# EMPLOYMENT TRIBUNALS

**Claimant:** Miss E Marshall

**Respondent:** Doncaster Gymnastics Academy Limited

**Heard: in Sheffield**

**On: 7 and 8 August 2023**

**Before:** Employment Judge Ayre, sitting alone

**Representation**

**Claimant:** Mrs C Marshall, mother
**Respondent:** Mrs K Eves, director and owner

# JUDGMENT

1. The claimant was an employee of the respondent.

2. The claimant was unfairly dismissed by the respondent.

3. The claimant contributed to her dismissal by 75% and the unfair dismissal basic and compensatory awards should be reduced accordingly.

4. The respondent is ordered to pay the claimant the sum of £167.08

# REASONS

## The Background

5. On 26 September 2022 the claimant issued this claim in the Employment Tribunal following a period of early conciliation that started on 23 August 2022 and ended on 21 September 2022. Her claim included complaints of unfair dismissal and for unlawful deduction from wages. The respondent accepted that it had underpaid the claimant and, in a consent judgment sent to the parties on 8 March 2023, the complaint of authorised deduction from wages succeeded and the respondent was ordered to pay to the claimant the sum of £800.15.

6. An Order was made that the claimant's claim should be considered together with a claim made against the same respondent by Hayley Laxton. That claim was however dismissed on withdrawal in a judgment sent to the parties on 6 February 2023.

7. The only claim that therefore remains is a claim by the claimant for unfair dismissal, which the respondent defends.

## The Issues

**8.** The issues that fell to be determined at the hearing were as follows:

**1.** Was the claimant an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996

**2.** Was the claimant dismissed by the respondent?

**3.** What was the reason or principal reason for the dismissal? The claimant says it was a combination of conduct and/or redundancy.

**4.** Was it a potentially fair reason?

5. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? This involves deciding whether:

    i. there were reasonable grounds for that belief;

    ii. at the time the belief was formed the respondent had carried out a reasonable investigation;

    iii. the respondent otherwise acted in a procedurally fair manner;

    iv. dismissal was within the range of reasonable responses.

6. If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. This involves deciding whether:

i. The respondent adequately warned and consulted the claimant;

ii. The respondent adopted a reasonable selection decision, including its approach to a selection pool;

iii. The respondent took reasonable steps to find the claimant suitable alternative employment;

iv. Dismissal was within the range of reasonable responses.

7. Does the claimant wish to be reinstated to her previous employment?

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

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

10. Should the Tribunal order re-engagement? The Tribunal will consider whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

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

12. If there is a compensatory award, how much should it be?

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

## The Proceedings

9. Each side had produced their own bundle of documents. The claimant's bundle ran to 10 pages and the respondent's to 20 pages. Neither bundle had been paginated and I gave the parties time at the start of the hearing to paginate their bundles. The respondent also produced a bundle of 'remittance slips' which was unpaginated.

10. I heard evidence from the claimant and from Katie Eves, co-owner and director of the respondent. Mrs Eves told me that she was not familiar with the financial side of the business, as that is handled by her husband. I adjourned the hearing briefly to give the respondent time to consider whether to call Mr Eves to give evidence. The respondent indicated that it did not wish to do so.

11. As claims for unfair dismissal can only be brought by employees, I began the hearing by considering the question of employment status. The claimant claims

to have been employed by the respondent, the respondent's position was that the claimant was self-employed. I heard evidence from the claimant and Mrs Eves on the question of status, and submissions from both parties. I then adjourned to make my decision.

12. For the reasons set out below, I found that the claimant was at the relevant time an employee of the respondent. Having reached that decision, I then went on to hear evidence and submissions on the substantive unfair dismissal claim and adjourned to make my decision on that question.

13. For the reasons also set out below, I found that the claimant was unfairly dismissed. I then went on to hear evidence and submissions on the question of remedy, including on the questions of whether the claimant contributed to her dismissal, and whether following a fair procedure would have made any difference to the outcome.

14. I asked the claimant whether she was seeking reinstatement or re-engagement. She indicated that she was not seeking either, but rather was looking for financial compensation.

## 15. Findings of fact

Background

16. The respondent is a gymnastics club based in Doncaster which provides gymnastic coaching to children aged 4 to 17. The business is owned and run by Katie Eves and her husband, who are employed by the business. They currently also have two gymnastic coaches, who they describe as self-employed, and two assistants.

17. The club runs gymnastic classes between 4 and 8 pm Mondays to Fridays, and from 9 am to 3.30 pm on Saturdays. It currently has between 450 and 500 children registered with it. Most of those children attend one class a month, for which their parents pay a set monthly fee. Approximately 30 of the children are 'competition squad gymnasts' who attend more than one class a week and, as a result, pay higher monthly fees. Typically, a squad gymnast will attend between two and ten hours of lessons a week.

18. The claimant first worked for the respondent in 2016 when she was 16 years old. She stopped working for the respondent in 2018 to go to university and returned in 2019. She was never provided by the respondent with a contract of employment or written statement of employment particulars or indeed any other written contractual documentation other than a letter given or sent to her in August 2019.

Status

19. When the claimant returned to work for the respondent in 2019, she was provided

with a letter stating that she would be self-employed and responsible for her own tax and national insurance contributions. In the letter the respondent wrote that payments would be made in arrears at the end of each month 'as before'.

20. The claimant says that she never received that letter. On balance I prefer the respondent's evidence and accept that the letter was given to the claimant. The date on the letter was consistent with it having been created at the time the claimant began working for the respondent for the second time, and there was no reason to believe that it had been fabricated. Given the time that has elapsed since the letter was produced the claimant has in my view simply forgotten receiving it.

21. The claimant began working for the respondent for the second time on 8 August 2019. She was told by Mrs Eves what hours she would be working, and those hours remained unchanged between 2019 and 2022, with the exception of the Covid lockdowns, when the centre was closed.

22. The claimant worked fixed hours every week – four hours on Tuesday, four hours on Thursday and six hours on Saturday. The claimant had to turn up and work those hours unless she was sick or on holiday, in which case she had to let the respondent know. The claimant was provided with work every week except during the 5 weeks of the year when the gymnastics centre was closed. She would sometimes work extra hours, for example when Mrs Eves was on holiday, but was not required to do so and could turn down an offer of additional hours.

23. The claimant's duties were to teach gymnastics classes. She had to perform her duties herself and did not have the right to send a substitute, although there was one occasion when she did arrange for another coach to cover her shift.

24. The claimant was not paid when she was on holiday or off sick. She was not provided with any benefits. The rate of pay was determined by the respondent alone. There was no negotiation as to the terms applicable to the claimant.

25. There were no restrictions on the claimant working elsewhere, although in practice she did not. The claimant was not in business on her own account.

26. She performed her duties at the centre using the respondent's equipment. It was not feasible given the nature of the equipment for her to provide her own. When working she could wear her own gym wear or a jumper with the respondent's logo on it which she had purchased herself. She was not required to wear this jumper, however – it was a matter of her own choice.

27. The claimant was not told how to teach her classes, but there was always at least one other coach present when she was teaching, and sometimes a senior coach as well. The claimant's work was not supervised and there were no performance reviews.

28. The claimant had to provide her own DBS certificate and undergo safeguarding

training. This training was provided free of charge by the local council.

29. In 2017 the claimant did a gymnastic coaching course which cost between £500 and £600. She paid for that course herself. The claimant was required to have her own insurance and paid for that herself. It is a requirement for every coach to have insurance through British Gymnastics.

30. The claimant was paid monthly by direct bank transfer. She was not required to keep records of her working hours or to submit invoices and did not do so. She was not provided with pay slips. The respondent calculated the payments it made to the claimant based upon the claimant's hours worked and produced remittance slips setting out the amounts paid each month. These slips were not routinely provided to the claimant, although copies were produced for the Tribunal hearing.

31. The respondent did not deduct tax or national insurance from the payments it made to the claimant. The claimant herself did not pay any tax or national insurance on them.

Events leading up to the claimant's dismissal

32. The respondent's business was closed during lockdown. The claimant was not however laid off or made redundant during that period. She did not work, and instead claimed Universal Credit, but there was no evidence to suggest that the respondent took any steps to terminate her employment due to the lack of work.

33. In February 2022 a new coach, Hayley, started working for the respondent. Hayley wanted to change things and was not afraid to express her views. The claimant became friendly with Hayley. Hayley began choosing the children that she wanted to teach and appeared not to be interested in other children.

34. In July 2022 Katie Eves went on holiday, leaving senior coach Leigh Anne Lee in charge. Whilst Mrs Eves was on holiday Hayley resigned to join another gymnastics club in Retford which was a competitor of the respondent. Leigh Anne sent a text message to Mrs Eves to tell her about this.

35. Over the course of the next few days Mrs Eves received messages from several parents whose children were doing gymnastics with the respondent, indicating that their children would be leaving the respondent to follow Hayley to her new club.

36. At this time the claimant began taking an adult gymnastics class at the Retford gymnastics club where Hayley was now teaching. She began telling children in the respondent's competition squads that the facilities at Retford were more up to date, that they would be able to do more there, and that they should go and try out the Retford club.

37. Mrs Eves returned from holiday at the end of July. She met with Leigh Anne to

discuss what had happened. Leigh Anne told her that the children who had already left the club were not the only ones who would be leaving, and that the claimant had been talking to the older gymnasts and recommending that they move to Retford because the equipment there was better.

38. In early August two parents came in to speak to Mrs Eves. They told her that the claimant had spoken to their children and recommended that they go and have a trial at Retford gymnastics club. One of the parents complained about the way in which the claimant had spoken to children.

39. Four gymnasts who had lessons with the respondent also approached Mrs Eve in early August and told her that the claimant had said Retford was much better than the respondent's club.

40. In her evidence to the Tribunal the claimant denied having encouraged children to leave the respondent. She admitted however that she had told children that the equipment at Retford was more up to date than at Doncaster. The respondent produced emails from 3 parents, two of whom were the parents spoken to by Mrs Eves on her return from holiday in 2022.

41. One of those parents wrote that:

"*When a new coach started at our club things had started to change for the worse. A lot of the girls left as they felt the new coach disliked them and she wasn't interested in half the girls in the club. Elise got on well with the said coach and she also took similar attitudes with the group.*

*…I was made aware that the new coach was leaving and Elise was training at the same gymnastics school the new coach was moving to. Elise did not hide this from the club and was very open with my daughters group and told them on a regular basis that the said gymnastics club was better than our club. This made my daughter feel very disheartened and confused with everything going on.*

*Elise would repeat conversations like this with the group of girls she taught quite often implying and encouraging them to attend the gymnastics club where she had moved to along with the new coach.*

*…Once the coach left, there was a lot of children who also left and started attending the same club as the coach and Elise…*"

42. Another wrote: "*…Elise approached* [my daughter] *and her friend … who was also a member at that time and said to them that if they wanted to get better at gymnastics they should leave DGA and go somewhere else to train…*"

43. The third wrote that the claimant and Hayley:

"*…frequently made comments to the girls and parents, advising them to move to Retford gymnastics club, where Hayley and her were going.*

*She subsequently made comments to the girls stating that Doncaster gymnastic Academy was rubbish and that Retford was better and they had a pit and much more opportunities. She essentially tried to and subsequently succeeded in poaching gymnasts to take to another club…*"

44. There was a conflict of evidence between the claimant and the respondent as to whether the claimant encouraged children to leave the respondent and told them that Retford was a better club. I prefer the respondent's evidence on this issue. Mrs Eves' evidence was consistent with the written evidence of the three parents, and the email from Leigh Anne Lee. I find this to be more credible than the claimant's evidence which I do not accept on this issue.

45. As a result of the actions of Hayley and the claimant, 16 children left the respondent and went to join Retford gymnastics club where Hayley was working, and the claimant was training. All those children were competition squad gymnasts. The monthly fees paid by those gymnasts came to nearly £3,000 so there was a significant drop in income for the respondent. In addition to losing revenue, the respondent also lost approximately half of its competition squad.

46. This was a big loss for the respondent. The respondent had only recently recovered from the impact of Covid and the lockdown, and got classes back up and running at full capacity.

47. Mrs Eves closed the club for a week to try and restructure the classes for the remaining children. She had to reorganise the timetable and move children between different classes.

48. As a result of the loss of gymnasts and revenue, the respondent could no longer afford to pay the claimant. The respondent was also concerned about the claimant's behaviour, and about her attitude. In early August a safeguarding officer from British Gymnastics came to the club and had a meeting with Mrs Eves. The safeguarding officer observed some lessons that were being taught and then told Mrs Eves that she did not like the claimant's manner with the gymnasts or her coaching style for the age of the children she was teaching.

49. Mrs Eves discussed the situation with her husband. As a result of the claimant's behaviour and the loss of income resulting in part from that behaviour, Mrs Eves decided to terminate the working arrangements with the claimant.

50. Mrs Eves did not tell the claimant what she was proposing to do. She did not share her concerns with the claimant, invite her to a meeting to discuss them or give her the opportunity to comment and put forward her version of events. There was quite simply no procedure whatsoever followed by the respondent.

51. Instead, on 6 August 2022 Katie Eves sent a text message to the claimant in which she dismissed her. The text message contained the following:

"*…you have been encouraging some of our gymnasts to leave the club and go*

*to Retford I now have no choice but to say I can no longer offer you any coaching hours at Doncaster Gymnastics Academy.*

*The amount of children that have left has made a big difference to the club and I cannot justify what you have done in encouraging the process.*

*We gave you hours and then again after you came back from University so felt you may have some loyalty towards the club but it seems not.*

*I am sorry that this has happened and am pretty disgusted with the way myself and the club have been treated…*"

52. The claimant was not given any notice of termination or paid in lieu of notice. She was not offered the right to appeal against the decision that had been made.

53. Neither the claimant nor Hayley have been replaced. The club continues to operate but with just two coaches. Mrs Eves worked an extra day, and her daughter is now working the hours that Mrs Eves used to work.

Remedy

54. The claimant was born on 11 March 2000 and was aged 22 when she was dismissed. Her employment commenced on 8 August 2019 and terminated on 6 August 2022. She therefore had two complete years of service with the respondent.

55. The claimant worked 14 hours a week. The National Minimum Wage for workers aged 20-21 from April 2022 onwards was £9.18 an hour. The claimant's weekly pay was therefore £128.52 (14 times 9.18).

56. The claimant has been in receipt of Universal Credit since the Covid lockdown. The amount of her Universal Credit did not change when she was dismissed.

57. The respondent did not comply with the ACAS Code of Practice on Discipline and Grievance procedures when it dismissed the claimant.

58. The respondent did not provide the claimant with a statement of employment particulars either at the start of her employment or at any time during her employment.

## The law

Employment status

59. Section 230 of the ERA provides the definition of employee, employment and worker as follows:

*"(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*

*(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*

*(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*

*(a) a contract of employment, or*

*(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;*

*and any reference to a worker's contract shall be construed accordingly.*

*(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.*

*(5) In this Act "employment"—*

*(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and*

*(b) in relation to a worker, means employment under his contract; and*

*"employed" shall be construed accordingly…"*

60. In ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497***, McKenna J set out the conditions required for a contract of service, namely that:"(*i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service*."

61. These principles were approved by the Supreme Court in ***Autoclenz Ltd v Belcher [2011] ICR 1157*** in which the Court also stated that "*There must be*

*an irreducible minimum of obligation on each side to create a contract of service…If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status…If a contractual right, as for example, a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement.*

62. The key factors to be considered in determining whether an individual is an employee are: -

    a. The degree of control that the employer has over the way in which the work is performed;

    b. Whether there is mutuality of obligation between the parties – ie was the employer obliged to provide work and was the individual required to work if required;

    c. Whether the employee has to do the work personally; and

    d. Whether the other terms of the contract are consistent with there being an employment relationship?

63. Other relevant factors include:

    e. The intention of the parties;

    f. Custom and practice in the industry;

    g. The degree to which the individual is integrated into the employer's business;

    h. The arrangements for tax and national insurance;

    i. Whether benefits are provided; and

    j. The degree of financial risk taken by the individual.

64. The label placed by the parties on their relationship can be a relevant factor in deciding the question of employment status but is not in itself conclusive. The Tribunal must decide the status of the individual by considering objectively all of the relevant factors, not just the label used by the parties. Elias LJ summarised the position in ***Quashie v Stringfellow Restaurants Ltd [2013] IRLR 99, CA***, as follows:

    "*It is trite law that the parties cannot by agreement fix the status of their relationship: that is an objective matter to be determined by an assessment of all the relevant factors. But it is legitimate for a court to have regard to*

*the way in which the parties have chosen to categorise the relationship, and in a case where the position is uncertain it can be decisive…*"

Unfair dismissal

65. Where an employee has been dismissed, the respondent must establish that the reason for the dismissal was one of the potentially fair reasons set out in section 98(1) or (2) of the Employment Rights Act 1996 ("**the ERA**").

66. Section 98(1) provides that: "*In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show – (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*"

67. Section 98(2) contains the potentially fair reasons for dismissal:

"*(2) A reason falls within this subsection if it –*
*(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*

*(b) relates to the conduct of the employee,*

*(c) is that the employee was redundant, or*

*(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*"

68. The burden of establishing a fair reason for dismissal lies with the respondent. The reason for dismissal has been held to be the factor or factors operating on the mind of the decision maker which causes them to make the decision to dismiss (***Croydon Health Services NHS Trust v Beatt [2017] ICR 420)***. The label placed by the employer on the reason for dismissal is not normally determinative of the reason for dismissal – the Tribunal has to ask itself 'what is the real reason for the dismissal'. This involves examining the evidence of the facts and beliefs that caused the employer to dismiss the employee. The Tribunal is entitled to find that the true reason for dismissal was not the one identified by the employer.

69. Section 98(4) of the ERA states as follows:

*"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
*(a) Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the*

*employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and*
*(b) Shall be determined in accordance with equity and the substantial merits of the case. "*

70. Where conduct is established as the reason for dismissal, the starting point for the Tribunal when considering whether the dismissal was fair is the test in ***British Home Stores Ltd v Burchell [1980] ICR 303***, namely:

a. Did the respondent have a genuine belief that the claimant was guilty of the misconduct?
b. Did the respondent have reasonable grounds for holding that belief; and
c. At the time it formed that belief, had it carried out as much investigation as was reasonable?

71. One of the considerations under section 98(4) is whether dismissal was within the range of reasonable responses, ie was it an option that a reasonable employer could have adopted in all the circumstances. The Tribunal must not substitute its view of the appropriate disciplinary sanction for that of the employer (***Iceland Frozen Foods v Jones [1983] ICR 17***). The range of reasonable responses test is not a perversity test, and it applies also to the procedure followed by the respondent including the investigation (***Sainsbury's Stores Ltd v Hitt [2003] IRLR 23***)

Remedy

Basic Award: Unfair dismissal

72. Section 118 of the ERA provides that:

"*(1) Where a tribunal makes an award of compensation for unfair dismissal…the award shall consist of –*

*(a) A basic award (calculated in accordance with sections 119 to 122 and 126), and*
*(b) A compensatory award (calculated in accordance with sections 123, 124, 124A and 126."*

73. Section 119 of the ERA contains the provisions for calculating a basic award, which shall be done by:

"*(a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,*
*(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and*
*(c) allowing the appropriate amount for each of those years of employment…"*

74. The 'appropriate amount' is set out in section 119(2) of the ERA as follows:

> "*(a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,*
> *(b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and*
> *(c) half a week's pay for a year of employment not within paragraph (a) or (b).*"

75. Section 122(2) of the ERA gives the Tribunal the power to reduce the amount of the basic award, "*Where the tribunal consider 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*".

Unfair dismissal compensatory award

76. Section 123 of the ERA contains the power to make a compensatory award where an employee has been unfairly dismissed, of "*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*".

Uplift for unreasonable non-compliance with the ACAS Code

77. Section 124A of the ERA (Adjustments under the Employment Act 2002) provides that:

> "*Where an award of compensation for unfair dismissal falls to be –*
>
> *(a) reduced or increased under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (effect of failure to comply with Code: adjustment of awards)…*
> *the adjustment shall be in the amount awarded under section 118(1)(b)…."*

78. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("**TULRCA**") gives Employment Tribunals the power to increase or decrease compensation payable to an employee in certain circumstances. It applies to proceedings under any of the jurisdictions listed in Schedule A2, which includes complaints of unfair dismissal.

79. The relevant part of section 207A states as follows:

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

*(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*
*(b) the employer has failed to comply with that Code in relation to that matter, and*
*(c) that failure was unreasonable,*
*the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."*

80. The power to increase compensation by up to 25% applies to unfair dismissal compensatory awards but does not apply to unfair dismissal basic awards.

81. The term "relevant Code of Practice" includes the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) ("**the ACAS Code**") which was produced under the authority given to ACAS by section 199 of TULRCA and subsequently approved by the Secretary of State and by Parliament in accordance with section 200 of TULRCA.

Failure to provide a statement of employment particulars

82. Section 38 of the Employment Act 2002 provides that where an Employment Tribunal makes an award to a worker in relevant proceedings (including unfair dismissal claims) and, when the proceedings started the employer was in breach of its obligation to provide a section 1 statement of employment particulars, the Tribunal must, unless there are exceptional circumstances, increase the amount of the award by two weeks' pay. The Tribunal may if it considers it just and equitable in all the circumstances, increase the award by four weeks' pay.

Contributory conduct

83. Section 123(6) of the ERA states that: -

"*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*."

84. The leading case on contributory conduct is ***Nelson v BBC (No.2) 1980 ICR 110*** in which the Court of Appeal held that, for a Tribunal to make a finding of contributory conduct, three factors must be present:-
    a. There must be conduct which is culpable or blameworthy;
    b. The conduct in question must have caused or contributed to the dismissal; and
    c. It must be just and equitable to reduce the award by the proportion specified.

85. 'Culpable or blameworthy' conduct can include conduct which is 'perverse or foolish', 'bloody-minded' or merely 'unreasonable in all the circumstances' (Nelson v BBC (No.2)).

86. In ***Hollier v Plysu Ltd [1983] IRLR 260*** the EAT said that contribution should be assessed broadly and should generally fall within the following categories: employee wholly to blame (100%); employee largely to blame (75%); employer and employee equally to blame (50%) and employee slightly to blame (25%).

Polkey / no difference arguments

87. When assessing compensation for unfair dismissal, the Tribunal must consider the possibility that the claimant's employment would have come to an end in any event. In ***Polkey v A E Dayton Services Ltd [1998] ICR 142*** the House of Lords held that it is, in most cases, not open to an employer to argue where there are clear procedural failings, that following a different procedure would have made no difference to the outcome (i.e., the employee would still have been dismissed) and that accordingly the dismissal is fair. Their Lordships did however find that when deciding the amount of compensation to be awarded to an employee who has been unfairly dismissed, a deduction can be made if the Tribunal concludes that there is a chance that the employee would have been dismissed anyway had a fair procedure been followed.

88. In ***King and others v Eaton Ltd (No.2) [1998] IRLR 686***, Lord Prosser in the Court of Session stated that the question "*will be one of impression and judgment, so that a tribunal will have to decide whether the unfair departure from what should have happened was of a kind which makes it possible to say, with more or less confidence, that the failure makes no difference, or whether the failure was such that one cannot sensibly reconstruct the world as it might have been.*"

89. In ***Software 2000 Ltd v Andrews and others [2007] ICR 825***, the then President of the EAT, Mr. Justice Elias, reviewed the authorities on ***Polkey***. He summarised those authorities as including the following principles:

    a. In assessing compensation for unfair dismissal, the tribunal will normally have to assess how long the employee would have been employed but for the dismissal;

    b. If the employer argues the claimant would or may have been dismissed had a fair procedure been followed, the tribunal must have regard to any relevant evidence to that effect, even if it involves speculation and a degree of uncertainty; and

c. There will be circumstances where the evidence is too unreliable for the tribunal to reconstruct what might have happened

## Conclusions

Employment status

90. The respondent in this case described the arrangements between the parties as being ones of self-employment. The label placed by one or even both parties on the relationship is not however conclusive. There was no evidence before me to suggest that there had been any discussion between the parties about the nature of the relationship. Rather, the respondent decided unilaterally to categorise the relationship as one of self-employment and the claimant had no option but to go along with that.

91. This is a situation where there was no equality of bargaining position. The claimant was just 16 years old when she started working for the respondent for the first time, and 19 when her second period of work for them started. The terms of the arrangements were dictated entirely by the respondent.

92. It is not sufficient for an employer merely to describe someone as self-employed for them to be self-employed. The Tribunal must consider not just the label assigned to the relationship by the respondent, but the practical arrangements between the parties and whether those were consistent with employee, worker, or self-employed status. That is particularly so in a case such as this where there was no written contract.

Control

93. The respondent specified the place of work, the hours of work, when the claimant worked those hours, and how much she was paid for them. The respondent calculated the payments to the claimant and she was not required to prepare or to submit invoices. It exercised a considerable degree of control over the terms of and the manner in which the contract was performed.

Mutuality of obligation

94. The respondent provided work to the claimant every week over a period of almost three years, and the claimant worked the hours provided over the same period. There was a clear expectation on both sides that the claimant would be provided with work and that she would work the hours provided. The hours were fixed at 14 hours a week and did not change except when the claimant agreed to teach additional classes.

Personal service

95. The claimant provided the services personally – the fact that she was required to have a DBS certificate and to have undergone safeguarding training limited

who else could have provided the services. There was no express right for the claimant to send anyone else in her place to teach her classes. Rather, she was expected to teach them herself. The fact that one in three years the claimant arranged for a colleague to cover a shift for her does not mean that there was a genuine right of substitution. In practice the claimant was expected to and did provide the services herself.

Degree of financial risk

96. It cannot be said in this case that the claimant was in business on her own account. There was no evidence to suggest that the respondent was a client of the claimant, or that the claimant worked elsewhere during the three years that she worked for the respondent.

97. Once she had completed the coaching course in 2017 at her own expense, the claimant took no financial risk when working for the respondent. She was required to take out and pay for her own insurance, but this was an industry requirement imposed by British Gymnastics.

98. The claimant did not provide any of her own equipment and provided her services at the place of work determined by the respondent using the respondent's equipment.

99. Applying the tests in ***Ready Mixed Concrete***:

    14. The claimant did, in this case, agree to provide her own work and skill as a gymnastics coach in return for payment by the respondent;

    15. The claimant did through her actions agree to be subject to the respondent's control. She agreed to their terms as to how the relationship would work, when and where she would work and how she would be paid; and

    16. The other provisions of the contract were, on balance, consistent with it being a contract of service. Although the tax arrangements imposed by the respondent suggested self-employed status, the tax treatment of a relationship is not in itself conclusive on the question of employment status.

100. For these reasons I find that, on balance, the claimant was employed by the respondent. The irreducible minimum of personal service, control and mutuality of obligation was present in the arrangements between the parties.

Unfair dismissal

101. I have no hesitation in this case in finding that the claimant was dismissed by the respondent. It is clear from the text message sent by Mrs Eves to the claimant on 6 August 2022 that Mrs Eves brough the relationship between the parties to an end. Although Mrs Eves at the time considered the claimant to be self-employed, by sending this text message she was dismissing the claimant.

The claimant was therefore dismissed on 6 August 2022 without notice or any payment in lieu of notice.

102. I have then gone on to consider what was the reason for the claimant's dismissal. It is of course for the respondent to show the reason for dismissal, and that it was one of the potentially fair reasons set out in the Employment Rights Act 1996.

103. The respondent describes the reason for dismissal, in essence, as being a combination of conduct and redundancy. As a result of the behaviour of the claimant and her friend, Hayley, sixteen squad gymnasts left the respondent's club to join a competitor, and this caused a large drop in the respondent's income. The label placed by the respondent on the reason for dismissal is not binding on the Tribunal, and it is open for me to find that the real reason for dismissal was not one identified by the respondent.

104. Based on the evidence before me, it is my view that the principal reason for dismissal in this case was the claimant's conduct. The claimant's behaviour in criticising the respondent, in praising a competitor club and in encouraging children to leave the respondent and join the other club was clearly misconduct. The drop in income was a result of her behaviour and that of Hayley.

105. Although there was no evidence before me of the respondent having any disciplinary rules setting out what was unacceptable behaviour, that in itself does not prevent the claimant's behaviour from amounting to misconduct. This is a very small employer run by a wife and husband, and there was no evidence before me to suggest that they had any HR or employment law advice. The size and administrative resources of the respondent were extremely limited.

106. There are some categories of behaviour which are so egregious that they do not need to be written down in disciplinary rules in order to amount to misconduct. What the claimant did on this occasion falls into that category. It is in my view clear from the evidence of Mrs Eves and of the parents, that the claimant told children that she believed Retford club to be better than the respondent and encouraged them to try out that club. As a result of her behaviour and that of her friend and former colleague Hayley, approximately half of the respondent's competitive squad gymnasts left the respondent, and the respondent suffered a loss of revenue of nearly £3,000 a month.

107. It is implicit in any employment relationship that an employee will not actively seek to damage the employer's business. Unfortunately, that is just what the claimant did on this occasion, and that was why she was dismissed.

108. I have considered whether the dismissal could more properly be categorised as being by reason of redundancy, given that neither the claimant nor Hayley were replaced, and that there was therefore a reduction in the number of coaches engaged by the respondent.

109. On balance however, I find that the predominant and principal cause for the dismissal was the claimant's conduct. I was influenced in reaching this decision by Mrs Eves' evidence that the respondent had rebuilt its business after Covid, and by the claimant's evidence that the club had been closed during Covid. There was no evidence before me to suggest that the respondent had taken steps to terminate the claimant's employment during lockdown or when class numbers were lower due to Covid, rather it was when the respondent discovered the claimant's behaviour that it decided to dismiss her.

110. In addition, Mrs Eves had to increase the number of hours that she (and subsequently her daughter) worked teaching classes, which further supports the proposition that the real reason for dismissal was conduct rather than redundancy.

111. I therefore find that the claimant was dismissed due to her conduct, which is a potentially fair reason for dismissal.

112. I have then gone on to consider the ***Burchell*** tests, the procedure that was followed by the respondent and whether dismissal was within the range of reasonable responses.

113. The first limb of the ***Burchell*** test is whether the respondent had a genuine belief in the claimant's guilt. I find, based on the evidence of Mrs Eves, that it did. Not just the senior coach, Leigh Anne Lee, but also parents and children at the academy complained about the claimant's behaviour. Their complaints were consistent with each other. They all said that the claimant had been encouraging children to leave the respondent and join another club, where the claimant believed the facilities were better. I therefor find that the respondent's belief in the claimant's guilt was genuine.

114. I also find, on balance, that the belief was reasonably held. I am concerned that there was no discussion with the claimant before Mrs Eves formed the view that she did but based on the weight of the evidence before her I am satisfied that she had reasonable grounds for believing what she was told. The evidence came from a number of different sources – a senior coach, parents, and students. None of those involved had anything to gain from making up stories about the claimant's behaviour, and there was no reason for Mrs Eves to doubt what they were telling her.

115. It cannot however be said that there was a reasonable investigation carried out by the respondent. There was, quite simply, no investigation whatsoever. Mrs Eves listened to what she was told by the senior coach, the parents, and the children, but did not speak to the claimant. The respondent therefore fails on the third limb of the ***Burchell*** test, as it did not carry out a reasonable investigation.

116. There was also a total lack of any fair procedure followed by the respondent. These was not even an attempt at a disciplinary or redundancy process, and no compliance whatsoever with the ACAS Code of Practice on disciplinary and

grievance matters. The claimant was not told of the allegations against her, was not shown any evidence, was not invited to any meetings and did not have the opportunity to put forward her version of events. She was not offered the right of appeal. Rather she was dismissed by a simple text message after almost 3 years' employment.

117. The dismissal of the claimant was therefore unfair because the claimant did not carry out a reasonable (or indeed any) investigation and did not follow a fair procedure. In light of the claimant's conduct however, it cannot in my view be said that dismissal as a sanction was outside the range of reasonable responses available to the respondent. The claimant damaged the respondent's business through her behaviour and in those circumstances, dismissal was a reasonable response.

118. For the reasons set out above however I find that the claimant was unfairly dismissed.

Remedy

119. The claimant is not seeking reinstatement or re-engagement, so the remedy that falls to be considered is compensation.

Contributory conduct

120. I have considered whether it can be said that the claimant caused or contributed to her dismissal, such that it would be appropriate to make a deduction from the basic and/or the compensatory award to reflect any contributory conduct.

121. Applying the tests in ***Nelson v BBC***, I have no hesitation in finding that the claimant's conduct, in encouraging children to leave the respondent and join a competitor club, was culpable and blameworthy. I also find that it was the claimant's behaviour that caused her to be dismissed – for the same reasons as I have found that the dismissal was because of her conduct.

122. This is a case, in my view, in which it is appropriate to make a deduction for contributory conduct. Adopting the principles set out in ***Hollier v Plysu***, I find that a deduction of 75% is appropriate. The claimant in this case was largely to blame for her dismissal. It cannot be said that the respondent and claimant were equally to blame – it was the claimant's behaviour that led to her being dismissed.

123. Both the basic and the compensatory awards should therefore be reduced by 75% to reflect the contributory conduct of the claimant.

Polkey / no difference

124. The procedural failings in this case were significant. To put it simply, there was no attempt at a fair procedure – the claimant was dismissed by a text message.

125. During the hearing, I asked both parties to address me on the question of whether following a fair procedure would have resulted in a different outcome. The claimant's submissions on this question were resoundingly clear – the claimant did not believe that following a different procedure would have resulted in a different outcome.

126. That is a submission that I agree with. Given the nature of the claimant's misconduct, and the damage that it caused to the respondent's business, I am satisfied that even had a proper disciplinary process been followed, the claimant would have been dismissed.

127. I have therefore considered how long the claimant would have been employed for had a fair procedure been followed. It seems to me that a period of two weeks would be more than sufficient for the respondent to investigate the misconduct and convene a disciplinary hearing.

128. I have therefore decided to limit the period for which the claimant should be compensated to two weeks.

Uplift for failure to follow the ACAS Code of Practice

129. There was in this case a clear failure to follow the ACAS Code of Practice. The claimant, in submissions, asked for a 10% uplift in compensation to reflect this. In the circumstances I consider this to be a reasonable uplift. I could have awarded more given the lack of any compliance with the ACAS Code in dismissing the claimant but take into account the fact that the respondent is a small employer with very limited resources, that did not deliberately set out to flout the ACAS Code. Rather, its failure to follow the Code was due to ignorance on its part.

130. I therefore find that there should be an uplift of 10% to the compensatory award to reflect the fact that the respondent failed unreasonably to comply with the ACAS Code.

Failure to provide a section 1 statement of employment particulars

131. The respondent accepted that it had not provided the claimant with a contract of employment that complied with section 1 of the ERA. The reason for that was that it considered the claimant to be self-employed.

132. At the time these proceedings were commenced, the respondent was therefore in breach of its obligation to provide the claimant with a statement of employment particulars. There was no evidence before me to suggest that this

failure was due to 'exceptional circumstances' such that no award of compensation should be made.

133. It is in my view appropriate to make an award of two weeks' pay in respect of the failure by the respondent to provide the claimant with a statement of employment particulars.

Basic Award

134. The claimant's continuous period of employment started on 8 August 2019 and ended on 6 August 2022. The claimant had two complete years of service when she was dismissed.

135. Although a period of continuous service would normally be extended by the statutory period of notice contained within section 86 of the ERA, which in the claimant's case would be one week, section 86(6) provides that:

"*This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party.*"

136. This is a case in which the conduct of the claimant was such that the respondent was entitled to dismiss her without notice. As a result, her right to statutory notice under section 86 of the ERA does not apply, and there is no extension to her continuous period of employment by virtue of section 86.

137. The claimant's gross weekly pay was £128.52. She had two complete years' service with the respondent and was aged 22 when she was dismissed. The appropriate multiplier for the purposes of calculating the basic award is 0.5 weeks' pay per year of service.

138. This gives a basic award of £128.52, to which a reduction of 75% is applied to reflect the contributory conduct of the claimant.

139. The basic award payable to the claimant is therefore **£32.13**.

Compensatory award

140. The period for which the claimant is to be compensated is limited to the two weeks that it would have taken to follow a fair dismissal procedure. The claimant's weekly earnings were £128.52, so the total loss suffered by the claimant as a result of the dismissal is £257.04.

141. I have applied an uplift of 10% to this sum for the respondent's failure to follow the ACAS Code. This takes the loss to £282.74.

142. I have added to that sum two weeks' pay (£257.04) for the respondent's failure to provide the claimant with a statement of employment particulars. This gives a total of £539.78.

143. That sum is then reduced by 75% to reflect the contributory conduct of the claimant, resulting in a total compensatory award of **£134.95**.

Total award

144. The total award to the claimant, combining the basic and compensatory awards, is **£167.08** and the respondent is ordered to pay that sum to the claimant.

Employment Judge Ayre

Date: 8th August 2023

JUDGMENT SENT TO THE PARTIES ON

15 August 2023

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FOR THE TRIBUNAL OFFICE

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