EMPLOYMENT TRIBUNALS

Claimant: **Mrs S Lightfoot-Webber**

First Respondent: **Lawcommercial Trading Ltd t/a Lawcomm Solicitors**

Second Respondent: **Lawcommercial Services Limited**

Heard at: **Exeter by Video Hearing** **On:** **5 June 2023**

Before: **Employment Judge Volkmer**

Representation
Claimant: Mr Goodwin (Counsel)
Respondent: Mr Dhariwal (Director of the First and Second Respondent) in person.

RESERVED REMEDIES JUDGMENT

The First Respondent must make the following payments to the Claimant:

a. Basic award: £3,426;
b. Compensatory award: £1,228.61 (including an ACAS uplift of £111.69);
c. Failure to give employment particulars: £1,187.68; and
d. Breach of Contract: £7,035.75 (gross)

This amounts to a **total award** of: **£12,878.04**

REASONS

1. By a claim form presented on 10 September 2022 the Claimant claimed constructive unfair dismissal, a bonus payment and a failure to provide a statement of terms of employment. A liabilities hearing took place before me by video on 21 and 22 February 2023. By a reserved judgment dated 22 March 2023, and sent to the parties on 30 March 2023, the Claimant's claims were upheld against the First Respondent. All claims against the Second Respondent were dismissed. The First Respondent is described simply as the Respondent in this judgment.

2. At paragraph 86 of the liabilities judgment, I made a finding that a bonus payment of £7,035.75 should have been paid to the Claimant, on the 29 April 2022.

3. The Claimant and Respondent each submitted written submissions in relation to remedies. I was also referred to a Remedies Bundle of 116 paginated pages. The Liabilities Bundle of 256 paginated pages was also referenced. Submissions were made in the hearing in relation to the Claimant's costs application, but it was agreed with the parties that this would be dealt with after the remedies judgment had been given as the Claimant wished to make reference to correspondence which was without prejudice save as to costs.

Issues

4. The issues for the Tribunal to determine are as follows.

    4.1. What basic award is payable to the Claimant, if any?

    4.2. Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

    4.3. If there is a compensatory award, how much should it be? The Tribunal will decide:
        4.3.1. What financial losses has the dismissal caused the Claimant?
        4.3.2. Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
        4.3.3. If not, for what period of loss should the Claimant be compensated?

    4.4. Does the statutory cap of fifty-two weeks' pay or £93,878 apply?

    4.5. How much should be awarded in relation to the Claimant's contract claim?

The relevant legal principles

Basic award

5. Where the award sought in a successful unfair dismissal claim is compensation, section 118 Employment Rights Act ("ERA") sets out that the award shall consist of a basic award and a compensatory award. The basic award is calculated in accordance with sections 119 to 122 ERA. The amount

awarded depends on length of service in whole years, age and a week's pay. The calculation of the award is not in dispute between the parties.

6. Section 122(2) of ERA sets out that reductions may be made to the basic award where: "*the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.*"

7. In *Steen v ASP Packaging Ltd 2014 ICR 56, EAT*, the EAT, summarising the correct approach under S.122(2), held that:

   "*The application of those sections to any question of compensation arising from a finding of unfair dismissal requires a Tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault, (2) having identified that it must ask whether that conduct is blameworthy... the Tribunal has to ask whether it is just and equitable to reduce the amount of the basic award to any extent*"

8. The focus for this assessment is on what the employee actually did or failed to do, not on the employer's assessment of how wrongful that act was. It is a matter of fact for the Employment Tribunal to establish and, if established, it is for the Employment Tribunal to evaluate.

9. As to the question of whether the conduct is blameworthy, the Court of Appeal in *Nelson v BBC (No.2) 1980 ICR 110, CA* gave the following guidance

   "*The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody-minded. It may also include action which, though not meriting any of those more pejorative epithets, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved.*"

Compensatory award

10. The compensatory award is governed by sections 123 and 124 ERA. In particular section 123 says, where relevant:

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable and in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
(2) The loss referred to in subsection (1) shall be taken to include –
(a) Any expenses reasonably incurred by the complainant in consequence of the dismissal, and
(b) Subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal. …
(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply

the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales…

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

11. *Steen* also dealt with section 123(6) of ERA, and noted that the same considerations are relevant as to 122(2) save that "*The Tribunal must ask for the purposes of section 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did not do so to any extent there can be no reduction on the footing of section 123(6), no matter how blameworthy in other respects the Tribunal might think the conduct to have been. If it did cause or contribute to the dismissal to any extent then the Tribunal moves to the next question, (4). 14. This, (4) is to what extent the award should be reduced and to what extent it is just and equitable to reduce it*."

Failure to give statement of employment particulars

12. Under section 38 of the Employment Act 2002 the following applies in relation to the failure of an employer to give a written statement of employment particulars:

(3) If in the case of proceedings to which this section applies—
(a)the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and
(b)when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 …. the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3)—
(a)references to the minimum amount are to an amount equal to two weeks' pay, and
(b)references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

ACAS Uplift

13. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A") provides that: "*If in any 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) the 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 per cent*."

14. Section 207A(5) of TULR(C)A provides that where an award falls to be adjusted under that section and under section 38 of the Employment Act 2002 the adjustment under Section 207A of TULR(C)A is made first. Section 207A(1) of TULR(C)A states that the section applies in respect of claims proceeding before an Employment Tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2. The schedule includes unfair dismissal claims and claims brought for breach of contract under The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

15. Pursuant to section 124A of ERA, this power applies to the compensatory award but not to the basic award

Basic Award – Findings and Outcome

16. The parties agreed that the correct calculation of the basic award under section 119 of ERA had been carried out by the Claimant in her schedule of loss. The Claimant was dismissed on 29 September 2022, she was 49 years old at the time and had 4 years' continuous service, with gross weekly pay above relevant statutory cap of £571 per week. The correct multiplier was 1.5 x 4 x £571 = £3,426.

17. The Respondent submitted that the basic award should be reduced as a result of the Claimant's conduct. I set out below the respective submissions and findings of fact in relation to each element relied on by the Respondent.

Alleged breach of confidentiality obligations

18. A contractual duty of confidentiality at clause 1.10.3.8 of the Claimant's contract required her to "*use [her] best endeavours to prevent the publication or disclosure of details of the employees and officers of the Employer or any associated business and of the remuneration and other benefits paid to them*" with the same obligations at 1.10.3.12 in relation "*any information which [she had] been told is confidential*" (p55 of the Liabilities Bundle). The Respondent asserted that the Claimant's bonus was headed "confidential".

19. The Respondent referred to paragraph 11 of Mr Roper's witness statement, which stated that "*The Claimant also openly talked about her dispute with the First Respondent in relation to her discretionary bonus even though this was private and confidential.*". The Respondent says it referred to this in the memorandum of 20 May 2022 at page 214 of the Liabilities Bundle. This states "*It is disappointing that you have discussed issues over discretionary bonus with members of staff who have in turn told us that you have had these discussions with them.*"

20. Mr Goodwin pointed out for the Claimant that this had never been put to the Claimant in evidence. Further the Claimant's position is that discussing the level of bonus is not the type of culpable conduct which would justify a reduction in the level of the basic award.

21. In my finding, the Respondent's allegation of a breach of contract is not proven. It is not clear what the Claimant is alleged to have said, to whom and when. A generalised allegation is made that she discussed the bonus dispute, but it is not clear from this whether this relates to the dispute or specific details of the

bonus (which are said to be confidential). The evidence is vague and it is apparent that it is based on hearsay evidence from "members of staff" who have not been identified. Meanwhile the allegation was not put to the Claimant in cross examination. This is not sufficient to find that there was a breach of contract, on the balance of probabilities.

Alleged failure to return to work and attend meetings

22. The Respondent alleges that the Claimant failed to return to work and failed to attend meetings. The Tribunal was referred to paragraphs 12 and 13 of Mr Roper's witness statement, and pages 213, 214 and 221-224 of the Liabilities Bundle.

23. Mr Roper's statement at paragraph 12 states *"I was advised that during the second quarter of 2022… she stopped coming into the office. This was not agreed by myself or Mr Dhariwal. The Claimant just told me that she would be working from home.*". The Respondent stated in submissions that this was a breach of contract. Paragraph 13 of Mr Roper's witness statement refers to a failure to attend a meeting with Mr Roper and Mr Dhariwal on 20 May 2022.

24. The Claimant's submission was that, having an autistic daughter she was previously allowed to work from home, without any criticism at all. The Claimant's position is that she had the explicit approval of Mrs Dhariwal, to work from home to care for her daughter. It was only when the Claimant started to complain about the bonus that the Respondent said that it did not want the Claimant to work from home. This was not put to the Claimant in cross-examination, had it been she could have provided a lot of detail about this. The Claimant was therefore left in position where she cannot respond.

25. Although it is an agreed fact that the Claimant worked from home for a period of time towards the end of her employment, there is simply not enough evidence before me from which I can make a finding that this was not permitted by the Respondent. Whilst an email from Mr Dhariwal raises it at page 221 of the Liabilities Bundle, the Claimant's contemporaneous response on the same page is that she was contractually permitted to work from home.

26. As set out in ***Steen*** it is relevant what the Claimant actually did, not the employer's assessment of how wrongful that act was. However, it is relevant to the findings of the underlying facts to consider the contemporaneous documentation. It is notable that in the Respondent's memorandum of 20 May 2022, at page 214 of the Liabilities Bundle, the Respondent seeks to retain the Claimant, saying that she is a valued employee. The Respondent now appears to cast the Claimant's working from home in a serious light, as a breach of contract, without having put it to the Claimant in cross examination. The evidence does not support a breach of a contractual obligation. Therefore, whilst I find that the Claimant did work from home in my finding, the Respondent's allegation that this was a breach of contract is not upheld.

27. It is agreed by the parties that the Claimant did not attend a meeting on 20 May 2022.

Alleged Inappropriate Conduct

28. The Respondent refers to emails which it says demonstrate inappropriate conduct:
    28.1. an email on 1 February from Mr Ayling to Mrs Dhariwal saying: "*I just had a call from Hoowla explaining that they recently had a call from Sarah Lightfoot-Webber. She was asking for a feature that isn't quite possible as it would cause crashes and problems if implemented. Her response was "Well your system is crap then!" and hung up the phone*."
    28.2. an sent by the Claimant email on 10 May 2022 to the Respondent's employees saying: *"I don't know how to create a document because I don't use Hoowla. I don't need training because it is a useless system for me and not fit for purpose, except for time recording. The bespoke system we were promised has not been delivered.*"

29. The Claimant's position is that the first allegation is based on hearsay only and that neither would justify a reduction in the basic award.

30. Given the nature of the hearsay evidence, and in the absence of witness evidence or the allegation being put to the Claimant, I do not uphold that the Claimant made the first comment. The email of 10 May 2022 is in evidence and was therefore clearly sent.

Alleged causing of financial loss to the Respondent, breaches of the Respondent's accounts procedures and breaches of SRA regulatory rules

31. The allegation is put in written submissions as set out above. In oral submissions, the Respondent referred to the fact that the Claimant agreed repayment plans with clients and worked without having taken fees on account. The Respondent's position is that only a director has authority to write off invoices or agree late payments. I was referred to page 240 of the Liabilities Bundle, a spreadsheet identifying a number of Claimant's cases, and where under the notes it says instalments or paying at conclusion. The Respondent's position is that none of this agreed with the Respondent. The Respondent's office accounts manual is clear that payment should be expected within 14 days. It is alleged that the Claimant was billing well in advance of matters concluding, and agreeing payment plans without authority from a director of the. That conduct is said was to have resulted in clients not paying.

32. I was referred to paragraph 3 of Ms Fox Noble's witness statement, which stated that "There was also a significant risk of debts not being recovered as there were no written and enforceable payment plan agreements." I was also referred to her statement at paragraph 13 in which Ms Fox Noble said "I am advised that the current status on matters is as follows", and listed a number of matters.

33. I was referred to an email from a client of the Claimant's at page 255 of the Liabilities Bundle which was said in submissions to have led to a write off of £1800. I was referred to a spreadsheet at page 240 of the Liabilities Bundle which referred, in relation client reference of 69951, to the £1,800 figure and said "Check with BD".

34. I was referred to an email at page 256 of the Liabilities bundle in which the Claimant told a client that a payment could be made at conclusion of the matter. This was said in submissions to be without authority.

35. I was referred in page 111 of the Remedies Bundle, and email from a client on 10 May 2022 saying that they would dispute fees. Whilst Mr Dhariwal referred to a £2,000 write off, he conceded that this was not in evidence.

36. In relation to the Respondent's accounts procedures, it was alleged that the Claimant had incurred disbursements on behalf of clients without receiving payment on account, in breach of the Respondent's procedures at page 250 of the Liabilities Bundle, which states that "*As a general rule whenever practical we encourage fee earners to obtain payment on account of costs and disbursements before commencing work in a matter (in some circumstances it is accepted that this will not be typical and so should not be pursued if it may damage client relations)"*. A counsel's fee note at page 116 of the Remedies Bundle was said to be evidence of financial loss to the Respondent. It was said that there was a threatened complaint to the SRA by counsel.

37. The Claimant's submissions were that the Respondent was making extremely serious allegations and failing to support them. In relation to the alleged breaches of accounts procedures, these were dealt with in evidence, what the Claimant said in evidence was that she did have authority to offer various arrangements. She was the Head of Family law and it was entirely understandable that she would be given authority, explicit authority, to do this. The Claimant gave evidence that she had specifically discussed payment plans in appraisals with Mr Dhariwal. The Respondent was choosing and cherry-picking docs. The Claimant's position was that different work was billed in different ways; sometimes with money on account, sometimes without. This was specifically provided for in accounting procedures.

38. In relation to the issue of incurring disbursements and counsel's fees, the Claimant submits that the fees would be incurred whether or not there was money on account. The Claimant's position is that this is a matter arising post resignation – the fee is incurred on 7 June 2022, but anything that follows must have happened after the Claimant's resignation on 9 June 2022.

39. In my finding, these are very serious allegations which are put without being sufficiently supported by the evidence before the Tribunal. I note that Ms Fox-Noble conceded in cross examination that she had not written her own witness statement, the relevant paragraph 13 refers to the fact that Ms Fox-Noble is "advised that", before setting out the relevant "status on unpaid matters". It is therefore entirely unclear what the source of the information is as Ms Fox-Noble did not have access to client files. The matters listed in paragraph 13 have vague references to financial losses such as "*client defaulted in payments, claiming costs excessive and is refusing to enter into a payment plan. Continuing to chase.*". This does not set out a specific financial loss, nor does it adequately evidence how the relevant alleged loss can be said to have been caused by the Claimant, rather than simply being part of the ordinary course of business that certain customers pay invoices and others do not pay them. Similarly, the submission relating to a £1,800 write off, refers to a spreadsheet at page 240 of the Liabilities Bundle, which does not evidence a write off at all.

40. I prefer the evidence of the Claimant, which was given from her own knowledge rather than being hearsay evidence from an unspecified source. I therefore make a finding that the Claimant did have authority to offer various financial arrangements to clients.

41. In summary, the allegation of financial loss caused to the Respondent by the Claimant is not evidenced and is not upheld.

42. The Respondent's written submissions referred to breaches of unspecified SRA rules. This is a very serious allegation which was not evidenced at all. Reference was made in oral asubmission to the threat of a complaint to the SRA by counsel but no evidence of this was provided. This allegation is not upheld.

43. In my finding a breach of the Respondent's accounts procedure by incurring disbursements without client monies on account has not been proven. The relevant procedures say that monies on account should be sought as a general rule, but will not always be appropriate. As such, it is not clear that not obtaining monies on account before instructing counsel is in breach of this procedure.

Allegedly Causing Support Staff to be Upset and Leave

44. Paragraph 109 of the Liabilities Judgment dealt with the same allegation, and I made a finding that these were not credible. I do not propose to re-open matters I have already made findings on, and therefore rely on the finding in the Liabilities Judgment.

Allegedly soliciting the Respondent's clients

45. The Respondent was clear that even on its own case, it could not be sure that the alleged solicitation took place before 9 June 2022, the date of the Claimant's resignation. In the absence of any evidence of when this allegedly took place, even taking the Respondent's case at its highest, in my finding this cannot be proven to have taken place before the Claimant's resignation. As such it cannot be relevant to section 122(2) of ERA.

Summary Findings Regarding Conduct

46. In summary, in relation to the Respondent's allegations of conduct relevant to section 122(2) of ERA, I have dismissed all of the allegations, save that I have found that the Claimant:
    - 46.1. worked from home towards the end of her employment;
    - 46.2. did not attend a meeting on 20 May 2022; and
    - 46.3. sent an email on 10 May 2022 to the Respondent's employees saying: "*I don't know how to create a document because I don't use Hoowla. I don't need training because it is a useless system for me and not fit for purpose, except for time recording. The bespoke system we were promised has not been delivered*."

47. Having regard to the definition of blameworthy conduct set out in *Nelson v BBC*, and in all of the circumstances of the case, I do not consider that any of the proven conduct (set out at paragraph 46) was blameworthy. It is not the type of behaviour envisaged by the term blameworthy, which envisages some type of serious conduct like disloyalty or dishonesty. The intention is not for employers to comb through every detail of a claimant's conduct and seek to point to minor and trivial matters to attempt to justify a reduction in the basic award.

48. In the absence of any blameworthy conduct on the part of the Claimant, I make no reduction to the basic award and award it in the sum of £3,426.

Compensatory Award – Discussion and Outcome

49. The Respondent admits the Claimant's loss of earnings in the sum of £616.92. The claim for travel expenses is disputed on the basis that it is not evidenced. The Respondent disputes the sum of £637.90 sought in respect of loss of statutory rights, and argues that it should be the £500 as claimed by the Claimant in her Schedule of Loss at page 39 of the Liabilities Bundle.

50. Notwithstanding a finding at paragraph 120 of the Liabilities Judgement that there should be no ***Polkey*** reduction and that there was no contributory fault on the part of the Claimant, the Respondent made submissions that the compensatory award should be reduced pursuant to section 123 of ERA. Reference was made to the Claimant's conduct and an argument that the Claimant would have been dismissed due to the same conduct allegations as set out above in relation to the basic award.

51. I do not welcome an attempt to revisit matters on which I have already made findings. However, in any event, my findings in relation to a deduction under section 122(2) of ERA would apply. I have found that there has been no blameworthy conduct on the Claimant's part, see paragraphs 46 and 47 above.

52. I therefore make an unreduced award of £616.92 in relation to lost earnings. In the absence of evidence regarding travel costs, I make no award in that regard. In relation to the loss of statutory rights, I consider £500 to be the appropriate sum to reflect that loss to the Claimant.

ACAS Reduction/Uplift – Discussion and Outcome

53. The Claimant seeks a 25% uplift to compensation. She makes a submission that her two emails of 9 March 2022 (pages 183-185 and 186 of the Liabilities Bundle), and 26 April 2022 (pages 196-197 of the Liabilities Bundle and the Claimant's note given to Mr Dhariwal on 10 May 2022 (Liabilities Judgment, paragraph 72) individually or collectively amounted to a grievance. The Claimant's position is that the Respondent ought to have dealt with them in accordance with the Acas Code of Practice on disciplinary and grievance procedures (the "ACAS Code").

54. The Claimant alleges that the Respondent failed to comply with the ACAS Code (with reference to paragraphs of the ACAS Code) by:
    - 54.1. failing to independently investigate Claimant's complaints (paras 4 and 32).
    - 54.2. failing to meet with the Claimant to discuss the complaints (paras 33-34).
    - 54.3. not inviting the Claimant to be accompanied to any meetings (paras 35-39).
    - 54.4. failing to impartially consider the complaints (paras 4, 32 and 40).
    - 54.5. failing to offer the Claimant an opportunity to appeal any outcome (paras 41-45).

55. The Respondent's position is that it sought to resolve the issue informally, saying that Ms Dhariwal and Ms Fox-Noble had fully investigated the issue and that several meetings had taken place, and Mr Dhariwal had responded in writing in a memorandum on 20 May 2022 (page 214 of the Liabilities Bundle).

56. The Respondent made submissions that any award should in fact be reduced by 25% on the basis of the following allegations:
    56.1. the Claimant's wilful breaches of confidentiality;
    56.2. the Claimant's agreement that she accepted the Respondent's position on 7 April 2022 to then without warning amend her position;
    56.3. the Claimant's refusing to attend R's premises without permission; and
    56.4. refusing to attend a hearing to review the decision made as communicated in the memorandum.

57. In my finding, the content of the Claimant's emails of 9 March 2022 and 26 April 2022 clearly constituted a grievance – the ACAS Code refers to these as "*concerns, problems or complaints that employees raise with their employers*". I make no finding in relation to the note of 10 May 2022 because it is not in evidence. Paragraph 32 refers to a grievance being formally raised when it is raised in writing, as this was by the Claimant. This then triggers the application of the ACAS Code.

58. Even taken at their highest, I consider the conduct referred to by the Respondent is entirely irrelevant. Matters 56.1 to 56.3 do not appear to relate to the ACAS Code at all. In relation to 56.4, an employee not attending a meeting after a decision has been communicated is not a breach of a provision of the ACAS Code.

59. Whilst the process was not framed as a formal grievance process, in my finding, there were two meetings with Mr Dhariwal to discuss the Claimant's grievance on 7 April 2022 and 10 May 2022 (pages 193 and 214 of the Liabilities Bundle).

60. Paragraph 35 of the ACAS Code states "*Workers have a statutory right to be accompanied by a companion at a grievance meeting which deals with a complaint about a duty owed by the employer to the worker. So this would apply where the complaint is, for example, that the employer is not honouring the worker's contract.*" The Claimant was not informed of her right to be accompanied, as would be best practice, despite the fact that her complaint related to a complaint about honouring her contract. However, she also did not make a request to be accompanied, so it cannot be said that the requirement to allow an employee to be accompanied has been breached.

61. The obligation at paragraph 4 of the ACAS Code states "*Employers that carry out any necessary investigations, to establish the facts of the case*". In this case it does not appear that the facts were in dispute; this was a dispute about contractual interpretation. The Claimant relies on paragraphs 4, 32 and 40 of the ACAS Code as requiring an independent investigation and to impartially consider the complaint. However, there is no reference to an independent investigation, or impartial consideration set out in those paragraphs. The ACAS Guidance certainly refers to those as best practice, but acknowledges that in a small company there may not be alternative managers to consider a grievance raised by an employee. The memorandum dated 20 May 2022 (page 214 of the Liabilities Bundle) prepared by Mr Dhariwal meets the requirement at paragraph 40 of the ACAS Code to communicate a decision in writing to the employee.

62. Paragraph 40 of the ACAS Code also states that: "*The employee should be informed that they can appeal if they are not content with the action taken*." The memorandum dated 20 May 2022 stated "*Should you wish to discuss any items, please do not hesitate to contact me*.". This was not sufficient to constitute informing the Claimant that she could appeal. This is a breach of the ACAS Code.

63. In my finding there was one breach of the ACAS Code by the Respondent in that there was no appeal offered to the Claimant. I take into account that the ACAS Code was applied to some extent as set out above and that the failure appears to be advertent in that the Respondent was not treating the Claimant's emails as a formal grievance. However, notwithstanding the small size of the Respondent, it is a law firm which holds itself out as specialising in employment law, and had an employee Mrs Dhariwal, the Practice Manager, who dealt with HR matters. For those reasons, in my finding the failure was unreasonable. In my finding, a just and equitable percentage reflecting all of the circumstances is 10%. This does not overlap with any other awards. This amounts to £111.69 which is a proportionate sum when considered in absolute terms.

Failure to give statement of employment particulars – Discussion and Outcome

64. The Respondent's position in the Grounds of Resistance was that there had been a transfer of the Claimant's employment pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") from the Second Respondent to the First Respondent. I made a finding of fact that a TUPE transfer had taken place at paragraph 54 of the Liabilities Judgment. Notwithstanding this, the Respondent made a submission in relation to this head of loss that there had been no TUPE transfer. The Respondent also argued that the Claimant had not suffered any prejudice as there had been no confusion. The Respondent argued that these points meant that there were exceptional circumstances making it unjust to make an award.

65. The Claimant submitted that the award of two weeks' pay was mandatory. The Claimant was told that she would be transferred pursuant to TUPE and the Respondent had simply never followed up to say that her employment had now transferred and confirm the identity of her employer. It is central to the relationship to know who the employer is. The Claimant had been threatened with costs because she had sued the First and Second Respondent as a result of the confusion. The Claimant argued that this was a case where four weeks should be awarded. The Respondent is a law firm purporting to provide employment law advice, there is no way that they are unaware of this basic requirement.

66. The mandatory award is two weeks' pay, there is no exceptional circumstance which would justify a reduction to that. The Respondent's submissions do not stand up to scrutiny, the finding of a TUPE transfer was conceded by them and was their own submission made at the liability stage. There clearly had been confusion on the Claimant's part, which is why both the First and Second Respondent were respondents to the Claimant's claim. I take into account that the Respondent is a law firm which purports to specialise in employment law, as well as the fact that the Claimant did have particulars of employment, but that these had not been updated. In all of the circumstances, my finding is that

a two week award is appropriate, I do not exercise my discretion to make an award of four weeks. I therefore make an award of £1,187.68

Bonus payment

67. At paragraph 86 of the liabilities judgment, I made a finding that a bonus payment of £7,035.75 (gross) should have been paid to the Claimant, on the 29 April 2022.

68. The Claimant argues that because the rate of taxation would be different in the current tax year, in order to ensure that the Claimant receives on a net basis what she should have received in the 22/23 tax year, an adjustment should be made to the award. These points were made in oral submissions for the first time. It was not raised in the Claimant's Schedule of Loss or written submission. No evidence was submitted to the Tribunal regarding the Claimant's tax position as at 29 April 2022 and as at the date of the remedies hearing, and how the calculations would differ.

69. It is correct as a matter of law that losses for breach of contract should be grossed up and that the relevant tax year for grossing up is the year that the award is received by the complainant. However, in the absence of any evidence of a difference in the tax rates, I do not consider it appropriate to make guesses regarding the Claimant's tax position which will vary according to all sources of income, not just that from employment. For that reason, I simply award the breach of contract figure as a gross sum in the sum of £7,035.75.

Employment Judge Volkmer
Date 15 June 2023

Reserved judgment & reasons sent to the parties on 27 June 2023

For the Tribunal Office