



EMPLOYMENT TRIBUNALS

Claimant: Miss Lisa Wilkinson

Respondent: Miss Gurshital Gill

HELD AT: Watford (Via CVP) **ON:** 19th & 20th July 2023

BEFORE: Employment Judge Anderson
(sitting alone)

REPRESENTATION:

Claimant: In Person

Respondent: In Person, Assisted by Ms Sharan Gill.

JUDGMENT

1. The Claimant's complaint of unfair dismissal is well-founded and succeeds.
2. The Respondent is ordered to pay the Claimant the following sums:

a. Basic Award	£1302.00
b. Compensatory Award	£234.43
Total	<u>£1536.43</u>
3. The prescribed period in respect of the compensatory award is 19th September 2022 to 25th September 2022.
4. The claim of unpaid holiday pay is not well founded and is dismissed.

Employment Judge Anderson

26th July 2023

JUDGMENT SENT TO THE PARTIES ON

3 September 2023

FOR THE TRIBUNAL OFFICE: GDJ

REASONS

Introduction

1. The Claimant, Miss Lisa Wilkinson, claims unfair dismissal and unpaid holiday pay against her former employer Miss Gurshital Gill.
2. This has not been an easy case for the Claimant, the Respondent or the Tribunal.
3. At the outset, I identified the following issues to be determined. I explained these to the parties and asked them to write them down as these would be the points that we would focus on.
4. In respect of unfair dismissal liability:
 - a. Is the Respondent able to prove that the reason or principal reason for the dismissal of the Claimant was for a potentially fair reason?
 - b. Did the Respondent undertake such investigation as was reasonable in all the circumstances of the case?

- c. Did the Respondent form a belief based upon reasonable grounds that the Claimant did the acts complained of?
- d. Was the decision to dismiss within the range of reasonable responses open to the Respondent?
- e. Did the Respondent follow a fair procedure in dismissing the Claimant?

5. In respect of unfair dismissal remedy:

- a. What are the Claimant's losses?
- b. Did the Claimant contribute to her dismissal by engaging in culpable and blameworthy conduct? If so, what percentage reductions are appropriate?
- c. Would a fair dismissal have occurred in any event or at some point in the future?
- d. Has the Claimant taken reasonable steps to mitigate her losses? If not, by what period would the Claimant be expected to obtain work?
- e. Was there an unreasonable failure to follow the ACAS Code? If so, by what percentage should any compensatory award be altered?

6. In respect of holiday pay:

- a. What is the holiday year?
- b. What is the Claimant's leave entitlement?
- c. What leave was taken in the year?
- d. What leave is outstanding on termination?

7. It was agreed that I would deal with all of these questions at once. i.e. consider liability and remedy at the same time.

Procedural Matters

8. Neither party was represented. The Respondent asked that her sister (Sharan Gill) represent her during the hearing, though the Respondent made a closing submission on her own behalf.

9. This case is a good example of the relative informality of the Tribunal system trying to do its best to ensure that all parties have access to justice and to adapt and make do where appropriate. The hearing was allocated to CVP. The parties had attempted to comply with the spirit of the directions from the Tribunal, but with the best will in the world this still led to difficulties. The Claimant supplied a witness statement and some documents on her own behalf. The Respondent supplied a witness statement (broken up into different pages) together with a witness statement from her sister, Sharan Gill and a bundle of documents. The documents supplied contained a number of omissions, most notably the contract of employment which both parties then produced differing versions of.

10. There was also an issue with the Tribunal viewing CCTV. The files were large and were not in a format that could be viewed by Tribunal staff or the Judge. The hearing was initially listed to be in person and flash drives were prepared. Upon it being converted to CVP, this caused the additional technical difficulty. I asked that this was resolved by 10.00am on day two and the Respondent was able to send through one element of the CCTV footage, that from the 15th August 2022. I make my findings regarding this CCTV footage below.

11. The Respondent is disabled. Her condition is Secondary Progressive MS. A number of adjustments were appropriate. Her sister was permitted to be on

screen with her and turn pages for her. We also took extended breaks, including an extended lunch period on day one and finishing the hearing early on day one.

12. Ms Sharan Gill cares for the Claimant. She is her sister and it is clear that she is protective of her as a vulnerable individual. Sharan Gill was permitted to assist the Respondent by moving bundle pages or locating documents. However, on a couple of occasions I did have to request that she refrain from assisting the Respondent with her answers or answering on her behalf.

13. At the outset of the case, with both parties unrepresented, I went through the issues to be determined and I also discussed the procedure to be followed. With the agreement of both parties, I adopted a more informal, inquisitorial approach than I otherwise would. The specifics of this were that each witness still gave sworn evidence but that the opposing party would then try and formulate some form of question which I would then try and turn into a clearer question to enable an answer. The most common effect of this was that I would end up breaking down a question with several elements into separate, manageable questions. In my view, this approach benefited the proceedings significantly.

14. In respect of the above, I was also influenced by the nature of this employment relationship. This was a carer bringing proceedings against someone that she used to provide intimate care for who had in turn dismissed her. There was clearly a lot of upset on both sides. Whilst not a familial relationship, it did have elements of that and I wanted to ensure that the proceedings were not overly stressful for either party. By ensuring that matters went through myself, this to a certain extent reduced the tension between the parties. My hope is that the

hearing went some way to achieving a less stressful hearing or even if it did not, that it was still better than the alternatives.

Findings of Fact

15. I made the following findings of fact on the balance of probabilities.
16. The Claimant commenced employment on the 15th January 2018. She was dismissed on the 22nd September 2022 and given four weeks notice with an effective date of termination of 16th September 2022.
17. The Claimant had a written contract of employment, signed by the parties on the 16th January 2018.
18. The Claimant's role was to care for the Respondent. The Respondent's witness statements identify that she has been living with progressive Multiple Sclerosis since the age of 17. She has limited mobility in both of her arms and legs. She uses an electric wheelchair and operates devices with voice control.
19. The Respondent's position is that the Claimant had a prior verbal warning. The Claimant's position is that this was not correct and she had a clean disciplinary history. Based on the events as described to me, I find that there was a conversation with the Claimant within the first year or two of her employment with regard to timekeeping in which it which Sharan Gill spoke to the Claimant. I do not find that the phrase 'verbal warning' was issued or that the Claimant would understand the conversation to amount to a warning. In any event, I consider this to be of tangential relevance to the overall case.

20. During the course of her employment, on three occasions, the Respondent would transfer money to the Claimant. The total amount of these sums was around £1000. The Claimant's position is that these were in effect a form of bonus, for working through covid or other difficult circumstances. The Respondent says that she felt sorry for the Claimant and her financial position and would transfer money because she did not want the Claimant to lose her home or have her life disrupted so that she would lose her as a carer. These sums were in addition to other bonuses that were paid to the Claimant.
21. Other than the points mentioned above, the Claimant's employment history with the Respondent was unremarkable. The Claimant was close with the Respondent personally in the manner that you would expect between an individual carer and the cared for person over a long period of time.
22. On the 15th August 2022, the Claimant attended work. The Claimant's case is that she was injured whilst assisting the Respondent.
23. On the 16th August 2022, the Claimant says that she was in increased pain and took painkillers in order to attend work. She says that she told the Respondent that she was injured and that it happened at work. The Respondent denies this.
24. After leaving work in the morning, there was a text exchange between the Claimant and Sharan Gill. This records Ms Gill covering the care for that afternoon and the Claimant informing her that she would not be in tomorrow. The Claimant references seeking to obtain painkillers and the level of pain that she is in.

25. The Claimant then was off sick with the back injury from the 17th August 2022.
26. During the week, the Claimant spoke to her GP and was referred to a Physio whom she also spoke to. At no point was she physically examined.
27. There is some medical evidence before me regarding the back injury and I have the evidence of the Claimant herself. It is right to say that the medical evidence could be more detailed and as I note above, there was the lack of physical examination and therefore any medical evidence is self-reporting. Ultimately, I find as a fact that the Claimant did injure her back. Other than the lack of best evidence being available to the Tribunal, the Claimant's oral and written evidence regarding this is accurate.
28. There is a further text with Sharan Gill referencing painkillers being prescribed and the Doctor telling her to rest up for a few days and also refer for urgent physio.
29. The reply from Ms Gill is that she found the message confusing, though on the face of it, the message is clear. The claimant replies on the 18th August confirming that the Doctor has told her to rest up for a few days and not to lift.
30. This appears to prompt Ms Sharan Gills email of the 18th October to the Claimant setting out a number of points re annual leave and sickness absence. This was somewhat out of the blue in the circumstances and wording used, but in isolation it is a communication that someone acting on behalf of an employer

can send to an employee, though some of the tone given the immediate situation could be open to question.

31. The content of the 18th August email prompts a reply from the Claimant on the 20th August 2022, a Saturday. That email includes the following

“I am emailing in response to your email dated 18th August 2022 regarding my sickness ie back injury, which unfortunately I incurred whilst at work hoisting and lifting your sister on 15th August 2022.”

32. Her email also disputes a number of factual points contained within the email regarding her leave. The email includes the further statement relating to the position on leave/sickness “I have received advice from ACAS today and you had no right to do that.”

33. The assertion in the email of 20th August 2022 that the injury occurred at work, together with the Claimant disputing the contents of Sharan Gill’s email appears to be the root cause of all that followed. Whether in the mind of the Respondent herself or in particular Ms Sharan Gill, everything that then occurs flows from this.

34. On 22nd August 2022, the Claimant received an email dismissing her. This document should be read in full. However, the following points are summarised:

- a. Allegation 1 - Capability – You are no longer capable of doing the job due to your back injury which occurred in your personal time.
- b. Allegation 2 - Conduct – You made a false allegation of hurting your back whilst hoisting Shetal on Monday.
- c. Allegation 3 - Conduct – You made a second false allegation that you were wearing a support belt when you arrived on Tuesday.
- d. Allegation 4 -Capability – At the start of your employment I requested several times for your driving licence so you be insured Shetal's adapted vehicle.
- e. Allegation 5 - Conduct – I have recently learnt Shetal has given you sums of money.
- f. Allegation 6 -Conduct – Your start time is 9am and 12.30pm. It is very rare that you arrive on time and you have never apologised for being late.

35. The letter goes on to provide the Claimant with 4 weeks notice and an end date of 16th September 2016.

36. The letter does not provide the Claimant with a right of appeal. Nonetheless, the Claimant wrote asking for evidence to be gathered, and provided a timescale of 30 days. When asked where the 30 days suggestion came from, the Claimant said that a friend told her this.

37. On the 26th August 2022, Sharan Gill emails the Claimant referencing the relationship and including the statement "Therefore, we are respectful asking you to accept the termination." This email also references contacting the

Council and reporting the money issue to the Police. The inference appears to be that the Claimant accept her termination, not challenge it further or the Police will become involved.

38. The Claimant sends an email explicitly appealing her dismissal dated 31st August 2022. In the appeal letter she seeks to respond to each of the allegations.

39. Ultimately, there is no appeal meeting or appeal decision. The Claimant disputes that Sharan Gill should hear any appeal given her significant prior involvement and further disputes attending the Respondents home. The latter requirement is removed as a requirement, but ultimately there is no appeal outcome.

40. Having heard from the Respondent I find that the Respondent was immovable in her position that she did not trust the Claimant any more. The Respondent gave uncontradicted evidence that she has not employed anyone else since the Claimant's dismissal because she no longer wishes to be an employer or placed in this position again. Her evidence was that she just cannot trust people to be her carer and now relies upon family only.

41. The Respondent's evidence also states that her mental health was good but that the present stressful situation has resulted in her being prescribed with medication to help her with anxiety and sleep.

The Law

42. The Right not to be unfairly dismissed is contained within s.94 Employment Rights Act 1996.

43. In the present case, it is agreed that the Claimant had in excess of two years continuous service and that she had been dismissed by the Respondent. It is for the Respondent to prove that the reason or principal reason for the dismissal was one of those listed within s.92(b) Employment Rights Act 1996. In this particular case, the Respondent relies upon conduct as the reason for dismissal.

44. A reason for dismissal is a set of facts or belief held by the employer which cause them to dismiss the employee: Abernethy v Mott Hay and Anderson [1974] IRLR 213 per Cairns LJ.

45. If the Respondent does prove a potentially fair reason for dismissal, then reasonableness under s.98(4) ERA 1996 must be considered. The classic formulation of a conduct case based on BHS v Burchell [1978] IRLR 379 requires the Tribunal to consider a) whether the Respondent formed a belief that the employee had committed the act of misconduct and whether that belief was held on reasonable grounds b) whether the Respondent had undertaken such investigation as was reasonable in the circumstances of the case and c) whether the decision to dismiss was within the range of reasonable responses open to an employer.

46. It is also necessary to look at whether the employer followed a fair procedure in dismissing the Claimant.
47. The range of reasonable responses test applies throughout the Burchell test. The leading authority of Sainsbury's Supermarket v Hitt [2003] IRLR makes it clear that I must apply the range of reasonable responses test to the investigation and not substitute my own view as to what a reasonable investigation would have been.
48. The burden of proof for the purposes of s.98(4) is neutral.
49. Key to understanding the Burchell test is the concept of a range of reasonable responses. It is not for the Tribunal to substitute its own view for that of the Respondent. Rather the Tribunal must answer the questions posed from the perspective of whether or not the actions taken fall within the range of reasonable responses open to an employer, having regard to the size of the undertaking and the administrative resources available to it.
50. When considering compensation and whether a fair dismissal could occur in any event, I must remove defects which led to the dismissal being unfair and ask myself the question whether a fair dismissal could have occurred in any event, including if for a different reason. In particular, I must ask what this particular employer would do, with the defects removed.
51. Some Other substantial Reason (SOSR) is a potentially fair reason contained within the Employment Rights Act 1996. There are two stages. First, the

employer must establish the SOSR reason which could justify the dismissal and secondly, the decision to dismiss must be reasonable for s.98(4) Employment Rights Act 1996 purposes.

52. SOSR is a residual category of potentially fair reasons for dismissal. Its purpose is to catch some cases that due to the nature of employment do not fit neatly within the other categories but are sufficiently substantial so as to be of the type that could justify dismissal.

53. In terms of holiday pay, this is governed by the provisions of the Working Time Regulations 1998. I have already identified the key questions above.

Conclusions

54. At the outset of the conclusions, I begin by acknowledging the two competing forces here. For the Claimant, she has employment rights, provided for her by statute. She depends on work for her income and her family. For the Respondent, she is a disabled person, dependent on the care of others. She is as small (or 'micro') an employer as it is possible to get. She is not running a business, she is not making profit, she has limited resources and uses them to provide for her care. In addition, I also got the sense of a general naivety on the part of the Respondent and Sharan Gill when it comes to employment law obligations.

55. The nature of employment law offers a degree of flexibility. It must do so in order to remain credible. It is why the word 'reasonable', an inherently broad word is

used so frequently. The two competing forces above need to be considered throughout these conclusions.

56. Starting with the claim of unfair dismissal, it is for the Respondent to prove that the Claimant was dismissed for a potentially fair reason. The email of 22nd August 2022 explicitly references both conduct and capability.

57. In the present case, I find that the reason for the dismissal was conduct. Conduct is what the Respondent had in mind when taking the decision to dismiss.

58. I do not find that the reason for dismissal was capability, nor do I find it was a mix of capability and conduct. The reason for this is that it is apparent that capability has been used in the email of the 22nd August 2022 as an incorrect label to apply to matters that the Respondent in reality considers to be conduct and can only be properly labelled as conduct. I do not consider allegation 1 to be the reason for the dismissal, the adverse and pejorative other reasons are why the dismissal is occurring.

59. In addition, the Claimant was not dismissed because of the fact that she was absent from work due to ill-health or alleged ill health. These would have been capability points.

60. The investigation was limited at best. Nothing was put to the Claimant prior to her dismissal. The reality is that a view was formed of the Claimant which then leads to the dismissal letter.

61. Bearing in mind that this is a micro employer, it is right to say that the Respondent must be given significant procedural latitude. However, even allowing for that, there is no genuine fact finding exercise that can be identified beyond looking at CCTV images in order for the investigation to fall within the range of reasonable responses.

62. In relation to allegation 1, there is no capability process, understanding of the medical position, considering future prognosis.

63. In relation to allegations 2 and 3, again there was no process beyond looking at CCTV. One of the two CCTV's were available to the Tribunal. However, in any event they are of limited value. A back complaint may not be ascertainable via CCTV. A reasonable investigation would have put the allegations to the Claimant and considered her response with an open mind. That response could have led to other potential evidence. Basic medical evidence may need to have been obtained.

64. There is a dispute of fact whether the Claimant informed the Respondent on the 16th as to the cause of her accident. There is significant scope for misunderstanding here as to whether a passing reference to why the injury occurred was made or not. This possibility should at least have been considered. However, even if the Respondent is right in terms of an assertion

that the first time an explicit reference was made to the injury occurring at work was in the email on the 20th August, that is still a matter that requires investigation. Dishonesty or fraud doesn't automatically follow. It should not be labelled dishonesty without taking time to put the allegation, gather and consider evidence and consider that matter once emotions have calmed.

65. In relation to allegation 4 – this is a historical issue over the driving licence.

There is no prior investigation or an explanation as to why it is now being raised.

66. Allegation 5 is potentially the most serious allegation. I sought to establish why it was included in this letter if it was a fact that the Respondent was already aware of. It does appear to be a fact that is already known to the Respondent but is added once the suggestion occurs that the accident happened at work. It is not put to the Claimant for comment prior to dismissal.

67. Allegation 6 is a generalised allegation of lateness. No specifics are provided.

The Claimant is given no opportunity to comment prior to dismissal.

68. Even if the Respondent is not held to the standard of holding a separate investigatory and disciplinary hearing, there was no disciplinary hearing in any form. One of the most fundamental elements of procedural fairness is putting something to an employee before a decision is taken.

69. Indeed, I was concerned and sought to explore in the case how the email of the 22nd August 2022 came about at all. The email of the 18th August and its timing with hindsight could perhaps be seen as indicating that there was an issue in

the Respondent or her sisters mind. However, it is apparent that it is the email of the 20th that then leads to the dismissal email of the 22nd. In the 20th email, the Claimant feels the need to contradict the facts asserted in the email of the 18th and also references the accident happening at work.

70. Bearing in mind the need to apply the range of reasonable responses to the investigation, the lack of a basic investigatory process renders the dismissal unfair.

71. I accept that the Respondent had a belief in the allegations against the Claimant. However, I am unable to find that the Respondent held that belief on reasonable grounds. Much of the basic evidence has not been collated. The reality is that the Respondent (and Ms Sharan Gill) leapt to a conclusion without the evidence. Even allowing for the fact that the Respondent is a micro-employer, I cannot make findings as to the reasonableness of the Respondents belief on evidence that is not there. This is not a case in which the belief could stem from allegations which are admitted. They are in dispute.

72. The Respondents decision to dismiss bears all the hallmarks of a decision taken with multiple other matters then added in in order to bolster that decision. It was pre-judged. The decision to dismiss was outside the band of reasonable responses, even after making all of the necessary allowances for the limited resources of the Respondent as a micro employer.

73. In effect, I find that at some point prior to the 22nd August, the Respondent and her family formed the view that the Claimant was to be dismissed. They suddenly viewed the Claimant as a nefarious and fraudulent individual.

74. For the sake of completeness, I do not accept that this was a rare case in respect of which the Respondent is entitled to dismiss without following a procedure and there still be a finding of fair dismissal. At the very least, the allegations should be put to the Claimant, and she should be given the opportunity to comment on those allegations prior to a decision to dismiss being taken. That did not occur.

75. In these circumstances, beyond the reason for dismissal, on each element of the Burchell test, the dismissal can be said to be unfair.

76. I now move on to the issue of remedy.

77. This is not a case in which it is appropriate to order reinstatement or re-engagement. It would be wrong to impose the Claimant's employment on the Respondent in a care setting. In any event, the ET 1 does not seek reinstatement or re-engagement.

78. It is at this stage I must consider the Respondents complete loss of trust in the Claimant. I remind myself that this is an individual carer. It is as close and intimate an employment relationship as it is possible to conceive. The Respondent was adamant on this point. It is her genuine belief. Even if a

process was followed in dismissing the Claimant, I find that the Respondent would have remained immovable in her view.

79. I find that the loss of trust in the Claimant would be sufficient to amount to 'Some Other Substantial Reason'. This is because of the unique employment relationship between carer and the person being cared for. All employment relationships must have trust and confidence in order to successfully exist, but this relationship is one step further. It would be impossible for the Respondent to consent to care from an individual that she did not trust.

80. Even if that lack of trust were to be wholly irrational, that doesn't alter the state of affairs whereby somebody must consent to the person who is providing care for them. If I were to decide otherwise, I would effectively be holding that as a matter of law the Respondent was required to receive intimate care from an individual she did not trust and did not consent to providing that care. This principle of consent to care is in my view fundamental.

81. My finding therefore is that notwithstanding all of the defects, a fair dismissal could have occurred in any event, albeit for a different reason. To break it down into the necessary two stages, the dismissal would be by reason of SOSR, namely the Respondent's lack of trust in the Claimant and would be reasonable for s.98(4) ERA 1996 purposes given all the circumstances of the case, most particularly the fact that this was a care relationship, a micro employer, with limited resources and no possibility of redeployment and the principle that the Respondent must consent to receive intimate care from an individual. I would note that s.98(4) ERA 1996 explicitly references taking the size of the employer

into account. In these circumstances, it would be reasonable for this employer to treat the loss of trust as being sufficient reason for dismissing the employee.

82. I am aware that this approach has the potential to appear to be overly harsh to a Claimant in respect of whom I have attributed no blame. I have carefully considered this and considered the competing principles. The Claimant does have employment rights. Those rights are reflected in a finding of unfair dismissal. However, this is not employment in the standard sense, for example in manufacturing or retail. It is the particular and intimate nature of the care relationship, founded on the principle of consent that leads to this conclusion, once all matters have been carefully weighed.

83. I am also aware that assertions such as a loss of trust must be treated with particular care. They are all too readily asserted by Respondent's who view this as a potential way of limiting their liability. (c.f. Leach v Ofcom [2012] IRLR 839 and McFarlane v Relate Avon Ltd [2010] IRLR 872). This is not such a case. Firstly, given my findings regarding naivety, the Respondent does not have the legal knowledge or forethought to manufacture such facts and Secondly, I am also clear that this is the Respondent's genuinely held belief.

84. The absence of blame still does not prevent a fair SOSR dismissal. SOSR cases can encompass personality clashes, irreconcilable differences, loss of trust and confidence, pressure from third parties and other non culpable scenarios.

85. I consider that in this alternative scenario, it would have taken around a further week to follow the basics of a fair process. As a micro employer, the Respondent would not be held to a high procedural standard and would only need to complete the basics of a fair process. Such a process would not take long. The compensatory award is therefore £213.12, (one week net pay) uplifted by 10% to reflect the unreasonable failure to follow the ACAS Code, resulting in a total of £234.43.

86. I uplift by 10% for the following reasons. Firstly, there is more than one breach. There is little by way of an investigation and no disciplinary hearing. There is some fault on both sides in terms of the appeal process, but ultimately, the appeal should be offered in the dismissal letter and then a decision should follow at some point. In contrast, the Respondent was naïve as to her obligations and was a micro employer in the sense that I have already described above.

87. The Claimant was paid notice to the 16th September 2022. Therefore, the prescribed period is the 19th September 2022 to 25th September 2022, which represents a further week covering the period of the compensatory award.

88. In terms of the basic award, I do not reduce this by reason of contributory fault. I am not able to find that the Respondent has been able to prove culpable and blameworthy conduct on the part of the Claimant. In respect of allegation 5, I recognise that the fact of the money being given by the Respondent to the Claimant is a known fact. At the same time, the Respondent is an adult with capacity and aware of her actions throughout. It has only been labelled as

misconduct following the dispute regarding the Claimant's accident. Therefore, whilst I have the fact before me, it is still for the Respondent to prove that it is culpable and blameworthy. I do not consider that the Respondent has placed that evidence before me. In terms of the other allegations, none of those allegations are made out on the balance of probabilities and none are culpable and blameworthy. They all bear the hallmark of being allegations freely thrown at the Claimant once this dispute over an accident at work has arisen. To summarise:

- a. Allegation 1 is not culpable and blameworthy conduct. It is absence from work due to ill health.
- b. Allegations 2 & 3 are not established on the facts. It is more likely than not that the Claimant injured herself at work given the timing of her injury. The Respondent has no evidential basis for asserting that this amounts to gross misconduct.
- c. Allegations 4 & 6 are makeweight allegations. Allegation 4 is not established on the facts and Allegation 6 was alleged in general terms at best. They did not contribute to the dismissal.

89. Given my findings above, it is not necessary to address the issue of mitigation.

However, for the sake of completeness, I record that the Claimant's evidence was that she recovered from her back complaint roughly around mid-October. However, she says that the impact of the Respondents actions on her mental health were such that she became unfit to work due to anxiety and depression for which she receives ongoing treatment. Her Universal Credit was amended

to include PIP elements as a result. The Claimant has therefore not applied for jobs due to her mental health.

90. It is possible that the Respondents actions caused the Claimant's mental ill health. However, the evidence before me was incomplete and I do not make a finding of causation between the actions of the Respondent and the Claimant's long term ill health. There are other existing stress factors in the Claimant's life, sadly bereavement for example. I had the fact of the wording of the fit note changing and the Claimant's own assertions, but I did not have wider medical evidence. The cause of the Claimant's ill health is material to both the period of loss and whether the Claimant has taken reasonable steps to mitigate. (c.f. Dignity Funerals Ltd v Bruce [2005] IRLR 189).

91. The basic award is based upon a gross weekly pay of £217.00 x 1.5 x 4 = £1302.00.

92. If I am wrong in finding that there was no contributory fault, then unlike the compensatory award, I have a discretion as to whether or not to reduce the basic award. In the alternative, I would have exercised the discretion in favour of not reducing the basic award. The Claimant has been unfairly dismissed and given my findings in respect of the compensatory award, it would be unduly harsh to reduce the basic award in circumstances where the compensatory award has been significantly curtailed.

93. In terms of the holiday pay claim, the Claimant bears the burden of proof in proving her claim. I find that the holiday year started on the 15th January as per

the signed contract that I have seen. The Claimant was dismissed on 22nd August 2022. Based upon the calculations in the bundle and accepting the evidence of the Respondents as to the leave taken by the Claimant, I find that the Claimant used up her accrued holiday entitlement in 2022, taking into account the additional bank holiday due to the Queen's Jubilee, which the Claimant did not work and was paid for. The fact of the Jubilee did not add to the Claimant's overall entitlement.

94. Following my oral Judgment, both parties requested written reasons and I have therefore provided them as promptly as possible.

Employment Judge Anderson

26th July 2023

Sent to the parties 3 September 2023
GDJ