EMPLOYMENT TRIBUNALS

Claimant: Mrs J Fowler

Respondent: SSL Healthcare Limited t/a Brookfields Care Home

Heard at: Teesside Justice Centre

On: 2, 3 and 25 May 2023

Before: Employment Judge L Robertson

Representation
Claimant: Mr A Jones (friend)
Respondent: Mr P Joy (registered manager of Brookfields Care Home)

RESERVED JUDGMENT ON REMEDY

1. The claimant is not entitled to compensation in respect of her claim of unfair dismissal.

2. The claimant's complaint for failure to provide written particulars of her employment under section 38 Employment Act 2002 is well-founded and succeeds. The respondent is ordered to pay to the claimant an award in the gross sum of £1,482.

REASONS

INTRODUCTION

Tribunal proceedings

1. This claim was originally listed for a final hearing on 9 January 2023 but that hearing was adjourned and converted into a case management hearing. It was re-listed for a final hearing on 13 March 2023 but that was also adjourned and converted into a case management hearing. The case came before me, listed to determine both liability and remedy, on 2 and 3 May 2023.

2. I heard evidence and submissions as to liability, contributory fault and Polkey on 2 and 3 May 2023 but, due to time constraints, re-listed the matter for 25 May 2023 to deliver my oral judgment in relation to liability and determine remedy if appropriate.

3. I delivered my oral judgment on 25 May 2023 – that the claimant's claim of unfair dismissal pursuant to Part X of the Employment Rights Act 1996 succeeded - and then proceeded to deal with remedy.

4. At the case management stage, the issues and directions relating to remedy had been set out and clearly explained to the parties. I had also explained the issues relating to remedy and the burden of proof where relevant. The issues relating to remedy were as follows:

   4.1. Does the claimant wish to be reinstated to their previous employment?

   4.2. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

   4.3. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

   4.4. What should the terms of the re-engagement order be?

   4.5. If there is a **compensatory award**, how much should it be? The Tribunal will decide:

      4.5.1. What financial losses has the dismissal caused the claimant?

      4.5.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

      4.5.3. If not, for what period of loss should the claimant be compensated?

      4.5.4. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

      4.5.5. If so, should the claimant's compensation be reduced? By how much?

      4.5.6. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

      4.5.7. Did the respondent or the claimant unreasonably fail to comply with it?

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

      4.5.9. If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

4.5.10. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

4.5.11. Does the statutory cap of fifty-two weeks' pay apply?

4.6. What basic award is payable to the claimant, if any?

4.7. 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?

5. The following evidence was considered in relation to remedy:

5.1. the claimant's witness statement, which dealt with liability and remedy, and oral evidence from the claimant;

5.2. a witness statement and oral evidence from Mr Joy and Ms Payne;

5.3. the most recent schedule of loss dated 6 February 2023;

5.4. a joint bundle of documents.

6. Although it had been made clear that the claimant must produce evidence and a witness statement relating to the compensation she was claiming, how that was calculated, and her job search, there was no documentary evidence relating to the claimant's job searches. The claimant had generally submitted CVs by hand and so there was little by way of contemporaneous written evidence of her job searches. The claimant had included fit notes in the bundle which stated that she had been unfit for work following her dismissal but there was no medical evidence relating to the extent to which the dismissal had caused her to be unfit for work. There was a discussion about whether the remedy hearing should proceed and, following a break, the parties were content to proceed by way of the claimant giving supplementary oral evidence as to these matters. I reserved my decision due to time constraints.

7. The claimant did not seek reinstatement or re-engagement and my considerations are therefore limited to the issue of financial compensation.

FINDINGS OF FACT

8. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made by or on behalf of the parties at the hearing and the relevant statutory and case law, I record the following facts either as agreed between the parties or found by me on the balance of probabilities.

9. My earlier findings of fact (from the oral liability judgment) which are relevant to the question of remedy are as follows:

9.1. It was common ground that the claimant was employed by the respondent from 16 August 2016 up to and including 26 June 2022.

9.2. The claimant was summarily dismissed for gross misconduct by the respondent.

9.3. She was 50 years of age at the time of her dismissal.

10. There was a dispute about whether the claimant had been given a written statement of particulars of her employment. I find that the claimant had not, at any point, been given a statement of particulars of employment which complied with the requirements of sections 1(1) and 4(1) of the Employment Rights Act 1996 ("ERA"). In or around 2021, she had been given a template contract which did not include her name, date of birth or address. She told the administrator that she was unable to sign it and asked for one with those specific details included. The administrator took it back and an amended version was never provided. Although there is an electronic copy of the contract of employment on her personnel file, there was no evidence before me that it complied with the above requirements or that it was ever sent to the claimant. The claimant said it was not. I find on balance that it was not.

11. The claimant regularly worked overtime. I accept her evidence that she regularly received requests from the respondent to work overtime, and she agreed to certain specific requests. However, there was a dispute about the hours she was required to work and whether any of the overtime she worked was compulsory. There was no contract of employment before me. On balance, I find that the claimant's normal hours of work were 39 hours per week and that the overtime she worked was neither guaranteed nor compulsory. Rather, it was voluntary. Although the claimant gave oral evidence that the weekly rota included more than 39 hours of work for her on several occasions, I find that she understood that she was required to work 39 hours and that overtime was voluntary. This is evidenced by her response during the disciplinary hearing (page 36) in which she stated that, "the hours I do is 39 and then I get phone call after phone call." The fact that, by the time the rota was produced, she was on the rota to work more than 39 hours per week was because she had, by that time, agreed to work overtime.

Facts relevant to contributory fault

12. There was a dispute as to whether the allegations which led to the claimant's dismissal were made out.

13. Although the claimant disputed Ms Payne's evidence as to whether a particular resident (who I shall refer to as "the resident") was able to stand and walk, I preferred Ms Payne's cogent and persuasive evidence that the resident was able to stand and move between the wheelchair and a chair but that she did not always do so.

14. The claimant's position was, at the different stages, unclear and inconsistent as to whether she had assisted Ms Payne with the resident at the times that formed the basis of the allegations. The claimant's position was that she had been working in the kitchen on the morning of 10 May. However, the claimant was on the rota as being a member of care staff, not kitchen staff, on the day in question. In any event, the rota was unlikely to have been conclusive as the claimant accepted that she moved around – she said she spent part of her time in the kitchen at the start of the day and then moved into a carer role. However, the claimant's written and oral evidence was inconsistent as to why she would have been working in the kitchen that day.

15. I preferred Ms Payne's cogent and persuasive evidence that she and the claimant had assisted the resident as Ms Payne set out in her statement. Ms Payne confirmed, and I accept, that two cleaners witnessed the first alleged incident and told the claimant to stop and they took over. I also accept Mr Joy's evidence that the senior on duty that day witnessed the claimant assisting the resident with Ms Payne.

16. At the investigation stage, the claimant accepted that she and other staff had told the resident to try to stop scratching at different times. The disciplinary allegations, however, related to the nature and manner of the claimant's comments in this regard. At the disciplinary hearing, the claimant accepted that she, "sometimes comes over sharp/rough. I've been brought up you say it as it is. My mouth does get me into trouble." During the Tribunal hearing, the claimant gave evidence that, when she said her mouth got her into trouble, she had been referring to having said that staff should not go outside for a cigarette rather than serving breakfasts. I do not accept this; she had made this comment in the context of a discussion at the disciplinary hearing about the allegations that had been raised.

17. Also, in the disciplinary hearing, following the comment referred to above, the claimant went on to say, "I don't believe what has been said." She then said that she could not remember the date. Mr Joy therefore asked whether she was saying that she could not remember whether she, "did or didn't do it", and the claimant replied "I don't know if I did or didn't, I don't think I did." After further discussion, Mr Joy said that if the claimant could not remember whether she did or didn't, that was her answer. The claimant's representative asked for a break, following which the claimant returned to say that her representative had explained what Mr Joy had meant and was clear that she did not do it. I do not accept that Mr Joy put pressure on the claimant to give a particular answer; rather, he made a reasonable attempt to clarify her position which was unclear.

18. The resident, who has dementia, had been unable to recall the alleged incidents but had commented that the claimant was, "fucking horrible." There was contemporaneous evidence from the resident's son that the resident had always voiced concerns about the claimant. There was also contemporaneous evidence from the resident's son and Mr Joy that the resident had seemed much brighter since the claimant's suspension.

19. Ms Payne's evidence was that the claimant had signed her name on the stand charts and observation forms for the shift in question. These were not before me but I accept her clear evidence in that regard. The daily notes were silent on what had happened – I accept that was not necessarily determinative as the contents depended on who wrote up the notes.

20. I have reviewed the statements from other colleagues and from residents but have attached very limited weight to these as they were not cross-examined before me.

21. The claimant said in the disciplinary hearing that it was a witch-hunt. However, Ms Payne and the claimant had been close friends both in and out of work. The claimant was unable to give any credible explanation for why Ms Payne's account should not be relied upon. On the other hand, Ms Payne

lost a close friendship in making these allegations which she would be unlikely to do if she had not believed in the truth of what she was saying.

22. In summary, there were two conflicting accounts from the claimant and Ms Payne. Ms Payne's account was supported by two cleaners and the senior on duty that day, although they had chosen not to put their concerns into writing. The claimant was on the rota as a member of care staff, not kitchen staff, on the day in question. The daily notes were silent and the claimant had signed stand charts and observations forms for the shift in question. The claimant was vague and at times inconsistent in her evidence whereas Ms Payne was consistent and precise. The claimant also accepted that she, "sometimes comes over sharp/rough. I've been brought up you say it as it is. My mouth does get me into trouble."

23. Although the claimant disputed the allegations, I prefer Ms Payne's clear, detailed and persuasive evidence which is supported by my above findings that, on 10 May 2022, the claimant had:

    23.1. Been helping Ms Payne to move a resident and, after the resident had stood up using a walking frame, the claimant had pushed the resident back into the lounge chair. This had caused the resident to shout out in pain because her bottom was sore from scratching and the claimant had said into the resident's ear, "it's because you're constantly scratching and picking at your arse." The resident had told Ms Payne afterwards that the claimant is horrible to her; and

    23.2. Later that day, in the resident's bedroom, the claimant and Ms Payne were again assisting the resident to stand using the stand aid and the claimant had said, "you have shit, it's disgusting, you know when you need the toilet, you are just lazy." The claimant had continued, "look, look at that," and showed the resident the wipe with faeces on it and put it near her face and said you have shit. The claimant then told the resident that she would tell her family members that she "[shits herself]" and finds it funny and told the resident that her son had told the claimant that the resident was lazy. While the claimant had been cleaning the resident's bottom, she was very rough whilst doing this, smacking her hand between the resident's bum cheeks and the resident was shouting out that her bottom hurts. The claimant said: it's cause you're constantly scratching and picking your arse it's disgusting.

24. I therefore find that the claimant was guilty of the conduct for which she was dismissed.

Findings of fact in relation to loss of earnings

25. Between 27 June 2022 and 18 July 2022 inclusive, the claimant's net loss of earnings was £348 per week x 3.14 weeks = £1,093.71. There was no evidence that she had failed to mitigate her loss during this initial period.

26. Between 19 July 2022 and 17 January 2023, there were fit notes in the bundle which stated that the claimant was unfit for work inclusive by reason of: "anxiety/low mood and deterioration of back pain (awaiting back pain clinic input)." Although the claimant's position was that she had tried to find work as

she thought it might help her, I find that she was unfit for work during this period as is clearly recorded in the fit notes.

27. The claimant's evidence, which I accept, was that she had been taking medication for depression for around 12-18 months. She had been in the process of reducing that medication but her symptoms became worse following the disciplinary allegations being made against her and her GP had prescribed a higher dose. In or around July or August 2022, she gave evidence that she had suffered a mental breakdown in the GP surgery. The claimant continues to have 4-weekly reviews with her GP of her symptoms and medication.

28. Her fit notes also refer to deteriorating back pain. Her evidence was that she had suffered back pain for around 18 months and had returned to work for the respondent (prior to her dismissal) following an operation. Her position was that she had shown herself to be able to work with back pain and the real reason why she had been deemed unfit for work was her anxiety and depressive symptoms which had been significant at the time. However, the references to deteriorating back pain relate to the period after the operation and after the claimant's employment by the respondent had ended. Deteriorating back pain is one of the reasons for the claimant being deemed unfit for work by her GP during that period.

29. Undoubtedly the claimant was struggling with both her mental and physical health during this period. However, there was no medical evidence as to the reason why she was unfit for work other than the fit notes. The claimant's evidence was that it was the allegations that had worsened her existing symptoms (as opposed to the dismissal itself). Another key factor was that the respondent had made a referral to the Disclosure and Barring Service. It became common ground that the DBS had not yet made a decision in relation to that referral but that, if the claimant were to apply for another job in care, a DBS check would record that a concern had been raised. During the period of the fit notes, in addition to deteriorating back pain, the claimant was facing a number of adverse circumstances which could have caused or contributed to her worsening symptoms of anxiety/low mood – the allegations made against her by a friend, supported by other colleagues; her dismissal; and the referral to DBS which was likely to create difficulties for her in obtaining alternative employment within care. However, there was no medical evidence as to the reason why she was unfit for work other than the fit notes.

30. The claimant had applied for around four jobs in care and 20 roles in retail between around July and November 2022. She had had two interviews. She accepted that she had not applied for any jobs since November 2022. She explained that there were, "only so many knock-backs [you] can take," and those knock-backs had made her feel low and worthless so she had not made any further applications. The claimant had not found alternative employment by the time of the remedies hearing.

LAW

31. Unfair dismissal compensation is assessed pursuant to sections 118-124A of the Employment Rights Act 1996 ("ERA") and relevant case-law, by reference to a basic award and a compensatory award.

32. The compensatory award is assessed pursuant to section 123 of the ERA as being "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. In assessing the claimant's loss, the Tribunal must consider whether the claimant's unfitness for work was "to any material extent" caused by her dismissal *(Dignity Funerals v Bruce 2005 IRLR 189, Ct Sess (Inner House))*.

33. In *Gardiner-Hill v Roland Berger Technics Ltd 1982 IRLR 498, EAT*, the EAT said that where there is a substantial issue as to failure to mitigate, an employment tribunal should ask itself:

    (i) what steps were reasonable for the claimant to have to take in order to mitigate his or her loss;

    (ii) whether the claimant did take reasonable steps to mitigate loss; and

    (iii) to what extent, if any, the claimant would have actually mitigated his or her loss if he or she had taken those steps.

34. The onus of showing a failure to mitigate lies on the employer as the party who is alleging that the employee has failed to mitigate his or her losses — *Fyfe v Scientific Furnishings Ltd 1989 ICR 648, EAT*. It is for the employer to prove that the claimant has acted unreasonably: the claimant does not have to show that what he or she did was reasonable: *Cooper Contracting Ltd v Lindsey 2016 ICR D3, EAT*.

35. If the Tribunal concludes that the dismissal is unfair procedurally, it must go on to consider what chances there would have been of the employer dismissing the employee in any event, and it may make a consequential reduction in the compensatory award accordingly. This is the Polkey principle, from the House of Lords' decision in *Polkey v AE Dayton Services Ltd [1998] ICR 142, HL*. It is essentially an assessment of what would have happened had the respondent followed correct procedures.

36. The Tribunal must then go on to consider whether there was an unreasonable failure by one or other of the parties to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) and, if so, to make an adjustment of up to 25% up or down to the compensatory award under s.207A of the Trade Union and Labour Relations Act 1992.

37. If a dismissal is found to be unfair, under section 123(6) ERA, where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding even in cases where the parties do not raise it as an issue (*Swallow Security Services Ltd v Millicent [2009] 3 WLUK 526, EAT*). The relevant conduct must be culpable or blameworthy and (for the purposes of considering a reduction of the compensatory award) must have caused or contributed to the dismissal: *Nelson v BBC (No2) [1980] I.C.R. 110, CA*.

38. For the purposes of the compensatory award there must be a causal connection between the conduct and the dismissal. Langstaff J offered

tribunals some guidance in the case of *Steen v ASP Packaging [2014] I.C.R. 56, EAT*, namely that the following questions should be asked: (1) what was the conduct in question? (2) was it blameworthy? (3) did it cause or contribute to the dismissal? (for the purposes of the compensatory award) (4) to what extent should the award be reduced and to what extent it is just and equitable to reduce it? The authorities establish that the employee's blameworthy conduct must be considered to determine the extent to which it has caused or contributed to the dismissal, not to the unfairness of the dismissal: see *Gibson v British Transport Docks Board [1982] IRLR 228, paras 28–29*.

39. Unlike the position under section 98(4) ERA where the Tribunal must confine its consideration of the facts to those found by the employer at the time of the dismissal, the position is different when the Tribunal comes to consider whether, and if so to what extent, the employee might be said to have contributed to the dismissal. In this regard, the Tribunal is bound to come to its own view on the evidence before it. Decisions on contributory fault are for the Tribunal to make, if a decision is held to be unfair. It is the claimant's conduct that is in issue and not that of any others. The conduct must be established by the evidence.

40. There is an equivalent provision for reduction of the basic award, section 122(2) of the ERA, which states that, "where the tribunal considers that any conduct of the complainant before the dismissal…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." The tribunal has a wider discretion to reduce the basic award on grounds of any conduct of the employee prior to dismissal. It is not limited to conduct which has caused or contributed to the dismissal.

41. Section 38(2) of the Employment Act 2002 applies where a Tribunal finds in favour of an employee in a complaint of unfair dismissal but makes no award in respect of that complaint, and the Tribunal finds that the employer has failed to provide the employee with a written statement of employment particulars. In those circumstances, the Tribunal must make an award to the employee of two weeks' pay, unless there are exceptional circumstances which would make that unjust or inequitable, and may, if it considers it just and equitable in all the circumstances, order the employer to pay an award of four weeks' pay.

CONCLUSIONS

Unfair dismissal

Basic Award

42. The claimant had five years' continuous employment at the time of her dismissal and was 50 years of age at the time of her dismissal.

43. Her weekly pay was £370.50 (39 hours per week, paid at the applicable National Living Wage rate of £9.50).

44. The basic award is calculated as 7.5 weeks' pay, being 1.5 week's pay for each full year worked. The total is £2,778.75.

45. However, pursuant to section 122(2) of the ERA, this award is reduced by 100% to nil. I have found that the claimant was guilty of the conduct for which she was dismissed. That conduct was gross misconduct. I conclude that, in view of these findings, the claimant's conduct before the dismissal was such that it would be just and equitable to reduce the amount of the basic award by 100%. The claimant is not therefore entitled to receive a basic award.

Compensatory Award

46. For the reasons I explain below, the claimant is not entitled to receive a compensatory award.

Immediate loss

27 June 2022 to 18 July 2022

47. The claimant's net loss of earnings between 27 June 2022 and 18 July 2022 was £348 per week x 3.14 weeks = £1,093.71. There was no evidence that she had failed to mitigate her loss during this initial period.

19 July 2022 to 17 January 2023

48. I have found that the claimant was unfit for work between 19 July 2022 and 17 January 2023 inclusive and the fit notes record the reasons to be, "anxiety/low mood and deterioration of back pain (awaiting back pain clinic input)." I have also found that during the period of the fit notes, in addition to deteriorating back pain, the claimant was facing a number of adverse circumstances which could have caused or contributed to her worsening symptoms of anxiety/low mood – the allegations made against her by a friend, supported by other colleagues; her dismissal; and the referral to DBS which was likely to create difficulties for her in obtaining alternative employment within care. However, there was no medical evidence as to the reason why she was unfit for work other than the fit notes.

49. Taking all of these factors into account, I am not satisfied that the claimant's unfitness for work during this period was "to any material extent" caused by her dismissal. The respondent's position, which was uncontested, was that if the claimant had not been dismissed, she would have been entitled to SSP during her employment. The fit notes lasted for 29 weeks and 2 days. Her loss of earnings from 19 July 2022 to 17 January 2023 is therefore 26.1 weeks' SSP at £95.35 per week, ie £2,492.72.

18 January 2023 to date of remedies hearing; and future loss

50. I have found that the claimant had not found alternative employment by the time of the remedies hearing. As to whether the claimant unreasonably failed to mitigate her loss after the expiry of her fit notes, the respondent's position was that the claimant had unreasonably restricted her job search to retail (in which she had no prior experience) and had not made job applications after her fit notes ended.

51. I found that the claimant had applied for around four jobs in care and 20 roles in retail between around July and November 2022 and she had not applied for any jobs since November 2022.

52. The steps the claimant should have taken to mitigate her losses were to seek alternative employment after her fit notes ended on 17 January 2023. There was no evidence that she remained unfit for work after that date. The burden of showing the claimant had failed to mitigate her loss is on the respondent. Although there was no evidence before me as to particular jobs that the claimant could have applied for, it is well known that the UK has a large number of unfilled vacancies and labour shortages in several industries that do not require a DBS check for working with vulnerable adults or children. Had the claimant looked for work when her fit note expired in January 2023, I am satisfied that she was likely to have been successful in securing alternative employment within six months; that is, by 17 July 2023.

53. Her loss of earnings for the period 18 January 2023 to 16 July 2023 (25.7 weeks) is £348 x 25.7 = £8,943.60. I have used the average net loss of earnings in the schedule of loss which was uncontested.

Pension loss

54. Her pension loss is £9 per week multiplied by 55 weeks (27 June 2022 to 16 July 2023), which is £495.

Expenses

55. The claimant sought to recover expenses of attending five job interviews. However, her evidence before me was that she had attended two interviews. No evidence of the travel expenses was before me. There is insufficient persuasive evidence on which to make such an award.

Total loss of earnings

56. The total loss of earnings is £13,025.03.

Loss of statutory rights

57. I agree that an award of £500 for loss of statutory rights would be appropriate. This was not disputed.

58. Adding this to the loss of earnings gives an updated total of £13,525.03.

Polkey

59. Mr Jones submitted that there should be no Polkey deduction as it was just as possible that the claimant would not have been dismissed fairly as that she would have been. Mr Joy submitted that a 100% reduction was appropriate.

60. I agree with Mr Jones that it is entirely possible that, had a fair process been followed with Mrs Wooding, Mr Joy and Mrs Stobbs dealing individually (and not in consort) with each stage of the process, one of those decision-makers might have taken the view that they were not satisfied that they could resolve the conflict of evidence and accordingly not find the case proved. That would not be the same as saying that they disbelieved Ms Payne.

61. I found that the claimant was not given a proper opportunity to comment on certain additional evidence at the time of her dismissal. However, I also take into account that the claimant was vague in her evidence at the time of her

dismissal, whereas Ms Payne's account was precise and supported by the available evidence. On balance, I conclude that there was a 75% chance that the claimant would have been fairly dismissed in any event. A 75% reduction is therefore appropriate.

ACAS uplift

62. I have concluded that the ACAS Code of Practice on disciplinary procedures applied to this dismissal, and the respondent failed to comply with its requirements in that it failed to conduct a reasonable investigation at the time of the dismissal, Mr Joy was involved in the investigation, disciplinary hearing and appeal and Mrs Stobbs was involved in the disciplinary hearing and appeal. There is no cogent reason for those failures and I conclude those failures were unreasonable.

63. Taking into account the parties' submissions on this matter, but stepping back and having regard to the overall size of the award, in my view the respondent's unreasonable failures to comply with the Code would make an uplift of 25% appropriate.

Contributory conduct

64. However, pursuant to section 123(6) of the ERA, I conclude that a reduction of 100% to the compensatory award is just and equitable in this case. I have found that the claimant was guilty of the conduct for which she was dismissed. That conduct was gross misconduct and was culpable or blameworthy. It was the sole cause for her dismissal. Although I found the dismissal unfair because of flaws in the dismissal process, I conclude that the claimant's misconduct was such that dismissal was wholly justified.

65. I have stood back and considered the amount of the award and the impact of the deduction. However, to fail to apply a 100% deduction in this case would not be just and equitable. In view of her gross misconduct, it is not just and equitable for the claimant to receive compensation.

66. This reduces her compensatory award to nil.

Written particulars of employment

67. The claimant has succeeded in her unfair dismissal claim. An award under section 38 Employment Act 2002 for failure to provide a written statement of employment particulars is, therefore, possible. Section 38(2) applies as I have made no award in respect of her unfair dismissal claim.

68. The claimant was an employee of the respondent. She was, therefore, entitled under section 1(1) and 4(1) of the ERA to be provided with a written statement of employment particulars. I found that the claimant was never given a written statement of employment particulars which complied with the requirements of sections 1(1) and 4(1) of the ERA. The respondent was therefore in breach of its duty to provide written particulars when these proceedings were begun, for the purposes of section 38(2).

69. The respondent has not put forward any evidence of any exceptional circumstances which would make it unjust or inequitable to order them to pay

the claimant an award for this failure, in accordance with section 38 Employment Act 2002. I must, therefore, make an award of the minimum amount of two weeks' pay and may, if I consider it just and equitable in all the circumstances, make an award of four weeks' pay. The respondent had failed to provide written particulars of employment for nearly six years and there was no cogent explanation for this. In these circumstances, I consider it would be just and equitable to award four weeks' gross pay i.e. 4 x £370.50 = £1,482.

CONCLUSIONS

70. The claimant is not entitled to compensation in respect of her claim of unfair dismissal brought under Part X of the Employment Rights Act 1996.

71. The complaint for failure to provide written particulars of her employment under section 38 Employment Act 2002 is well-founded and succeeds. The respondent is ordered to pay to the claimant an award in the gross sum of £1,482.

L Robertson

_____

Employment Judge L Robertson

Date signed: 7 July 2023