EMPLOYMENT TRIBUNALS

Claimant: Miss K Johnson

Respondent: Department for Work & Pensions

Heard at: London South Croydon in public by CVP

On: 17 March 2023

Before: Employment Judge Tsamados
With members: Ms N Murphy
Mr N Westwood

Representation

Claimant: In person
Respondent: Ms N Ling, Counsel

RESERVED REMEDY JUDGMENT

The **unanimous** judgment of the Employment Tribunal is as follows:

The Claimant is awarded compensatory of £2,263.52 in respect of her complaint of unfair dismissal. She is not awarded any damages for wrongful dismissal.

REASONS

Background

1. This is the remedy hearing following on from our Reserved Judgment and Reasons on liability (the "Liability Judgment") which was sent to the parties on 18 August 2022 in which we found that the claimant was unfairly and wrongfully dismissed.

2. Paragraph 299 of the Reasons indicated that the matter would be listed for a remedy hearing for one day to address those matters set out at (6) (xxvii) of the List of Issues. The remedy hearing was to be listed on the first available

date 10 weeks after the Liability Judgment was sent to the parties. The parties were directed to notify the Tribunal within 5 weeks of the date on which the Liability Judgment was sent to them if they required a remedy hearing. That paragraph further indicated that at this point the Tribunal would issue Case Management Orders to prepare the matter for the remedy hearing.

3. A number of attempts were made to set a date for the remedy hearing. It was initially listed for 21 December 2022 and Case Management Orders were sent to the parties in November 2023. This contained orders requiring the provision of a schedule of loss and supporting documents, a counter schedule of loss, preparation and provision of a file of documents and exchange of witness statements.

4. The claimant subsequently notified the Tribunal by email that she had been away and was unable to comply with the deadlines within the Case Management Orders and further that she would be on holiday between 21 December and 11 January 2023.

5. As a result, the hearing date was postponed. Further attempts were made to seek dates of availability from both parties. Correspondence was received from the claimant stating that she was unclear what she was being requested to do within the Case Management Orders.

6. On 17 January 2023, the Tribunal wrote by email to the claimant cc the respondent at my instruction, setting out our attempts to set a date for the remedy hearing over the previous few months and explaining to her in plain terms what it was she was required to do under the Case Management Orders and why.

7. Notice of hearing was then sent to the parties by email on 24 January 2023 of a remedy hearing set for 16 March 2023. However, the respondent then notified the Tribunal that Ms Ling was unable to attend on that date and they had in fact previously notified the Tribunal of this in their dates of availability.

8. As a result, that hearing date was postponed and it was fortunate that the Tribunal was able to re-list the hearing for 17 March 2023 around the previously notified availability of the parties. Notice of the new hearing date was sent to the parties by email on 7 February 2023.

9. It is apparent from the email correspondence on the file, that the respondent unsuccessfully endeavoured to get the claimant to comply with the Case Management Orders and offered revised dates for compliance. On 13 February 2023, the respondent wrote to the Tribunal setting out the position, offering further dates for compliance in order to prepare the case for the forthcoming hearing and seeking an Unless Order against the claimant to secure compliance, failing which her claim for remedy should be struck out.

10. Having reviewed the file, I decided it was inappropriate to issue an Unless Order but instead sent out the original Case Management Orders with revised dates for compliance. This was sent to the parties by email on 22 February 2023.

11. The claimant subsequently emailed her schedule of loss and two documents in support later that day.

The issues

12. These are set out at paragraph (6) (xxvii) of the list of issues that was before the liability hearing. They are repeated below for each of reference:

> *"Remedy*
>
> *(xxvii) If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded. Specific remedy issues that may arise and that have not already been mentioned include:*
>
> *a. if it is possible that the claimant would still have been dismissed at some relevant stage even if there had been no discrimination, what reduction, if any, should be made to any award as a result?*
>
> *b. did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any [compensatory] award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A")?*
>
> *c. did the claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to decrease any [compensatory] award and if so, by what percentage (again up to a maximum of 25%), pursuant to section 207A?"*

13. Whilst this does not contain the issues in respect of the wrongful dismissal complaint, we nevertheless formed the view that this was a complaint brought by the claimant as we indicated paragraph 297 of our Liability Judgment.

Documents and evidence

14. We had the following documents before us: the full hearing bundle and index, ("FHB") a remedy hearing bundle and index ("RB"), a witness statement from Daniel Fennell, the claimant's schedule of loss (received on 22 February 2023 but dated as at 21 February 2021), her supporting documents, namely notification of her taxable income from HMRC for the tax years 2017-2018 and 2018-2019, the respondent's counter schedule of loss and the Liability Judgment. Ms Ling also provided written closing submissions.

15. We heard evidence from the claimant which was given orally in answer to questions. We heard evidence by way of a written statement and in answer to oral questions from Daniel Fennell, a Grade 7 District Operations Manager. Whilst Mr Fennell was not directly involved in the Claimant's management or the circumstances leading to her dismissal, he was brought as a witness to general issues relevant to remedy.

Postponement request

16. There is some history to the prolonged progress of this matter to the full hearing which is set out at paragraphs 3-9 and 19-36 of our Liability Judgment.

17. On the morning, prior to the notified start of 10.00 am, the claimant indicated to our clerk that she had had a seizure during the night and was in bed. Our clerk had spoken to the claimant through the Cloud Video Platform although the claimant's camera was turned off. The claimant confirmed that she would like the hearing postponed but, if it was not, she would proceed albeit from her bed.

18. We started the hearing at 10:21 am. The claimant attended by audio only. I summarised the position regarding the length of time it has taken to get this matter to a remedy hearing, in fact almost 2 years to the day, the attempts taken to find this date and that it was the only day the panel members and I were available this year.

19. We then heard oral submissions from Ms Ling who pointed out that the claim relates to events that arose years before the start of the hearing, previously the claimant had not engaged in the process, although accepting she accepted that the claimant does have health issues. However, Ms Ling expressed her concern that the claimant's health issues were effectively getting in the way of resolution of the claim and she was concerned as to whether the case will ever be finalised. She asked us to give consideration to striking out the claim or alternatively refusing the postponement request.

20. The claimant in response said that her various medical conditions were exacerbated by stress and tragic death of her nephew and that since then the number of seizures that she experienced had increased. It also was apparent during the hearing that the claimant had a cold and a bad cough. Indeed, it came out during our discussion that the claimant had in fact been unwell for the last week but had only notified the Tribunal this morning of her incapacity.

21. I asked the respondent if we were to decide to continue whether it was content to do so with the claimant attending by audio only. Ms Ling indicated yes. I asked the claimant if we were to continue if she felt able to direct her mind to the matter and whether she was able to access the bundles and witness statement. The claimant stated yes if she had to but she had not got the hearing bundles. The respondent indicated that they had been emailed to her and posted a week ago. It was at this point the claimant said she had been ill for the last week. I explained that in a way that made her position weaker because she had not told the Tribunal of her ill-health until this morning. Her response was that she thought she would get better. I asked the claimant to check whether she had received the documents from the respondent by email. She indicated that she had received the witness statement but was somewhat equivocal as to whether she had received the bundle. I asked if she had received the posted documents. She replied that she was bedbound and had been unable to collect them from her front door. Subsequently though, she was able to obtain the documents.

22. I also asked her about her failure to comply fully with the Case Management Orders in that she had not provided a witness statement. Her response was that she intended to rely on her previous witness statement to the liability hearing. I reminded her that she had not provided one and that had also caused us some difficulties at the time. I added that in any event how would

a witness statement if provided or indeed her previous evidence relate to remedy?

23. We adjourned from 10.45 until 11.00 am to consider the applications. On our return I gave our decision which was to refuse the claimant's request to postpone the hearing and refuse the respondent's request for a strike out but to continue. I referred to those matters which are set out at paragraph 31 of our Reserved Judgment and Reasons on liability and I do not propose to set them out again here.

24. I explained that the reasons for our decision were as follows: there needs to be finality in this matter; it is not fair on the respondent the longer this matter is outstanding; it is not in the interests of the claimant given the length of time that has elapsed from the events in question and the length of time since our own involvement in the matter; the consequence of a postponement would mean that there would be a hearing sometime in 2024; whilst we recognise that continuing when the claimant is unwell is harsh, striking out the claim is even harsher, although we added that this matter had almost reached the point at which a strike out would be appropriate; the claimant has indicated several times morning that she is in a position to continue albeit she is unwell and that she does now have sight of the documents.

25. We then adjourned to read the documents provided to us and commenced the hearing at 11.36 am.

Findings

26. We decided all the findings referred to below on the balance of probability, having considered all of the evidence given by the witnesses during the hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that we failed to consider it.

27. We have only made those findings of fact necessary to determine the issues. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

28. The claimant has not provided a witness statement dealing with remedy as required and so we only had her schedule of loss, the HMRC documents and what she said orally at this hearing to go on.

29. With regard to the unfair dismissal complaint we refer specifically to our conclusions at paragraphs 256-289 of our Liability Judgment and in respect of the wrongful dismissal complaint paragraphs 290-299. In essence, the claimant was dismissed for gross misconduct with effect from 16 August 2017 because she was found to have been working without the respondent's permission during a period of absence from work on Carer's Leave. However, we found this to be both procedurally and substantively unfair and that she had not committed a fundamental breach of her contract of employment so radical in its nature that it justified summary dismissal without compensation for notice.

30. In her schedule of loss, the claimant sets out the calculation of the basic award based on a weekly gross pay of £496.62 for 8 weeks representing her age of 35 and 8 years service as at the effective date of termination which she says was 27 June 2017. We accept her age and length of service as set out that our finding of fact is that she was dismissed for gross misconduct on 16 August 2017 (at paragraph 53 of our Liability Judgment).

31. Her schedule of loss also indicates that she was unable to work for a period of 63 weeks and was unable to undertake temporary work for over a year. In addition she said that the respondent did not pay her and did not permit her to seek alternative employment and that they refused to suspend or reinstate her. She is seeking past loss of earnings for 63 weeks based on net pay of £2102 per month which comes to a total of £31,286.77, plus pension loss in the sum of £19,755.288. In her evidence it became apparent that she was in fact referring to the period of time prior to her dismissal when she states that she was suspended from work.

32. She further seeks the loss of a yearly bonus although she has not put figure on this but has simply stated "request information from DWP". In evidence she accepted that the bonus was only paid for outstanding performance.

33. She seeks future loss of earnings for 12 months in the sum of £12,544.54. In her evidence she accepted that she was in fact referring to the period after she was dismissed.

34. The claimant also seeks £500 for loss of statutory rights.

35. Finally she seeks an uplift of 10% in the compensation because of the respondent's failure to follow the ACAS Code of Practice and the ACAS guidance on voluntary work. In evidence she was asked to specify what elements of the ACAS Code of Practice (relating to the conduct of discipline and grievances at work) that the respondent did not follow and her response was she did not know.

36. The Claimant also seeks notice pay in her schedule of loss, including the same 10% uplift for failure to follow the ACAS Code, in the sum of £2885.40.

37. Her schedule goes onto seek her outstanding holiday pay although we heard no evidence about this entitlement and it did not form part of our findings or conclusions at the liability hearing. She also seeks an agreed reference which of course is not something that is within our power to grant.

38. She gives credit in her schedule of loss of the income set out within the 2 documents from HMRC for the tax years 2017-2018 and 2018-2019. However, she is not provided any details of the work undertaken or any evidence in support of that work and amounts received. Moreover, we have no evidence as to the position since April 2019 to date.

39. At today's hearing I confirmed with the claimant that she wished to be reinstated or re-engaged by the respondent and so I explained to her what each meant in terms of our powers. This is set out within our conclusions.

40. In our Liability Judgment we made findings conclusions that at the relevant time the claimant was disabled by virtue of Epilepsy, Sciatica, Fibromyalgia and Dyslexia. Whilst we have no further medical evidence on this we have no reason to suppose that these conditions are not ongoing and indeed on a number of occasions during the process of our liability hearings and in advance of this hearing, the claimant has referred to ongoing issues. Not least, the claimant has referred to night seizures which can be brought on by stress. She has also indicated at today's hearing that once one of her conditions flares up, so do all the others.

41. The claimant also referred to the tragic death of her nephew who was killed earlier this year and which has affected her health ever since. In evidence she was unable to state how this might affect her ability to attend work if she was re-employed and was only able to say that prior to his passing she had seizures although possibly not as many as she has been having this year. She reiterated that she suffered night seizures.

42. In answer to questions about her attempts to mitigate her loss she said that she had applied for jobs, such as administrative positions, support workers, but charities that help people back into work, employment workshops and personal advisers. She also stated that she undertook voluntary work. We had no documentary evidence in support of this.

43. The claimant also stated that the dismissal letter that she received from the respondent stated that she had to declare that she was dismissed and could not work for another government department for a period of time.

44. The claimant's letter of dismissal dated 15 August 2017 is at FHB581-585. We could not find any reference to such a restriction. The closest it comes to what she says is at FHB584 which states:

> *"I must remind you that you will continue to be bound by the provisions of criminal law which protect certain categories of information, including the Social Security Administration Act 1992, Section 193 and by your duty of confidentiality owed to the Crown as your former employer*.
>
> *You must obtain permission in advance if you wish to accept a job with a person, firm or company with whom you have had official dealings or have had commercially sensitive information about their competitors, within two years of leaving your employment with the Crown."*

45. The claimant also gave evidence that she had undertaken employment on a zero hours basis. She said that she worked for an organisation called Look Ahead, a charity that works with vulnerable people. She said that during the has not provided any documentary evidence of the work undertaken although she indicated that she received pay-slips. She stated that she could obtain a letter from the agency to confirm when she worked. She was unable to say how much she had earned each year since her dismissal by the respondent beyond the documents provided without checking. She was asked if she could get the information today and her response was that she did not know. I interjected to remind the claimant that she should have provided that information in advance of today so this was quite a concession by Ms Ling. Nevertheless, I said that the Case Management Orders were very clear. The claimant responded that she thought that the information was for the 2 year period after her dismissal. I replied that I was not sure where she had got

this from, that the Case Management Order very clearly explained what she was supposed to provide by way of evidence and my subsequent letter to her put this even more clearly. Indeed, she did seem incredulous when it was put to her in questions that she should have provided some evidence of the work she had undertaken.

46. The claimant accepted in evidence that by the time of her dismissal she had lost trust and confidence in Katrina McDonald (her second line manager) and Edward Russell (her line manager) and that she had accused them of a sustained campaign of harassment. She pointed out that Ms McDonald no longer worked at the Stockwell JobCentre, where she was seeking to be re-instated or re-engaged. It was put to her that the respondent had lost trust and confidence in her although the claimant's response was that she was unable to comment on that.

47. It was also put to her that her rate of pay at the date of her dismissal (at page 147 of the liability bundle) was based on a full-time annual salary of £25,824 gross, the part-time equivalent being £15,322.24 for 3 days per week. She was asked if she agreed that this was the going rate for 3 days a week in 2017 or was she unable to comment. The claimant's response was that she was unable to comment.

48. In answer to my questions, the claimant accepted that she had worked out her annual salary on the basis of the full-time rather than the part-time salary and that it was a gross figure. She said that whilst she had received tax credits for a period of time after her dismissal she believed that this had stopped when she obtained employment in either 2020 or 2021 and that she definitely did not get it last year.

49. Mr Fennell gave evidence as to whether the Claimant might have been dismissed for misconduct as a result of her failure to return to work from her carer's leave and the practicability of the Respondent re-instating or re-engaging her.

50. In his written evidence, Mr Fennell sets out a number of reasons as to why it would not be practicable to re-employ the Claimant. These in his witness statement at paragraphs 21 to 28. They are as follows:

    a. There has been an irretrievable breakdown in the relationship between the Claimant and Respondent. The Claimant's misconduct itself undermined that trust and in addition her conduct towards her line manager in blocking their attempts to return her to work. In addition, she had made a number of significant allegations of discrimination against the Respondent and accused her line managers of changing their evidence during the disciplinary process. She alleged she was subjected to a "systematic campaign of harassment" in her claim form (RB13);

    b. The Claimant would require significant training given the changes to the benefits system since her dismissal. This has resulted in significant changes to the Claimant's role as Personal Advisor.

c. The Claimant has said that she could only return to work in the Stockwell JobCentre owing to her disability and resulting needs. There are no roles available at her grade of Executive Officer ("EO") either at Stockwell or anywhere else in the London or Essex regions at present.

d. In oral evidence he said the following. If there were any EO vacancies, he would know because he would be involved in commissioning the recruitment. The respondent had taken on a number of new recruits during the Covid-19 pandemic and was currently above its head count.

e. In response to the Claimant's evidence that she would need to return to work remotely from home and flexibly due to the nature of her disabilities, Mr Fennell said as follows. This would not be compatible with the EO role because regulations require the role to be undertaken from the JobCentre and to book appointments 3 days in advance and to start at 9 am.

f. He was asked if there were more junior roles available. He gave oral evidence that there were roles which did not require the conducting of appointments, at Administrative Officer ("AO") level but they were above head count at present as well. He explained that there was in any event a pay differential between the two roles (£32,515 as opposed to £25,500 and less for each role for coming in earlier or at the weekends).

51. With regard to the question of whether the Claimant would have been dismissed in any event at some later point than her actual dismissal (which of course we have adjudicated to be unfair) he set out at some detail his understanding and belief at paragraphs 4 to 20 of his witness statement. What this came down to was his view that the Claimant would have been dismissed if she had been given some lesser sanction than dismissal assuming that she still failed to return to work from her carer's leave.

52. We accepted Mr Fennell's evidence.

Submissions

53. We had written and oral submissions from Ms Ling and oral submissions from the Claimant. We do not propose to set those out here unless we specifically refer to any particular point but we have taken them fully into account in reaching our decision.

Relevant Law

54. Sections 113- 119 and 123-24A Employment Rights Act 1996.

Conclusions

Unfair dismissal

Reinstatement / Re-engagement

55. If an employee is successful in a complaint of unfair dismissal, the Tribunal has the power to order re-instatement or re-engagement and ask the claimant

if she wants re-employment. The claimant is clear that she wants her job back or another suitable job.

56. Under an order for re-instatement, the employer must treat the employee in all respects as if she had not been dismissed. The Tribunal will decide the date when the employee will return to work and the amount of the missing wages and other benefits that the employer must pay for the period between dismissal and re-instatement, including restoring any rights that the employee would have acquired during the period of absence.

57. Under an order for re-engagement, the Tribunal can decide the employee must be engaged by the employer in employment comparable to previously or in other suitable employment. On making an order, the Tribunal would need to specify the terms on which re-engagement will take place, including the employer's identity, the nature of the employment and its pay, the date when the employee will start work and the amount payable by the employer in respect of any benefit including pay which the employee might reasonably have expected to have had but for the dismissal, giving credit for notice pay, ex gratia payments and new earnings. The employee is entitled to put forward her views on the terms of the order.

58. In exercising its discretion whether to order re-employment, the Tribunal must first consider re-instatement and if it decides not to order that, then it must consider re-engagement. In both cases, the Tribunal must take into account: whether the employee wants an order and what type of order; whether it is practicable for the employer to comply with an order; and whether it would be just to make an order if the employee has caused or contributed to some extent to the dismissal.

59. At this stage, the Tribunal only needs to make a provisional assessment of whether it is practicable to re-employ the employee. The Tribunal can reconsider after it has made an order if the employer refuses to re-employ on grounds of practicability.

60. The practicability of re-employment is assessed as at the date when it would take effect, not at the date of dismissal, and not necessarily even at the date of the remedies hearing. It is not a bar to getting a re-employment order that the employee has meanwhile got another job. "Practicable" means more than just possible. The order must be capable of being carried into effect with success. It is unlikely to be practicable to re-employ if the working relationship has completely broken down.

61. It will also not be practicable if no suitable job is available. For re-engagement, the Tribunal will look at comparable or suitable vacancies which exist at the date of the remedies hearing.

62. Turning then to the case before us, The Claimant is seeking re-instatement or re-engagement. In essence, the Respondent states that she cannot have either because they do not have any vacancies. The most significant factor is the lack of trust and confidence which has gone on both sides (the Respondent from the earlier conduct and behaviour and on the part of the Claimant towards Mr Russell and Ms McDonald and the nature of the

allegations that she made. Again this forms a substantial part of Liability Judgment.

63. We therefore reach the conclusion that it is not practicable to order re-employment.

Compensation

64. Compensation consists of two elements: the basic award and the compensatory award.

Basic Award

65. The basic award is calculated by reference to the period ending with the effective date of termination during which the employee has been continuously employed. It allows for one-and-a-half weeks' pay for each year of employment in which the employee was not below the age of 41, one week's pay for each year of employment when the employee was below 41 but not below 22, and half a week's pay for each year of employment below the age of 22. A maximum of 20 years' employment will be counted.

66. A week's pay is gross pay subject to a maximum figure which is index-linked to the retail price index (RPI). For dismissals from 6 April 2017 to 5 April 2018 the maximum figure was £489 per week gross. If there are fixed working hours, a week's pay is the amount payable by the employer under the contract of employment. If the employee's pay varies with the amount of work done ('piece rate') the amount of a week's pay is calculated by reference to the average hourly rate of pay over the last 12 weeks of employment and where there are no normal hours, a week's pay will be the average weekly pay over the last 12 weeks of employment. Roughly speaking, the 12 weeks are counted back from the termination date.

67. Under section 122(2) of the Employment Rights Act 1996, the basic award may be reduced for a number of reasons. This includes circumstances where the employee behaved before the dismissal or before the notice was given in such a way that it would be just and equitable to do so.

68. Having considered the circumstances leading to the Claimant's dismissal we found that the Claimant was dismissed for undeclared working whilst on carer's leave. Doing the best we can we conclude that the basic award should be reduced by 25%.

Compensatory Award

69. The idea of the compensatory award is to compensate the employee for the financial loss suffered as a result of being dismissed, including expenses incurred and loss of fringe benefits. The point is to compensate the employee, but not to award her a bonus, and not to penalise the employer. The Employment Tribunal must award what it considers to be "just and equitable" having regard to the loss.

70. The compensatory award is calculated net and is subject to an overall ceiling which is revised annually. For dismissals in the year starting 6 April 2017 was £78,962 and there is a further cap of 52 weeks' gross pay if this is lower than the overall ceiling.

71. The compensatory award can include compensation under these headings:

- loss of earnings;
- loss of fringe benefits;
- loss of pension;
- expenses for job-hunting or, rarely, the cost of setting him/herself up in business or moving to find employment;
- loss of statutory rights.

72. If the Tribunal finds the dismissal was to any extent caused or contributed to by any action of the employee, it can reduce the compensatory award proportionally as it thinks fit. This is known as "contributory fault" and the Tribunal can make percentage reduction. The issues are two separate questions: 1) did the claimant's conduct cause or contribute to the dismissal? and 2) if so, by how much would it be "just and equitable" to reduce the compensatory award? The claimant's conduct must have been culpable or blameworthy. This does not necessarily include merely unreasonable conduct – it depends on the extent of the unreasonableness. The biggest risk of a reduction for contributory fault is where the employee has been dismissed for misconduct, but it is also possible with dismissals in other categories if the employee has acted in a blameworthy way, eg her actions have led to a breakdown in trust and confidence.

73. Having considered the circumstances we find that the claimant's conduct contributed to her dismissal in that she failed to declare that she was working during her Carer's Leave and doing the best we can we find that it is just and equitable to reduce her compensatory award by 25%.

74. There is nothing to stop a tribunal reducing compensation both for contributory fault and on the Polkey principle. However, a tribunal should first consider the Polkey deduction, and this may affect how much it thinks it is just and equitable to deduct for contributory fault.

75. In a case called Polkey v A E Dayton Services Ltd [1987] IRLR 503, the House of Lords (as the Supreme Court was then known) held that a dismissal may be unfair purely because the employer failed to follow fair procedures in carrying out the dismissal.

76. Of course a dismissal may be unfair for procedural reasons only, even though the actual reason for dismissal is fair. In such cases, the compensatory award may be reduced by a percentage to reflect the likelihood that the employee would still have been dismissed, even if fair procedures had been followed. A percentage reduction can be as high as 100 per cent, although a Tribunal might still award loss of earnings for the time it would have taken to go through proper procedures.

77. It is often difficult to decide whether unfairness is procedural or a matter of substance. Either way, the Tribunal must consider the question of whether and when the employee would have been dismissed if the employer had acted fairly.

78. There had been a standoff by February 2017 and then the issue of return to work fell into abeyance whilst the disciplinary process was follows. But the claimant said in evidence that if she had not been dismissed she would have returned to work and in her cross examination of Mr Fennell and in her closing submissions she acknowledged that the respondent would not have simply moved to dismissal but would have had to go through some process involving the issue of warnings. It is impossible beyond the claimant's indication that she would have returned to work to form the view that she would have been fairly dismissed at future date or even determine that date. The best indicator we have is what she said. On this basis we do not make any deduction under Polkey.

79. We make the following awards:

Basic Award

80. This is based on the following. The claimant's gross year salary of £15,283.67 per annum (this calculated on the basis of a gross yearly salary of £25,759 pro rata to the part time equivalent of 21.36 hours per week). This is a weekly figure of £293.92 gross which is below the then statutory ceiling on weekly salary. Her Effective Date of Termination ("EDT") of 16 August 2017. Her age at the EDT of 38 years. Her length of service at the EDT of service 8 years. 8 x £293.92 = £2,351.36 Less a reduction of 25% = £1763.52.

Compensatory award

81. This would be based on net weekly earnings of £260

Past and future loss of earnings

82. The claimant seeking for one year from dismissal date. However, it is impossible to reach a conclusion as to the length of time of such an award or the amount given the paucity of evidence as to the earnings she received during that period or any further period and as to the steps she has taken to mitigate her loss. As we have indicated above any bonus was performance based and so it is not possible to quantify.

83. For loss of statutory rights = £500. We did not feel it was just and equitable to make any reduction for contributory fault in respect of this award.

84. The ACAS uplift. The claimant present no evidence of any breach of the ACAS Code and we made no findings in our Liability Judgment that it was not followed. We are therefor unable to make any uplift.

Wrongful Dismissal

85. We are unable to determine the amount of damages if any that the claimant is entitled to because she presented no evidence of what income she may have received during her notice pay period. For this reason we do not award any damages.

Total award

86. The total award for unfair dismissal is a Basic Award of £1763.52 + a Compensatory Award of £500 = £2,263.52.

87. The total award for wrongful dismissal is £xx gross.

Employment Judge Tsamados
Date: 27 September 2023