EMPLOYMENT TRIBUNALS

Claimant: Mr A Piaszczynski

Respondent: Leakers Limited

Heard at: **Bristol (by video – CVP)** **On:** **17 and 18 April 2023**

Before: **Employment Judge Livesey**

Representation
Claimant: Mr Gracka, consultant
Respondent: Mrs Parkins, Director

JUDGMENT having been sent to the parties on 26 April 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claim

1.1 By a claim dated 2 March 2022, the Claimant brought complaints of unfair dismissal, breach of contract relating to notice, unlawful deductions from wages, unpaid holiday pay and a failure to provide terms and conditions of employment.

2. The evidence

2.1 In determining those claims, I heard oral evidence from Mrs Parkins, one of the Respondent's directors, and from the Claimant.

2.2 I received the following documentation;
- A transcript of a meeting of 20 December 2021 from the claimant, C1;
- A hearing bundle from the Respondent, R1;
- A number of photographs of bread, R2.

2.3 Mr Gracka referred to a further bundle which had been produced by the Claimant. It was never produced or seen by me until the issue of remedy was addressed (C2).

3. Relevant background

3.1 The claim was originally listed for hearing on 19 and 20 October 2022. It was postponed at the Respondent's request and relisted on 9 and 10 January 2023. Standard directions were issued, but they were not complied with. The hearing on 9 January was postponed again and relisted as a result.

3.2 Despite those problems, a number of further issues arose at the start of the hearing. First, there was a problem with the technology. The video hearing service platform did not function properly. The hearing was converted to CVP and proceeded successfully thereafter.

3.3 Secondly, the Claimant made an application to strike out the Response. That application was put forward on the grounds that the Respondent's conduct, both before and after the last hearing on 9 January, was such that it had been in breach of Tribunal orders and had conducted proceedings vexatiously. A written application was filed to that effect on the morning of the hearing. The matters which particularly concerned Mr Gracka were focussed uoon the Respondent's bundle of documents and its witness evidence.

3.4 In relation to the bundle, Mr Gracka complained that the version produced on the Friday before the hearing by Mrs Parkins was different from that which had been previously produced. He was asked him on a number of occasions to identify any new or different documents which had caused him any particular prejudice. He was unable to do so. He referred to the fact that timesheets may have been different, but he did not identify any particular discrepancy. He also maintained that the Claimant's CV had been produced in the new bundle. Although it was not clear why it had been inserted or why it was relevant, Mr Gracka did not suggest that its production caused any particular evidential difficulty.

3.5 Moving onto the witness statements. Mrs Parkins had not exchanged any witness statement in accordance with paragraphs 22 – 28 of the Case Management Order of 9 January. She identified two documents within the bundle headed 'Background' and 'Problems' which she identified as her witness evidence. To the extent that they were relevant to the issues, those documents largely replicated or fleshed out the contents of the Response. There were also two witness statements from other individuals, Mr Donovan and Ms West. Neither witnesses were due to attend the hearing to give oral evidence in person.

3.6 As to the delay, Mrs Parkins stated that the reason why all of this evidence was only disclosed on Friday was because she had misunderstood the wording of paragraph 2 of the Order. She had failed to realise that paragraphs 22 – 28 concerned responsibilities that she had to the *Claimant*, whereas paragraph 2 was simply a paragraph which dealt with the parties' duties to the *Tribunal*.

3.7 Striking out a case as a result of the behaviour of a party was undoubtedly a drastic sanction and it must have been proportionate to the offence (*Bennett-v-Southwark LBC* [2002] IRLR 407 and *Bolch-v-Chipman* [2004] IRLR 140). Even if unreasonable conduct had been demonstrated, I still had to consider whether striking out the claim would have been a proportionate sanction and,

in a case where a fair trial was still possible, that would rarely have been the case (see, also, *Arriva London-v-Maseya* UKEAT/0096/16/JOJ). Striking out a response for non-compliance with an order under rule 37 (1)(c) was also a draconian step which the Court of Appeal had indicated should not have been too readily exercised (*James-v-Blockbuster Entertainment Ltd.* [2006] EWCA Civ 684). Such a decision clearly also needed to have been proportionate to the offence. The guiding principle was the overriding objective (rule 2). I had to consider all of the relevant factors, including the prejudice caused by the conduct or breaches, whether the nuclear option of striking the case out was proportional, whether a lesser sanction would have been sufficient and, critically, whether a fair trial was still possible.

3.8 Nevertheless, even if one of tests had been met, it did not follow the Response *had* to be struck out. A tribunal was always left with a discretion (the use of the word '*may*' at the start of rule 37) which I had to exercise in accordance with the guidance set out above.

3.9 In this case, the Respondent had failed to comply with case management directions and Mrs Parkins' attempt to rely on late disclosed evidence was to the potential prejudice of the Claimant. Instead of striking out the Response, however, a fairer middle ground could be found. In light of the significant delays and non-compliance on the Respondent's side, it was not fair or appropriate for the 'Background' and 'Problems' documents to have been admitted in evidence, nor the statements of Ms West and Mr Donovan. However, Mrs Parkins' could still give evidence by confirming the accuracy and the contents of her Response, a document which the Claimant had had sight of for many months. That did not shut the Respondent out from defending the claim, but nor did it permit late, additional evidence from being admitted outside the case management directions. A fair trial was therefore still possible on that basis to ensure that the case was heard on the third attempt.

4. The Issues

4.1 The issues had been discussed and recorded at the hearing on 9 January and were set out in Employment Judge Halliday's Case Summary. Neither party suggested that there should have been any changes to them when they were briefly discussed.

5. Facts

5.1 I found the following facts on the balance of probabilities. Where page numbers have been referred to below, they are references the electronic pages in the PDF version of the hearing bundle, R1, unless otherwise stated and have been cited in square brackets.

5.2 The Respondent owned and ran a bakery in Bridport with a history dating back to the 1700s. The bakery is now shut (it shut in October 2022) but the Respondent company is still active on the Companies House register. At all material times the Director of the business was Mrs Parkins. Her business partner was a gentleman called Mr Barnet and the Manager at the bakery was Ms West.

5.3 The Claimant was employed as Assistant Head Baker from October 2015 and he subsequently became Head Baker. By the end of his employment, he was earning £19/hour. He was one of approximately twenty employees.

5.4 Although not issued at the start of his employment, the Claimant accepted that he had received a written contract in 2016 [19-24]. Mrs Parkins accepted that the changes to his job title and, perhaps more importantly, his pay were not notified to him in writing after the initial contract was issued.

5.5 The Claimant complained about his workload. He was pressurised to work for periods without holiday, mainly to train others. The Respondent's case was that, as Head Baker, he was responsible for organising who did what, which included the setting of the rota. He nevertheless claimed that it had to be set taking into account the responsibilities that he was given.

5.6 He also complained that he was required to work overtime which was not paid. He alleged that there were four occasions when he had worked such time; in November 2019, 10 hours, November 2020, 10 hours, March 2021, 15 hours and April 2021, 15 hours. The Respondent's case was that the Claimant was paid for any extra hours that he worked and that he had never complained of non-payment.

Claimant's performance

5.7 The Claimant's case was that he was dismissed in December 2021 out of the blue, a decision that took him by surprise and took place without warning. In paragraph 19 of his witness statement, he said "*prior to being dismissed I had no knowledge or suspicion that either my conduct or performance was in question.*"

5.8 The Respondent's case was that he had been told on a number of occasions about problems with the quality of the bread which he was producing. It relied upon a number of documents within the bundle R1 in support of that assertion. On 8 December 2020 [26], it said that it had left a note for the Claimant in the following terms:

> "*I have asked you many, many times to make sure there are no holes in the middle of the loaf of bread. I have explained that our customers do not like to have holes in the middle when they are trying to make a sandwich or butter toast. They get irritated by it and there is a chance they will stop buying our bread. I have told you this many times and you have understood and agreed with me*.
> *I have been very patient and asked you many, many times to ensure there are no holes through the middle of the loaf.*
> *However, as you continually take no notice, I am issuing you with a written warning*."

5.9 On 1 September 2021, the Respondent relied upon a further letter which was allegedly given to him [25]:

> "*I have asked you again and again and again to mould the bread so that we do not have holes through the middle of the loaf. This letter is a formal notice to warn you that this cannot continue. We are losing customers because of this. Please see this does not happen again Artur."*

5.10 On 2 December 2021, the Claimant received another verbal warning, according to Mrs Parkins, at a meeting with her. She remined him of an earlier request that she had made for him to rotate the bags of flour, which he refused to do [27-9]. In relation to the bread that was being produced, the notes said this:

> "*We then turned to the bread. I have had considerable problems over the bread….We had complaints from a regular customer who has a pub and uses our bread for sandwiches….The complaints concern the large hole in the middle of the loaves I had talked to A* [the Claimant] *previously about this problem which occurs if the bread is not moulded properly.*"

The notes went on to refer to other problems concerning softness and some breads which had been poorly risen, including the wholemeal loaves which were described as 'flat'.

5.11 The Respondent further relied upon a letter of 5 December 2021 [30] which was alleged to have contained a final written warning which was issued as a result of continuing problems with the bread:

> "*This is a very serious situation – you walked out of our meeting last Thursday and every night since then some of the bread has been unsaleable. This cannot continue and I am therefore sending this letter as a final written warning which I do not want to do but I see no alternative.*"

5.12 The Respondent's case was that these letters were left by Mr Barnet on the Claimant's work bench at the start of each day for him to pick up and read. It was further alleged that examples of poor bread were habitually left on his bench for him to see the problems for himself.

5.13 The Claimant's case was very different. Whilst he accepted that some bread had been left for him and he accepted that it had been done to highlight the fact that some of his baking had not performed well, he did not accept that he had seen or understood the warnings which had been left for him. As he said in paragraph 15 of his witness statement, this was not effective as a means of communicating these warnings.

5.14 Mrs Parkins agreed that the letters had not been *handed* to him. They had not been emailed to him, sent to him by the post or signed for by him. They were also written in English and Mrs Parkins said in evidence that she doubted that he could read English well. That was unsatisfactory.

5.15 Having considered all of that evidence, I concluded that the quality of the Claimant's bread making had probably been raised with him verbally on a number of occasions. Mrs Parkins' evidence about the repeated discussions that she had had with him and the poor quality of the bread was extremely compelling. In relation to bread quality and incidents of softness and holes in loaves, her evidence was corroborated by the photographs and, to some extent, the Respondent's Day Book which provided some supporting evidence of such issues [58-61].

5.16 Accordingly, paragraph 19 of the Claimant's statement was not accepted; it was not accepted that he had no knowledge or suspicion that his

performance had been in question. Even he had accepted that loaves had been left for him which had been designed to highlight problems.

5.17 Further, it was clear from the evidence that the problems were with bread made by the Claimant and not by others. Mrs Parkins appeared to have a good understanding of the way in which the bakers had worked. She was well aware who made which bread from time to time and the Claimant seemed accepting of her level of knowledge and understanding at least to some extent on 20 December (see page 3 of the transcript, C1).

5.18 All of that said, in my judgment, the Respondent had not done enough to make the Claimant aware that he had been issued with warnings on 8 December 2020, 1 September 2021 or 5 December 2021. Given the manner that the documents had been allegedly left for him, his poor grasp of written English and his own evidence, as perhaps best reflected in the notes of the meeting of 20 December during which he repeatedly said that he had not seen or understood such warnings, I did not accept that the Respondent had been effective in communicating those warnings to him. However, I did not accept the Claimant's further allegation, that the letters had been created for the first time for the purposes of the proceedings. Mrs Parkins was disarmingly honest about her failings, but I did not consider her to have been dishonest.

Claimant's dismissal

5.19 On 20 December, the Claimant was called to a meeting without warning and was provided with a Polish interpreter. He was told that his performance had been substandard and, although he said that he had not been aware of previous warnings, he was dismissed. He was also accused of having had a poor attitude and of having been difficult.

5.20 He was not given any advance notice of that meeting. He was not told that he could attend with a representative. He was not provided with the photographs of the bread that had been taken on 6 December (R2) or any other evidence. He did assert that not all batches of bread would have been or could have been perfect. It was a theme of his evidence and his representative's submissions that baking was an art, not a science, and that all batches varied. Mrs Parkins, however, stated that, although some batches would differ to some extent, good, saleable bread did not have large holes in it and/or fall over because it was so soft.

5.21 The Claimant's dismissal was confirmed in writing on 22 December [31]. He was told that he would receive four weeks' pay in lieu notice, which was paid. He was due six weeks' pay and the remaining two weeks was not paid until Friday 14 April [34]. Within the Claimant's final payslip [33], he was also paid for just over 279 hours of outstanding leave. He was not provided with any right of appeal.

6. Conclusions

Unfair dismissal; legal principles

6.1 The Respondent effectively asserted that the Claimant was dismissed for poor performance, therefore for the fair reason of capability. As with the position in respect of conduct dismissals, an employer did not have to prove

that the employee was, in fact, incapable of performing his job in order to satisfy a tribunal that the dismissal was fair. The test was whether the employer had an honest belief in the employee's incapability which was based upon reasonable grounds (*Alidair Ltd-v-Taylor* [1978] 445, CA).

6.2 In performance cases of this sort, an employee needed to have been provided with an adequate and clear explanation as to why he was considered to have been failing in the role. Adequate warning, with targets and opportunities for improvement, needed to have been given. Sometimes further training might have been appropriate. A tribunal had to take into account all of the surrounding circumstances including, but not limited to, whether the targets were realistic, the reasons for the employee not attaining them and how other staff fared at that level of seniority and/or experience. The alleged incapability must have related to the work of the kind which the employee was employed to do (s. 98 (2)(a)).

Unfair dismissal; conclusions

6.3 In my judgment, the reason for dismissal in this case was a fair one. The Claimant was dismissed for perceived capability issues relating to his baking. No other reason was strongly suggested by him.

6.4 As to the issues of fairness under s. 98 (4), I had no doubt that the Respondent genuinely believed that the Claimant was underperforming. In other words, that the bread that the Claimant had produced, not anyone else, was inconsistent and at times poor to the extent that the Respondent's reputation and business was affected. The physical evidence told its own story. However, the Claimant had not been any specific performance targets. Further, on the basis of my findings, no clear warnings had properly been received or understood. There had been no discussion around addressing problems through training and the basic principles that one would have expected to ensure that a dismissal of this type was fair, were not adhered to.

6.5 Further, in procedural terms there was no invitation to the meeting of 20 December. He was not given a warning that that meeting might have been one at which his dismissal might have been discussed. He was not given a right of representation. He was not given advanced notice of the evidence that the Respondent was relying upon and he was not given any right of appeal. The Respondent was in breach of paragraphs 5, 9, 13 and 26 of the ACAS Code of Conduct. Mrs Parkins accepted that she was not aware of the provisions of the Code. She gave me no sense of having understood what might have amounted to good industrial practice in such circumstances. Accordingly, the Claimant's dismissal was unfair.

Polkey/contributory conduct; legal principles

6.6 I had to consider whether a fair process could still have resulted in the Claimant's dismissal. (the principle in the case of Polkey and AE Dayton Services. The decision in *Polkey-v-AE Dayton Services* [1988] ICR 142 required a tribunal to reduce compensation if it found that there was a possibility that the employee would still have been dismissed even if a fair procedure had been adopted. Compensation could have been reduced to reflect the percentage chance of that possibility. Alternatively, a tribunal might conclude that a fair of procedure would have delayed the dismissal, in which

case compensation can be tailored to reflect the likely delay. A tribunal had to consider whether a fair procedure would have made a difference, but also what that difference might have been, if any (*Singh-v-Glass Express Midlands Ltd* UKEAT/0071/18/DM). It was for the employer to adduce relevant evidence on the issue, although a tribunal should have had regard to any relevant evidence when making the assessment. A degree of uncertainty was inevitable, but there may well have been circumstances when the nature of the evidence was such as to have made a prediction so unreliable that it was unsafe to attempt to reconstruct what might have happened had a fair procedure been used. However, a tribunal should not have been reluctant to undertake an examination of a *Polkey* issue simply because it involved some degree of speculation (*Software 2000 Ltd.-v-Andrews* [2007] ICR 825 and *Contract Bottling Ltd-v-Cave* [2014] UKEAT/0100/14).

6.7 I also had to consider the question of contribution; whether the Claimant's dismissal was caused or contributed to by his own conduct within the meaning of sections 122 and 123 of the Act. In order for a deduction to have been made under the sections, the conduct needed to have been culpable or blameworthy in the sense that it was foolish, perverse or unreasonable. It did not have to have been in breach of contract, equivalent to gross misconduct or tortious (*Nelson-v-BBC* [1980] ICR 110). I applied the test recommended in *Steen-v-ASP Packaging Ltd* [2014] ICR 56;
(a) Indentify the conduct;
(b) Consider whether it was blameworthy;
(c) Consider whether it caused or contributed to the dismissal;
(d) Determined whether it was just and equitable to reduce compensation;
(e) Determined by what level such a reduction was just and equitable.

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

<u>*Polkey*/contributory conduct; conclusions</u>

6.9 In relation to the *Polkey* question, the Respondent's evidence did not contain any sufficient material upon which I could have been satisfied that a fair dismissal would still have occurred had a fair procedure been adopted. There were not just procedural failings in this case, there was a failing to address the Claimant's performance through the issuing of proper and clear targets and/or warnings. Speculating on what such things might have achieved was difficult.

6.10 On the issue of contribution, however, I was satisfied that there had been a lot of poor bread produced by the Claimant and I was also satisfied that that had significantly contributed to his dismissal. It had been its root cause. I was satisfied that it was just and equitable to reduce compensation by 50%, not just because of the performance issues, but aggravated by the fact that he had at least been aware that there were issues with his baking which he failed to rectify. I balanced those failings against the Respondent's failure to set clear parameters for improvement and against the fact that this was a performance matter and not, in the strictest sense, a conduct issue.

Holiday pay

6.11 The Claimant satisfied me that he was owed 23 days holiday from 2021. Paragraph 27 of his witness statement was not challenged by Mrs Parkins but his final pay had included a significant element for holiday pay, 279.64 hours [33] (see below).

Breach of contract (notice)

6.12 That claim had recently been met by the payment of the remaining two weeks' net pay that the Claimant was due.

Unlawful deductions from wages

6.13 This concerned the alleged non-payment of the four periods of overtime, but the claim was out of time. The non payments were not connected in a series, and the last one was in April 2021. The claim was not issued until March 2022. The complaint was therefore significantly out of time under s. 23 of the Employment Rights Act.

6.14 I had to consider whether it had been reasonably practicable for the claim to have been brought sooner. The Claimant did not address this issue in his evidence. Mr Gracka argued that the Claimant had not been aware of what he had lost at the time because he did not always receive payslips. It was not, however, demonstrated that he did not receive payslips for the months that he was allegedly not paid the overtime. It was surprising that such non-payments for such amounts would have been missed and it was never made clear why such underpayments, if they had been missed at the time, were only spotted a year later. There was no evidence upon which I could have properly found that it had not been reasonably practicable for that claim to have been brought in time and it was dismissed.

Terms and conditions of employment

6.15 The Claimant was issued with s. 1 particulars, but they were not updated in accordance with s. 4. Section 1 particulars had to include the correct rate of an employee's pay (s. 1 (4)(a)). When rates changed, amendments and annexes to contracts were required under s. 4. Mrs Parkins accepted that no change was notified in writing and that failure triggered s. 38 of the Employment Act 2002 (see below).

7. **Remedy**

7.1 After the hearing on liability, further evidence was heard from the Claimant about matters relating to issues of remedy. He was asked some questions by Mrs Parkins in further cross examination and Mr Gracka referred to documents in the further bundle, C2.

Further factual findings

7.2 The Claimant was paid at the rate £19/ hour. A document within C2 [87], which had been generated by the Respondent or its accounts department, showed that he averaged 60.28 hours per week in the year prior to his dismissal. That figure was accepted as accurate by both the parties, giving him an average gross weekly wage of £1,145.32. The various payslips, notably his final payslip [33] of R1, showed that his net pay was approximately 76% of his gross pay, which would have been the approximate expected proportion.

7.3 The Claimant took holiday in Poland over Christmas after his dismissal. He returned to the UK on 7 or 10 January 2022. The notice pay that he had received covered the period to 31 January 2022.

7.4 The Claimant looked for alternative employment. He said that he went to the only bakery locally which he thought had vacancies, called Rice. He phoned another seven bakeries in the area. In her closing submissions, Mrs Parkins identified five bakeries within a twenty mile radius of Bridport and four within a ten mile radius. I had no evidence of them nor was I aware of whether they had had vacancies at the time, but the Claimant told me that he was hampered by two things. First, he did not have a reference from the Respondent and many of the employers that he had made enquiries with had required them. It was not suggested to him in cross-examination that a reference might have been provided if he had asked or that one might have been favourable. Secondly, he soon discovered that the salaries at other bakeries were nowhere near as favourable as that which he had received from the Respondent. On the basis of the figures previously discussed, his gross annual salary was nearly £60,000. It was not therefore surprising that he was unable to find equivalent work at such a rate.

7.5 It took until May before he realised that he needed to find some different work and he then resorted to working with a friend in the building trade. He produced invoices for the work which he was paid for in the period after May of 2022 ([134-144] of C2), which totalled £11,638.76. As self-employed earnings, they will be subject to tax and national insurance but, given that the last was dated October 2022, it was not surprising that accounts had not yet been drawn up.

Discussion and conclusions; unfair dismissal

7.6 The Claimant's basic award was an arithmetical calculation dependent upon his age (he was 38 at the point of dismissal). The calculation was 6 x 1 x £544 (the statutory cap on weekly earnings applied). The figure was therefore £3,264.

7.7 In terms of the compensatory award, the Respondent's bakery shut on 14 October 2021. I therefore only considered the Claimant's loss of earnings until that date. He would have been dismissed then in any event, with everyone else. In rather enterprising submissions at the end of the hearing, Mr Gracka suggested that I should have been looking beyond 14 October because it could not have been assumed that the Claimant would have been dismissed on that day. I do not accept those submissions; it was reasonable to conclude that any sensible respondent winding down its operation would have tied notice periods with the date upon which it intended to close the business. There was no suggestion that the business closed suddenly.

7.8 The compensatory award was comprised of two elements. The first was past loss of earnings. I looked at the window of 31 January 2022, the end of the Claimant's notice period for which he was paid, until 14 October 2022, the business' closure. For the first twelve weeks of that period, the whole of February, March and April, the Claimant was out of work and I was not satisfied that the Respondent had demonstrated that he had failed to mitigate his loss. Mrs Parkins mentioned the existence of a number of bakers within

a certain distance of Bridport. That did not indicate that there were vacancies, or that the Claimant would have obtained work in the absence of a favourable reference. Further, it did not indicate that the salary achievable at those bakers would have been in any way competitive with what he had been paid at the Respondent.

7.9 The Claimant was therefore entitled to his full losses for the first twelve weeks after the end of his notice pay. His gross pay was £1,145.32 per week and his net pay was 76% of that figure, being £870.44 per week = £10,445.28.

7.10 Over the following 22 weeks, the Claimant's losses continued. However, he had to deduct the sums that he had earnt in building work which, as stated, amounted to £11,638.76. The calculation was therefore, using the same 76% gross to net calculation, £402.07 net per week; £870.44 - £402.07 = £468.37 net loss per week for the remaining 22 weeks, being £10,304.14.

7.11 The second element of the compensatory award was £500, the customary sum awarded for loss of statutory rights.

7.12 All sums together with the basic award together the figure is £24,513.42.

7.13 The next question was the extent to which the award should have been increased to reflect those matters referred to above in relation to the Respondent's failure to follow the ACAS Code of Conduct. The Respondent's failures were manifested in several basic and obvious ways. At least four breaches of the Code had been demonstrated. Mrs Parkins told me that she was a small employer. Whilst recognising that, I had seen many similar smaller employers perform dismissal procedures which were ACAS Code compliant. It was not a long, complicated, technical or complex document and it really should have been known, understood and applied by *all* employers of whatever size. There was no good reason to depart from an uplift of 25%. That therefore took the overall figure for the basic and compensatory award to £30,641.78.

7.14 Because of the findings made above under ss. 122 (2) and 123 (6), that figure fell to be halved and the final figure was therefore £15,320.89.

<u>Discussion and conclusions; holiday pay</u>

7.15 The Claimant had outstanding holiday pay when he was dismissed; he was owed 23 days (see above). In his final pay packet, however, he was paid for 279.64 hours [33], more than his actual entitlement.

7.16 He had worked six days a week, for an average of 60.28 hours per week: 60.28 ÷ 6 days x 23 = 230.77. He was overpaid by 48.87 hours at £19/hr, but subject to tax and NI, reducing it to 76%, an overpayment of £705.68.

7.17 When awarding compensation for unfair dismissal under s. 123 of the Employment Rights Act, I had to award a figure which was just and equitable in *all* of the circumstances. It was not just and equitable for the Claimant to receive a windfall overpayment, nor for the Respondent to incur a greater liability than should have been incurred in law. The compensatory award was therefore reduced by £705.68. The final figure for unfair dismissal was £14,615.21.

Written particulars

7.18 The Claimant had particulars in a written contract. The only mischief was that they had not been updated in accordance with s. 4. Under s. 1, the particulars had to include the correct rate of pay. The Claimant's written terms did not include the correct, updated rate of pay when he was dismissed (£19/hr), but it was a figure that he had asked for and it was on his payslips, so he well knew what it was.

7.19 Liability under s. 38 of the Employment Act was triggered, but it was not just and equitable to award the higher sum. There were no exceptional circumstances to prevent an award of the minimum of two weeks' pay and that was awarded in the sum of £1,088, applying the statutory maximum again.

7.20 The two final figures of award were therefore £14,615.21 and £1,088, being a total figure of £15,703.21.

Employment Judge Livesey
Date: 26 May 2023

Reasons sent to the Parties: 12 June 2023

FOR THE TRIBUNAL OFFICE

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