMENT TRIBUNALS

Claimant: **Ms M Goodsell**

Respondent: **Mrs D Barclay-Bernard and Mrs N Hiller t/a Ellenwhorne Equestrian Centre**

Heard at: **London South (CVP)** **On:5th & 6th September 2021.**

Before: **Employment Judge R F Powell (sitting alone)**

Representation:
Claimant: Mr Foster, solicitor
Respondent: Mr Hoyle, legal consultant

REASONS

Reasons having been given at the conclusion of the hearing

1. These are the written reasons of the Employment Tribunal, given orally at the conclusion of the hearing on the 6th September 2021, and written reasons being subsequently requested by the Respondents. These reasons, and the judgment, must be read together with my Findings of Fact dated 24th of February 2021.

2. The final hearing of February 2021 was listed to the determine liability and remedy but the respondents' application, initially articulated at the commencement of the 2021 liability (that the breach of contract claim was not within the tribunal's jurisdiction) prevented that hearing from reaching a final determination on liability. I was able to make findings of fact but the hearing was adjourned to determine the issue of jurisdiction once the respondent had articulated it sufficiently to be clearly understood and then determined.

3. In my judgement dated 4th of March 2022 I dismissed the respondents' assertion that the claimant's breach of contract claim was not within the employment tribunal's jurisdiction.

The case was then listed to consider the outstanding issues and an application for costs against the respondents.

4. My findings of fact have not been subject to appeal and, in light of those findings, the respondents admitted the alleged incidents of breach of contract and in particular, that their dismissal of the claimant was in breach of her contract.

5. The respondents also accepted that, in some respects, the wages they paid to claimant prior to her dismissal were less than the amount to which she was contractually entitled. At my direction the parties agreed the quantum of compensation in respect of the sums of underpayment of wages

6. I record that a discussion between the parties and myself did not resolve whether a cheque from the respondents, for one such underpayment, was actually rejected by the claimant. but nevertheless it was common ground that the respondents

7. On the basis of the admissions and agreements I proceeded to determine the quantum of any loss flowing from the admitted breach of contract with respect to the dismissal of the claimant on the 12th February 2018..

8. The claimant gave evidence with respect to her claim for damages. She was cross examined. The respondents did not offer any witness evidence or documentary evidence on that issue.

9. The claimant sought damages for loss of income for the balance of the expected duration of her apprenticeship contract . This she alleged included; wages for 59 weeks, damages for loss of statutory maternity benefits (both maternity payment and statutory maternity pay) and damages for the loss of formal training for the British Horse Society qualification as a riding instructor .

10. The respondents argue that there is no contractual basis for losses to be awarded beyond the statutory notice period; which I have taken be a reference to section 86 of the Employment Rights Act 1996. That argument is consistent with the claimant's contract of employment which reflects the approach of section 86 to the calculation of notice pay. In this case, at the date of dismissal, the claimant would have been entitled to one week's notice.

11. The essence of the respondents' argument on this point was set out in their amended particulars of response and , as is apparent from my judgment on jurisdiction, I have accepted the respondents' summation of law set out in first 16 or so paragraphs of those amended grounds of resistance which distinguish the character of a traditional apprenticeship, recorded as a deed of apprenticeship, and a modern apprenticeship which is a contract of employment with particular statutory characteristics.

12. The respondents also asserted, albeit not expressly stated in these terms, that the claims for maternity benefits and maternity pay were to remote because the claimant did not take up available employment, and thereby she failed to pay the necessary national

insurance contributions and did not, although able to, accrue 26 weeks of employment preceding the week of expected childbirth.

13. Before I address the respondents' arguments set out above I refer to the relevant principles of law to which I have directed myself; as the submissions I received from the parties did not address any case law.

14. The purpose of the remedy for wrongful dismissal is to put the employee in the position they would have been had the contract be performed lawfully, including the lawful termination of the contract. It is necessary to consider the losses caused by the proven breach; as opposed to losses caused by other factors.

15. An employee who has been dismissed in breach of contract maybe entitled to compensation for all benefits that they would have received, had they remained employed till the end of their notice, or in the case of a fixed term or limited term contract, until the contract was due to expire.

16. The servant who is wrongfully dismissed from his employment is entitled to compensation for the full amount of all the emoluments and allowances which he would have earned but for the breach of contract: *Addis v Gramophone Company ltd* [1909] AC 488. That judgment has been followed in many subsequent cases such as *laverack v Woods of Colchester limited* [1966] EWCA Civ 4.

17. It is upon the above principles that the claimant case is founded. She does not assert that she was employed under a deed of apprenticeship. She asserts that it is immaterial whether she her contract falls within the statutory framework for a modern apprenticeship; hers was a fixed term contract and that is the central consideration for determining the duration of her anticipated period of employment, which, but for the respondents' breach, would have continued to its conclusion.

18. In this case the written agreement between the parties is found in the agreed bundle at page 83.

19. It stated that the claimant was to be employed for "a fixed term". It specified the event which would terminate the agreement as "the apprenticeship finishes"

20. The contract of employment as an apprentice is associated with another document; the Learner Initial Interview [page 53] That document bears the signature of Mrs Barkley-Bernard on behalf of the respondents and the claimant. Both confirmed that the contract between them was a fixed term contract employment which would remain in place until the completion of the apprenticeship; the agreed end date for the conclusion of the apprenticeship was recorded as 21st June 2019.

21. I record that that neither party gave evidence of the date on which they "expected" the apprenticeship to conclude. Nor did they articulate their understanding of the document at page 83.

22. The contract also stated the contract could be terminated at an earlier date. The contract does not define the applicable circumstances in which an early termination could lawfully occur. The contract did give an example: " by way of your successfully finishing partnership on a date earlier than expected". That example was one of a number of circumstances defined within the contract as "amongst other things"

23. It is of course common ground that the claimant did not complete her apprenticeship because her employment was terminated on12th February 2018.

24. For the respondents Mr Hoyle argued that the term "amongst other things" contradicts the respondents' written statement that the claimant's employment was for a fixed term.

25. The respondents' witnesses gave no evidence on their understanding of, or the intended meaning of, the phrase "amongst other things". The claimant was not cross examined on this point in any detail.

26. I note that the respondents' contract expressly incorporates the content of their staff handbook which I am informed has a disciplinary process.

27. I accept that the phrase " amongst other things" could encompass conduct by the employee which was repudiatory in nature, or a party's fundamental inability to perform the contract by reason of incapacity.

28. However, those possible reasons for an earlier termination of a fixed term contract do not detract from the express statement of these parties' intention; that they intended to form a fixed term contract of employment for their mutual benefit; the claimant's education and the respondents' receipt of funding whilst the claimant worked as an employee at their premises at a lower rate of pay. The parties agreed that their contract was intended to terminate on the later of two events; the completion of her apprenticeship or the 21st June 2019.

29. I have been referred to the Fixed Term (Prevention of Less Favourable Treatment) Regulations 2002 and in particular regulation 1(2)(a) and (b). As I have recorded above, I have found that the contractual arrangements in this case specified both the completion of a specific task and a specific term.

30. I find that the claimant was employed under a fixed term contract.

31. I now return to the respondents' argument set out in their amended response which argued that the character of the modern apprenticeship agreement limited the claimant's quantum of loss to one week's notice pay.

32. The respondent's argument was founded on the distinctions between an apprenticeship agreement under the terms typically found in pre 21st century deeds and inception of modern apprenticeship agreements since 2009.

33. The respondent's written argument began with the assertion that the claim was ; " misconceived and is based on a very outdated pre 2009 state of affairs."

34. The argument went on to distinguish the typical characteristics of the two forms of apprenticeship and emphasised that a modern apprenticeship contract could be lawfully terminated during the currency of the apprenticeship without the employer being liable to pay damages for wages that would have been due during the balance of the apprenticeship term.

35. In my judgment the claimant's case is not predicated on an outdated state affairs. It is predicated on the wording of the contract which the respondents offered to the claimant and to which the claimant agreed which, regardless of its character as an apprenticeship agreement, was a contract of employment expressly stated to be for a " fixed term".

36. Further, the claimant does not assert that she has an unfettered contractual right to damages for the balance of the fixed term. She argues that she has done all she could to mitigate her loss and seeks an award of damages equivalent to that which she has lost consequent to the respondents' breach of contract.

37. Further, if there was any ambiguity in the terms of this contract which was drafted by, or for, the respondents, applying the principle of contra proferendum, I would resolve any ambiguity claimant's favour.

38. I therefore find that respondents' argument, as it were, somewhat misses the mark . I find that, as a matter of principle, it is open to a tribunal, in the relevant circumstances, to make an award for losses consequent to the breach of contract that continued, or occurred after the expiry of the statutory notice period.

39. I then turned to the quantum of loss. An action for wrongful dismissal is an action for damages rather than an action for debt. It is for the employee to mitigate her loss. For instance the employee who is wrongfully dismissed and immediately finds more lucrative employment elsewhere cannot effectively claim any damages against their former employer: *Secretary of State for Employment v Wilson* [1997] IRLR at 483.

40. In the course of determining the quantum damages to be awarded to a successful claimant it is incumbent on the tribunal to determine whether the claimant has acting reasonably in her efforts to mitigate her loss.

41. it was a matter raised by myself, whether it was permissible for the employment tribunal, as a matter of principle, to take into account the possibility that the contract might have ended lawfully at a date earlier than the 21st of June 2019 or whether there was a distinction on law between the approach under the Extension of Jurisdiction (England & Wales) Order 1994 and the method of calculating losses following the unlawful termination of employment under part X of the Employment Rights Act 1996

42. The claimant argued that such considerations were not relevant for a breach of contract claim. I have taken into account cases such as *Bold v Brough, Nicholson and Hall Ltd* [1964] 1 WLR which makes clear that consideration of the " vicissitudes of life" are relevant

circumstances which I may take into account. In that case it was just to consider whether the claimant's employment might have been terminated due to illness on a date earlier than the expiring the fixed term contract. So, as a matter of principle , I accept that the possibility of a lawful termination (whether by dismissal or resignation) is a factor which I should take into account.

43. The claimant gave evidence in accordance with her witness statement dated August 2022 which was cross referenced to the detail within her schedule of loss drafted and several attached documents which included a statement of the costs for the several stages of training to qualify as an accredited horse riding trainer and a P60 relating to the claimant's work as bank worker for Spire Healthcare limited.

44. Although the respondents business is in the relevant locality, and Mrs Hillier is an employee of a business that administered statutory apprenticeships, they offered no evidence of available equivalent alternative apprenticeships for which the claimant could have applied in the relevant period. The claimant denied that such opportunities could be found following her own inquiries and efforts to find appropriate alternative apprenticeships.

45. In the absence of evidence to contradict the claimant's assertion, I accept her evidence; having found her to be a generally reliable to witness during the February 2021 hearing.

46. I have taken into account the respondents' argument that the claimant has not documented her efforts: her searches of the government apprenticeship website, the adverts in magazines and social media for apprenticeship positions. I find that to be a failure to corroborate her evidence; that there were no opportunities to for comparable apprenticeships for she could apply.

47. That is a flaw in her evidence but it does not lead me to consider that her evidence is unreliable . The burden of course lies upon the respondents to demonstrate that the claimant's efforts to mitigate her loss were unreasonable, in that respect they have not done so.

48. I turn to the first issue "vicissitude of life" raised by the respondent. It is a matter I raised my parties and stems from my own findings of fact in February 2021; that the relationship between the grand daughter (or daughter) of the respondents demonstrated significant immaturity, and degree of vitriol, towards the claimant particularly in the two days before the date of dismissal. The respondent's assert that, had the claimant not been dismissed, she would have resigned on the date of her dismissal or soon thereafter.

49. I note that a resignation in response to the conduct of an employee's de facto manager may, if that behaviour was sufficiently serious in nature, amount to a breach of the implied term of trust and confidence; a potentially repudiatory breach of contract which can amount to a dismissal; section 95(1)(c) Employment Rights Act 1996.

50. On the evidence I have before me I am not persuaded that, had the claimant not been dismissed on 12th February 2018 , she would leave the respondents' employment for the reasons suggested by the respondents.

51. In my judgment the immature petulance between the two young women was something which any reasonable employer could have easily resolved, or at the very least, been successfully managed. Similarly, the alleged poor time keeping of the claimant could have been managed by either respondent.

52. Further, If Mrs Barclay Bernard had spoken in a formal managerial way to both her daughter and the claimant on the date of the dismissal, then in my judgment on the evidence I have before me, I do not think that any realistic prospect of that the respondents would have dismissed the claimant despite taking into account the fact that the claimant was self-evidently removing her horses from the respondents, that day.

53. Further I do not consider it at all likely that the claimant would have given up her apprenticeship with the respondents on, or after, the date of her dismissal because it gave her the benefit of progressing through the training necessary to become a qualified horse riding instructor , without incurring the considerable costs of undertaking that training outside of the apprenticeship scheme and a steady, if modest, wage. The achievement of that qualification was her single professional ambition.

54. For the above reasons, I'm satisfied that there is insufficient evidence to warrant a conclusion, even with reasonable speculation, that there was any degree of probability that the claimant's employment would have terminated prior to the expiry of the fixed term of the contract for the reasons proposed by the respondents.

The claimant's mitigation of her loss

55. Between mid-February and July 2018 the claimant worked for "around three months" and earned £2,000.00 net working for a member of her family. During those three months she earned considerably more than she would have earned in a similar period as an employee of respondents; where she was being paid around £448.00 per month[1].

56. The claimant, on the evidence before me, earned enough to pay any National Insurance contributions on her earnings in this period.

57. From late July to late September 2018, on the evidence which came entirely from the claimant, she took up renovating furniture. This was work for which she had no prior experience nor qualification or competence.

58. In the two to three months the claimant made a gross profit of £400.00.

59. In late September or early October 2018 the claimant commenced work in a stable yard with MJL Equestrian. This was work which she perceived might give her the opportunity to receive some training towards her horse riding instructor's qualification.

[1] I have noted that, as the respondents concede, the respondents were underpaying the claimant. Her gross weekly wage should have been around £126.00 per week or circa £504.00 per month.

60. Her witness statement gave the impression that she was working full time and records that she earned £600.00 in six weeks. Through cross examination the claimant conceded that she worked for nine days across that period.

61. In October 2018 the claimant found out that she pregnant. Consequently she sought out less physical work and obtained an office based role with Spire Healthcare which commenced on the 1st November 2018. She was employed as a bank worker; someone who might, or might not, be called upon to work. The modest amount of work the claimant undertook is reflected in her P60. Between 1st of November 2018 and 31st of March 1019 she earned about £652.00; a little over £130.00 per month.

62. The claimant ceased work on the 31st of March 2019; some 19 days before her son was born on the 19th of April.

Has the respondent proved that claimant acted unreasonably in her efforts to mitigate her loss ?

63. I have several concerns about the claimant's efforts to mitigate her loss which I will now summarise.

64. When questioned by Mr Hoyle about the general availability of the stable yard work and her ability to undertake any such type of such work before she became aware of her pregnancy, the claimant responded that she was looking for work which would further her ambition to qualify as a horse riding instructor and she was not interested in an apprenticeship, or work, which was unlikely to further that ambition .

65. Whilst her desire to obtain a qualification is commendable, on the evidence before me it was practical, and reasonable, for the claimant to take up any available work, for which she was qualified or experienced, whilst she continued to seek out her preferred type of apprenticeship or work.

66. I find that full time yard work would not, in any way , have curtailed her ability to seek out an alternative apprenticeship or take up a different job given her methods of seeking such employment were, as she described, reading magazines, using social media and looking at the government's apprenticeships website; all of which could be done alongside a full time yard work; for which she was qualified and competent.

67. Her efforts to find any suitable work was not reasonable prior to commencing her work with her Aunt.

68. It was clearly reasonable for the claimant to choose to work for a member of her family for around three months in the period from March to July 2018 because the rate of pay she received was higher than her £112.00 weekly wage at the respondent's stables.

69. However, in my judgment, it was not reasonable for her to prefer to try her hand at furniture restoration, as a full time occupation, when she had, on the evidence before me, neither qualification, experience nor some degree of competence in furniture restoration. That decision was not a reasonable effort to mitigate her losses .

70. Her nine days yard work, across a six week period, was certainly an effort to mitigate but, on the evidence before me, her decision not to seek work on the majority of working days in that period was not an example of making a reasonable effort.

71. I have come to the firm view, based on the claimant's own evidence, that she was choosing work of interest rather than taking any available work which would enable her to mitigate her losses.

72. I find that the claimant did not fully mitigate her loss when she accepted a role as a member of a "bank" of staff of Spire Healthcare ltd. Again this was an effort to mitigate her loss and the change of environment was clearly reasonable given her pregnancy.

73. She gave no evidence of efforts to obtain other, or additional, employment with guaranteed hours of work, whether on a full or parttime basis .

74. I have concluded that her efforts were limited to accepting the ad hoc hours office hours offered. I also find that the claimant would have been aware that she may not have been offered much, or any work, for some periods of time.

75. I've curtailed the period for which I consider it would be unreasonable for the claimant be reasonably expected to have sought new, or additional employment at the end of January 2019; the claimant was pregnant for the first time. Her principle area of work experience was with horses and stable work and it would have been incautious of her own, and her baby's health, to have taken up strenuous physical work alongside her occasional office work in those circumstances. Further, from that same date, it would not be reasonable to expect the claimant to have relinquished her work with Spire Healthcare Ltd for the uncertainty of a job that she might only be able to fulfil for a number of weeks before the birth of her child.

76. In summary, based on the claimant's s own evidence, she has demonstrated that, from February 2018 she has made efforts to mitigate her losses, but those efforts were not always reasonable.

77. Given her gross weekly wage with the respondents was £112.00 and subsequent to her dismissal, she demonstrated the capability of earning as much as £66.00 a day doing stable work and about £600 net a month working for her aunt, I have concluded that, had the claimant made reasonable efforts throughout the relevant period she would, have reasonable earned £2,000.00 more than she did.

78. For the above reasons the quantum of loss claimed in the schedule of loss, with respect to lost earnings is reduced by £2,000.00.

The claim for loss of statutory payments relating to maternity.

79. I note that, had the claimant remained in the employment of the respondents, her gross weekly pay would have been below the 2018/19 lower earnings limit for the purposes of

calculation of statutory maternity pay and, her gross weekly pay was less than the lower threshold for national insurance contributions.

80. Mr Foster's schedule of loss sets out two forms of loss relating to the claimant's pregnancy and child birth: qualification for one benefit is predicated earning a weekly sum in excess of the lower earnings limits for 2018/19 the other is predicated on a continuous period of employment before the earliest expect ed week of childbirth.

81. I am very cautious with these claims because it is my judgment, on the balance of probabilities, if the claimant had made reasonable efforts to mitigate her losses post July 2018, it is highly likely she would have been able to obtain employment of regular nature which would have enabled her earn sufficient to pay NI contributions. Further, had the claimant looked for work outside the realms of her family and horse riding (as she did in October 2018) she would have been more than able to obtain a role with continuity of employment from September 2018 and thereby had 26 weeks of continuous employment prior to the week of expected childbirth.

82. In light of my conclusions, I directed the parties to apply those conclusions to the claimant's schedule of loss and agree, if they could, the sum due to the claimant in respect of lost earnings for the relevant period. The parties were able to reach a consensus and the agreed sum is reflected in the judgment.

83. The last element in dispute is the cost the claimant has incurred funding the training and examinations needed to qualify as an accredited horse riding instructor through the British Horse Society.

84. I accept that, for the claimant, the principle benefit of the respondents' apprenticeship was the opportunity to obtain this qualification. I accept that the claimant made reasonable efforts to find an apprenticeship which provided the same opportunity to obtain the above qualification and could not do so.

85. I accept that, as a consequence of the respondents' breach of contract the claimant has continued her training and that such training has been privately funded; an expense for which the claimant seeks an award of damages.

86. In the course of discussion with the parties representatives after giving judgment on the primary aspects of remedy I raised the parties, and particularly with the claimant, whether Miss Goodsell had paid for the training costs herself, or whether another person had done so. if it was the latter in any part, whether Ms Goodsell was responsible reimbursing the third party contribution.

87. Mr Foster took instructions and stated that Ms Goodsell had paid a large part of the training fees herself and her parents had supported her to some degree but she was responsible for repaying them.

88. I allowed an adjournment for Mr Hoyle to see a document which set out the chronology of the relevant training and examinations undertaken (or yet to be undertaken)by the claimant

I asked whether or not responded disputed the truth of Ms Goodsell's position on this point. Mr Hoyle stated the claimant's assertions were not accepted

89. I allowed Mr Hoyle to cross examine the claimant a second time, but as he had already completed his questioning on the subject of remedy earlier, I directed that the scope of his cross examination was limited to the truthfulness or reliability of Ms Goodsell's assertion that she had paid the training and qualifications herself albeit with the benefit of her parents.

90. I intervened in the cross examination when Mr Hoyle was cross examining the claimant about a pony club qualification 2 years before the claimant commenced employment with the respondent and directed that questions were limited to the subject that I had set out beforehand.

91. At the conclusion of Mr Hoyle's cross examination, during which there was no challenge to the honesty of Miss Goodsell's evidence, the respondents sought disclosure of the following: records of transactions from the bank accounts of the claimant and her parents and any other document which evidenced the payment of fees for lessons, examination fees or an agreement by Ms Goodsell to repay amounts paid by her parents.

92. These requests would have entailed searching and collating documents from a number of sources, probable partial reductions of irrelevant transactions then copying and sending to the respondents and Mr Hoyle. It would further require time for both parties to give instructions and receive advice. All of which would likely lead to additional costs to the parties.

93. This application was made at lunch time on the second day of the remedy hearing and there was no prospect that such an application, if granted, could be addressed in the remaining time.

94. The application was opposed by Mr Foster on the following grounds; the respondent had received the claimant's schedule of loss in 2019 and had a very long time to consider the schedule and prepare its challenges, The case would inevitably be adjourned to another date; which on consideration of the history of this case, would probably lead to months of delay. There would be further costs to which his client would be put to answer an enquiry which was speculative at best. The delay, the cost and the speculative character of the request were cumulatively contrary to the interests of justice and the tribunal's overriding objective.

95. I take into account the overriding objective, the interests of justice and proportionality. I also take into account the degree to which this is an application that is made in untimely fashion.

96. I note that the respondent has not accused the claimant of lying in the course of two periods of cross examination during this remedy hearing.

97. I take into account that granting this request will prevent the parties concluding their part in this hearing and that I have yet to hear, and consider ,a substantial costs application against the respondents.

98. Given that the last substantive hearing in this case was conducted in February , a further delay, inevitably counted in months could lead to this case, which began in 2018, being re convened in several months' time.

99. I lastly note that Mr Hole's explanation for the timing of his application; it was an issue which he had not considered until I raised it with the parties. I accept that is true.

100. Whilst I have had conduct of this case since the February 2021 liability hearing, I first considered the schedule of loss yesterday. The point I raised is neither novel nor complex. In my judgment it is a matter which a professionally represented party, and particularly one that has had the schedule of loss for about two years, should have considered before the l afternoon of the last day of the hearing.

101. I have taken into account the possible prejudice to the respondents. I also take into account the respondents did not, in the second cross examination, put to the claimant that she was misleading the tribunal in her answers.

102. In my judgment, this a somewhat speculative application and the reason for the timing of the application is far from satisfactory. The further delay and the additional costs to the parties also weigh against allowing the application. In this case the balance of justice weights against putting the claimant to further cost and delay because the respondents were not sufficiently prepared to deal with an issue, despite having a fulsome opportunity to scrutinise the schedule of loss before the commencement of this two day remedy hearing.

103. For these reasons the application for an order of disclosure is refused.

104. Having heard the claimant's evidence I have concluded that the claim for the training and examination costs are well founded. There was no evidence to warrant a conclusion that the claimant could have found an alternative, and less costly, method of achieving the qualification and ,as I have noted, the opportunity to obtain the qualification was the principal benefit of undertaking the apprenticeship with the respondents. I find that the claimant had made reasonable efforts to obtain an alternative, and equivalent apprenticeship. In those circumstances her only practical option was to pay privately for that which the respondent's no longer provided after their decision to dismiss the claimant.

The Application under section 207A Trade Union and Labour Relations (Consolidation) Act 1992

105. The claimant seeks, and the respondents oppose, an uplift on the damages awarded arising from the elements of the breach of contract relating to the claimant's dismissal.

106. It is not in dispute that breach of contract claims brought under the provision of the 1994 Extension of Jurisdiction Order for England Wales is a class of claim which is set out within schedule 2A of TULR(C)A 1992.

107. It is not disputed that a breach of contract claim can fall within the ambit of section 207A or that it does so in this case

108. The respondent does dispute there is any relevant ACAS code of practice which applies to this case. The claimant asserts that, as I have found, the claimant was dismissed, and that dismissal was in breach of her contract. The claimant argues that a dismissal is an act to which the ACAS code on Discipline and Grievance applies. The respondent disputes the code applies to this case.

109. The statute states as follows (emphasis added):

Effect of failure to comply with Code: adjustment of awards

(1)This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2)If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a)the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b)the employer has failed to comply with that Code in relation to that matter, and

(c)that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

(3)If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a)the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b)the employee has failed to comply with that Code in relation to that matter, and

(c)that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.

(4)In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes.

110. The respondent asserts that the ACAS code on discipline is one which relates to claims of unfair dismissal as defined within various sections of the Employment Rights Act 1996.

111. The respondent argues that for the ACAS code to apply the claim must (a) contain an allegation of unfair dismissal and (b) such a claim must be within the Employment Tribunal's jurisdiction. Jurisdiction for an unfair dismissal claim necessitates that a claimant either has sufficient length of service for the purposes of section 108 ERA 1996 or, the unfair dismissal claim is within the class to which section 108 has no bearing; section 103A being one such example.

112. The claimant's case simply asserted that section 207A applies to breach of contract claims, that the foremost breach was a procedurally unfair summary dismissal and that the procedural steps of a dismissal process are clearly matters to which the ACAS code applies.

113. Neither party adduced any case law, any academic comment or made reference to the statute or the code of practice.

114. The statute, relevant to this point, states:

"(4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes."

115. The relevant Acas Code of Practice is the Code of Practice on Disciplinary and Grievance Procedures published on 11 March 2015 ('the Acas Code').

116. The Foreword to the Acas Code provides:

'The Acas statutory Code of Practice on discipline and grievance procedures is set out in paragraphs 1 to 47 below. It provides basic practical guidance to employers, employees and their representatives and sets out principles for handling disciplinary and grievance situations in the workplace.

117. In the case of Rentplus UK Ltd v Coulson [2022] IRLR 664 HHJ Tayler stated:

" 21 It is, however, necessary to consider what constitutes a 'disciplinary situation'. Paragraph 1 of the Acas Code provides that 'Disciplinary situations include misconduct and/ or poor performance' [emphasis added]. It is clear that where the employer contemplates action because it considers that there are issues of misconduct or poor performance the Acas Code is engaged. Paragraph 1 of the Acas Code specifically excludes 'redundancy' and the expiry of a fixed term contract from giving rise to a disciplinary situation.

22 Paragraph 1 of the Acas Code makes it clear that where the employer considers that there is an issue of poor performance that needs to be addressed, it is a disciplinary situation, even if the matter is to be addressed under the capability procedure and that 'the basic principles of fairness set out in this Code should still be followed'.

24 In Holmes v Qinetiq Ltd (2016) UKEAT/0206/15, [2016] IRLR 664, [2016] ICR 1016 Simler J (President) held that the Acas Code does not apply to incapability because of ill health:

'In my judgment, the word "disciplinary" is an ordinary English word. A disciplinary situation is a situation where breaches of rules or codes of behaviour or discipline are corrected or punished.

When an employee breaks rules or codes of behaviour, that is generally described as misconduct and gives rise to a disciplinary situation. Equally, an employer may have expectations about the way in which a job is to be performed and the minimum standards to be maintained. Where those expectations or standards are not met, that also gives rise to a disciplinary situation in respect of the poor or inadequate performance that arises. … If the employee faces an allegation of culpable conduct that may lead to disciplinary action, whether because of misconduct or poor performance or because of something else, the Code applies to the disciplinary procedure under which the allegation is investigated and determined. In other words, the Code applies to all cases where an employee's alleged actions or omissions involve culpable conduct or performance on his part that requires correction or punishment. Where there is no conduct or performance on the part of an employee that requires correction or punishment giving rise to a disciplinary situation, and most obviously that will be where no culpability is involved, disciplinary action ought not to be invoked and would be unjustified if it were."

118. In my judgment the dismissal of the claimant in this case was caused by the respondent's belief that the claimant had been attending work late, had failed to attend work and was possibly lying about the reason for her absence. She was also perceived as "disloyal"

119. I find that the conduct of the respondent, in dismissing the claimant on 12th February 2018, was a disciplinary process and one to which the Acas code applied.

120. There is no question in this case that the claim for breach of contract is within the employment tribunal's jurisdiction. Nor is it argued that a breach of contract, arising from the respondent's response to a disciplinary situation, is beyond the remit of the Extension of Jurisdiction Order 1994.

121. I disagree with the respondent's submission that the Acas code only applies to unfair dismissal claims; the language of the section 207A and the code contradict that assertion. I take note that claims for *unlawful* dismissal exist under a variety of regulations and statutes other than the Employment Rights Act 1996 encompass divers situations to which the code could apply.

122. With regard to the respondent's submission that the application section 207A is dependant on the claimant's length of service, I accept that the claimant must establish that her claim is within the employment tribunal's jurisdiction. In this sense the length of service requirement under section 108 of the ERA 1996 is simply a question of jurisdiction.

123. The Extension of Jurisdiction Order does not prescribe a particular length of service as a pre-condition for jurisdiction and to imply the jurisdictional regime of one statute into a distinct and discrete regulation would, on what has been put before me, quite wrong. If Parliament had such an intention It would doubtless had expressed it and Mr Hoyle

doubtless would have brought it to my attention. I therefore conclude that this is a case to which the Acas code can be applied

124. Whether section 207A should be applied and, if so, how it should be applied considerations addressed in some detail in the cases of Slade v Biggs and Stewart [2022] IRLR 216 and Rentplus UK limited v Colson (above).

125. My February 2021 Findings of fact make clear that the respondents' dismissal of the claimant, a teenage girl, was without forewarning, without investigation and without a meeting at which the claimant could begin to address the concerns which the respondents' had in mind when the claimant was dismissed without notice.

126. There is no dispute between the parties that the respondents had failed to comply with the code.

127. I find that the respondents' failure to comply with the code was unreasonable in the circumstances of this case.

128. The dismissal process was conducted in emotionally charged disagreement between the claimant and the daughter/granddaughter of the respondents. The decision making was ill considered, rushed and casual. Following the code would have provided time for calmness, a greater degree of objectivity and some considered enquiry before any decision was made. Had the respondent followed the code of practice the breach of contract may well have been avoided altogether.

129. For the above reasons, and those set out below, I consider it to be just and equitable to consider an uplift with respect to the damages which flow from the dismissal of the claimant.

130. Mr Hoyle argues that no award should be made, and if I was against him on that, it should be of a very low percentage. Mr Foster asserts this case demonstrates a series of avoidable failings of the most serious character.

131. I firstly take into account that the respondents' business is a small business and, so far as I'm aware, has very limited human resources advice or experience.

132. But allowing for the above, the respondents failed to follow all of the procedural steps of the Acas code. Each breach was unavoidable The respondents were well aware that they had a workforce of quite young and relatively immature employees and it should have been, even without conscious reference to the Acas code, obvious that it needed the senior manager to inquire rationally and calmly into the circumstances before dismissing a young person.

133. I balance the above with Mr Hoyle's argument that the claimant failed to appeal; even though it was apparent that her father had a claim for unfair dismissal in mind shortly after the dismissal had taken place.

134. I also take into account Mr Foster's point that, at the relevant time, the respondents were asserting that the claimant had resigned; so there was no dismissal against which the claimant could appeal. I further take into account the value of the damages I will award and the fact that the respondent's business in part funds a sanctuary for horses

135. in my judgment this is a case where it is just and equitable to impose an uplift of the award and the appropriate bracket sits somewhere between 20 and 25% in the particular circumstances in this case.

136. The procedural failings were fulsome but tempered by the respondent's inexperience of the code and, in addition to the points made by Mr Hoyle, I give some weight the fact that the claimant herself, through her father might have sought to challenge the decision to dismiss the claimant. That factor is itself tempered by my finding that the respondents, after the claimant's dismissal, stated an intention to contact the claimant's mother to try and understand the situation better, but did not do so.

137. Taking all those matters into account I consider it is just and equitable to make an uplift of 20% on the awards of damages which arise from the claimant's dismissal, but not those relating to underpayment, or non-payment of wages or holiday due during the claimant's employment or outstanding on the date of dismissal.

138. I record my gratitude to the parties representatives for agreeing and calculating, the sums due based on my decisions.

Employment Judge R F Powell
Dated: 1st December 2022