EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mrs E Belson		Jewellery Validation Service Ltd

Heard at: London Central (by video) **On**: 8 and 9 November 2023

Before: Employment Judge Stout
Tribunal Member D Shaw
Tribunal Member P Secher

Representations
For the claimant: In person
For the respondent: Mr M Cameron (consultant)

RESERVED REMEDY JUDGMENT

The unanimous judgment of the Tribunal is that the Respondent must, within 14 days of the judgment being sent to the parties, pay to the Claimant a total of **£8,922.50**, comprising:

a. Basic Award for unfair dismissal: **£4,080.80**;
b. Compensatory award for unfair dismissal (including wrongful dismissal):
    i. Notice pay: £2,884.60 gross notice pay (subject to tax at 20%, for which the Claimant will be liable);
    ii. Pension loss £31,99 x 7 weeks = £223.93;
    iii. Two further weeks' wages net £447.69 x 2 = £895.38;
    iv. £500 loss of statutory rights;
        Sub-total: £4,504.91
    v. Plus ACAS Uplift at 7.5% = **Total: £4,841.70**

The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply to this award as the Claimant did not receive benefits during any period in respect of which we have awarded compensation.

REASONS

Introduction

2. The Reserved Liability Judgment in this matter was sent to the parties on 11 May 2023 and re-issued with minor amendments on 5 June 2023. We found that the Respondent had unfairly and wrongfully dismissed the Claimant, and failed to issue her with a statement of employment particulars as required by ss 1-4 of the ERA 1996. Otherwise, the Claimant's claims were dismissed.

3. This Remedy Hearing has been postponed twice. At the start of the hearing we identified the issues to be considered as follows:-

    a. Basic Award;
    b. Notice Pay;
    c. Compensatory Award:
        i. *Polkey*;
        ii. Mitigation;
        iii. Holiday pay;
        iv. Uplift for failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures;
    d. Failure to provide statement of employment particulars (EA 2002, s 38).

The evidence and hearing

4. The orders made at the end of the Reserved Liability Judgment required the Respondent by 2 June 2023 to set out precisely what its case was on *Polkey*. The Claimant was by 16 June 2023 required to prepare and send to the Respondent a witness statement setting out her evidence and response to the Respondent's *Polkey* argument, together with evidence as to her efforts to mitigate her loss and relevant documents. The Claimant did this and confirmed at the start of her oral evidence that she believed she had provided all relevant documents.

5. The Respondent was required by 30 June 2023 to provide any witness evidence or documentary evidence that it relies on in relation to the Claimant's evidence on remedy and by 7 July 2023 to prepare a bundle for this hearing. The Respondent did not comply with these orders and instead sent the bundle and witness statements on which it relies to the Claimant by email on 6 November 2023, two working days before the hearing. The Claimant maintained that she did not receive this email, and so it was sent again at the start of this hearing.

6. We confirmed that the Claimant had then received all the documents from the Respondent and asked her if she objected to us taking them into account in view of their late production. The Claimant objected to the Respondent being allowed to rely on the witness statements that had been served late.

7. We indicated that we would consider whether or not to permit the Respondent to rely on the late documents once we had read both parties documents. We then read all the statements and the evidence in the bundle before resuming the hearing and indicating our provisional view that much of both parties' evidence was dealing with matters that were *res judicata*, i.e. issues that had decided by us as necessary parts of our Liability Judgment.

8. We allowed the parties to make further submissions and considered the position before announcing our decision that we would proceed as follows, giving reasons orally. What follows constitutes our written reasons for those case management decisions.

9. Upon our raising the *res judicata* point, both parties agreed that the evidence that they had put in for this hearing that was relevant to the issues we dealt with in the Liability Judgment was all evidence they could have obtained for the Liability Hearing and both parties confirmed that they were not seeking to make an application for reconsideration of the Liability Judgment.

10. We also considered the interests of justice for ourselves. We could not see why we should revisit the issues and facts we had previously decided. We were very tolerant at the Liability Hearing of both parties producing further evidence in the course of the hearing (see paragraphs 6-10 of the Liability Judgment) and we considered they had both had ample opportunity to put forward the evidence they wished to last time. The principle of finality in litigation is important and both parties were in their evidence just seeking to re-argue many matters we had decided previously (although it is right to record that the Respondent's evidence of this nature was largely responsive to the Claimant's evidence).

11. We also did not see that there was anything in what either party was trying to argue at this hearing that would have caused us to change our mind about our conclusions last time. We therefore decided that we should not hear further evidence on matters that went to issues that we determined in our Liability Judgment, and in respect of which we had made findings of fact that were necessary steps to findings on the issues that were before us at that stage. We therefore excluded from consideration at this hearing the following evidence from both parties:

    a. *The parties' evidence as to whether or not the Claimant's role was redundant, whether it had been transferred to Mr O'Driscoll and whether she was continuing to work 'as normal' up until the point that she was dismissed.* This was central to the question of whether the Claimant was redundant as the Respondent maintained at the Liability Hearing and as to the reasons for dismissal. We found at paragraph 201 that the Claimant's role had been redundant since the summer of 2021 when it was outsourced to Mr O'Driscoll, and that thereafter the Claimant had only been retained in employment as part of settlement negotiations in relation to the divorce. Our findings of fact at paragraphs 44-48 and 89 were necessary factual findings

on the way to those conclusions, which included that from November 2020 up until her dismissal the Claimant was not expected to work and although she did *"do some further work, but that this amounted to little more than maintaining an interest in the Respondent's business, including by 'checking up' on the Respondent's online accounts and doing some minimal minor administration alongside Mr O'Driscoll, possibly duplicating work he was doing or had been asked to do anyway"*. We consider that we are bound by the findings we made in the Liability Judgment on those matters.

b. *The Claimant's evidence re-opening the question of when her period of continuous employment commenced.* Again, this was a point we determined at paragraph 122 of our Liability Judgment as an issue identified for determination at that hearing.

c. *Further arguments from both parties attacking the truthfulness of the other party's evidence on issues that we previously determined such as whether the Claimant was paid late in October – December 2021 and other issues as to credibility relevant to the Liability Judgment.*

d. *Evidence about the Respondent's accounting practices which was relevant to our decision on whether the Claimant had made protected disclosures.*

12. It followed from our decision as to the matters that were *res judicata* that we excluded the witness statements for the Respondent of Mr O'Driscoll, Ms Granger, Mr Dunga and Mr Odogowu, paragraphs 1-8 of Mr Belson's statement and a number of passages from the Claimant's statement.

13. The Respondent also sought to adduce evidence relevant to the Claimant's whereabouts between 2018 and 2021, asserting that the Claimant had been untruthful about this in her evidence to the Tribunal at the Liability Hearing and also that it showed that she was not entitled to holiday pay on termination. We agreed that this evidence did not trespass on matters that were *res judicata* as the question of whether the Claimant was in the UK or not at various points had been of only peripheral relevance to the Liability Judgment. Although we did make some factual findings about her whereabouts these were not in our judgment necessary to any issue we had to determine and we were not at that hearing considering any question about the Claimant's annual leave. This evidence was, however, directly relevant to the issue before us at this hearing as to whether the Claimant was entitled to pay in lieu of untaken holiday on termination. We therefore concluded that this evidence was in principle admissible.

14. We then considered whether we should admit paragraph 9 to 20 of Mr Belson's witness statement (and the accompanying documents) given that it had been served on the Claimant so late and in breach of our orders. While there was no good reason for the failure to comply with our orders without applying for an extension of time, or any good reason why the documents had been served so late, we were satisfied that they had been properly sent

to the Claimant at about 10am on Monday (two working days before the hearing) and that the Claimant therefore ought to have had time to read and respond to them before this hearing. Although the Respondent's breach of our order was serious, we considered that the Claimant also bore some responsibility for not having located the Respondent's email prior to the start of the hearing. If she had not received the bundle and had been acting reasonably she should have contacted the Respondent to find out where it was before the start of the hearing. We were also satisfied, having given the Claimant the opportunity to make submissions, that she was in a position to respond to paragraphs 9 to 20 of Mr Belson's statement orally and thus not prejudiced by its late production. Indeed, her submissions about whether we should admit the statement essentially consisted of her response to it. We made clear, however, that if in the course of oral evidence it appeared that there was any disadvantage to her as a result of having received the statement and documents late, we could consider that if and when it arose and take any reasonable steps to remedy the disadvantage.

15. As a result of the above decisions, the only witnesses from whom we heard oral evidence were the Claimant and Mr Belson.

16. We record our findings of fact in relation to that evidence below in our conclusions on each of the issues that we had to decide. Given the nature of the issues, there is no need for us to make separate background findings. We can go straight to our conclusions. We consider it appropriate to mention here, however, that this was one of the most acrimonious hearings we have ever dealt with and, possibly in part as a result of video delays, when the Claimant was cross-examining Mr Belson, the parties frequently (despite warnings) spoke over each other at length and were so engaged in arguing with each other that on several occasions they did not notice the judge's attempts to interrupt them for some time.

17. We also record here the following other case management issues that arose in the course of the hearing:-

    a. The Claimant in oral evidence made frequent reference to without prejudice negotiations and communications between the parties in connection with the divorce proceedings (which are ongoing), albeit acknowledging as she did so that she thought she was not supposed to be referring to this material. We explained to the parties that without prejudice communications are jointly privileged and neither party can unilaterally waive that privilege, although the privilege may be lost through 'unambiguous impropriety'. We outlined the legal principles and invited the Claimant to consider whether she wished to make an application to rely on the without prejudice material so that, if so, we would need to determine whether it could be relied on or not applying the relevant principles. The Claimant was uncertain how to proceed. She asked to consider it while her evidence was concluded between 10am and approximately 11.15am on Day 2 and then again during a 15 minute break during which she attempted to contact her solicitor in the divorce proceedings for advice. In the end,

she decided not to make an application, although she was unhappy about that and wished she had had time to take legal advice on the point. She accepted, however, that there was insufficient time for that to happen if the hearing was to conclude within the two days and she did not want any further delay. We also did not consider it appropriate to adjourn of our own motion because we considered that the Claimant was aware of the general rule against referring to without prejudice material and had had time prior to the hearing to take legal advice on the point if she wanted to refer to it. We also considered it highly unlikely, given what the Claimant had said about the without prejudice material and the other evidence we heard at the hearing, that it would make any difference to our conclusions even if we did see it. We return to this point below.

b. We also had to adjourn the hearing at one point because it became apparent (from the ceiling fan and 'foreign' light switch in the background) that the Claimant was giving evidence from somewhere that was not in the UK. When the Claimant had asked for the hearing to be by video, she had done so in an email on 10 July 2023 which had made it appear as if the request was made for medical reasons (she wrote: *"I am suffering from the Cardiovascular disease and cannot postpone the surgical procedure any longer. From the 8th of November 2023 till 31st of March I only will be available for CVP Video Hearing"*). The Tribunal had therefore not been aware that the request was because she was going to be out of the country. The Claimant was unwilling to tell the Respondent in open Tribunal where she was, so we required her to email the clerk with details of her whereabouts. Having done so, we were satisfied that she was in a location from which it is permitted for oral evidence to be received by video and we resumed the hearing.

c. After the conclusion of evidence, Mr Shaw disclosed that he might know the Clare and Mark Granger who had been mentioned in oral evidence by Mr Belson. However, on raising this with the parties at 2pm on Day 2, it became apparent that the Clare and Mark Granger Mr Shaw knows are not those referred to in the evidence.

d. During closing submissions the Respondent sought to raise a new argument, not heralded anywhere in the documents or oral evidence, that the Respondent had since the termination of the Claimant's employment been paying for health insurance for her. The Respondent argued that the sums paid for this should be set off against the Claimant's compensatory award. We had not as part of the oral evidence we heard been told anything about this by the Respondent. It was not in its witness statements or Counter Schedule of Loss. All we had heard on this topic in oral evidence was the Claimant's evidence that she did not have health insurance since the termination of her employment, that the treatment she had received since had been on the NHS and that she had been looking for jobs that would include health insurance. In those circumstances,

in order to decide whether or not the Respondent's payments for the health insurance should be set off against the compensatory award, we would have needed to re-open the evidence to hear not only about how much had been paid by the Respondent, and to receive documentary evidence of the same, but also to have evidence from both parties about whether the Claimant had ever, following the termination of her employment, been told by the Respondent that she still had access to the company's health insurance and (indeed) whether that access was legitimate having regard to the terms and conditions of that insurance following the termination of her employment (as the Claimant contended it was not). It was by this time 3pm on Day 2 and the Tribunal had very little time left for deliberations. Having heard submissions from both parties, we refused the application. While we recognised that the issue was potentially of significant value to the Respondent, allowing the Respondent to run the point would potentially have been correspondingly prejudicial to the Claimant. There was also simply not time to deal with it within the current listing. It would have required too much further evidence. The Respondent had only itself to blame for that situation as if it wished to run the point it could and should have raised it in its counter-schedule of loss, witness statements and other evidence for this hearing. In those circumstances, we concluded that in the interests of justice and in accordance with the overriding objective the Respondent's application should be refused.

The law

18. Sections 112-124A of the ERA 1996 provide, so far as relevant, as follows:-

112.— The remedies: orders and compensation.

(1) This section applies where, on a complaint under section 111 , an employment tribunal finds that the grounds of the complaint are well-founded.

(2) The tribunal shall—
(a) explain to the complainant what orders may be made under section 113 and in what circumstances they may be made, and
(b) ask him whether he wishes the tribunal to make such an order.

(3) If the complainant expresses such a wish, the tribunal may make an order under section 113.

(4) If no order is made under section 113, the tribunal shall make an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 126) to be paid by the employer to the employee.

118.— General.

(1) Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) 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 1262).

119.— Basic award.

(1) Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated 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.

(2) In subsection (1)(c) "the appropriate amount" means—
(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).

(3) Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty years.

122.— Basic award: reductions.

…
(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

123.— Compensatory award.

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include—
(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

…

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

…

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

…

124.— Limit of compensatory award etc.

(1) The amount of—
(a) any compensation awarded to a person under section 117(1) and (2), or
(b) a compensatory award to a person calculated in accordance with section 123,
shall not exceed the amount specified in subsection (1ZA).

(1ZA) The amount specified in this subsection is the lower of—
(a) £93,878, and
(b) 52 multiplied by a week's pay of the person concerned.

…
(5) The limit imposed by this section applies to the amount which the employment tribunal would, apart from this section, award in respect of the subject matter of the complaint after taking into account—
(a) any payment made by the respondent to the complainant in respect of that matter, and
(b) any reduction in the amount of the award required by any enactment or rule of law.

124A Adjustments under the Employment Act 2002

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), or
(b) increased under section 38 of that Act (failure to give statement of employment particulars),

the adjustment shall be in the amount awarded under section 118(1)(b) and shall be applied immediately before any reduction under section 123(6) or (7).

19. The losses that can be compensated under s 123(1) are limited to pecuniary, economic losses; claimants cannot recover compensation for loss arising from the manner of the dismissal including humiliation, injury to feelings or distress: *Dunnachie v Kingston upon Hull City Council* [2004] ICR 1052, HL.

20. Subject to that case-law-defined limitation, the Tribunal needs to determine the statutory question in s 123(1) of what loss has been *"sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer"*.

21. If the Tribunal concludes that the dismissal was unfair but is satisfied that if a fair procedure had been followed (or that as a result of some subsequent event such as later misconduct or redundancies) the employee could or might have been fairly dismissed at some point, the Tribunal must determine when that fair dismissal would have taken place and what was the percentage

chance of a fair dismissal taking place at that point: the *Polkey* principle as explained in *Contract Bottling Ltd v Cave* [2015] ICR 46.

22. In this case, the Respondent contends that it could fairly have dismissed the Claimant for 'some other substantial reason' (SOSR) within two weeks of its dismissal of her purportedly for redundancy on the basis that there had been an irreparable breakdown in working relations. We have therefore had regard to authorities such as *Stockman v Phoenix House Ltd* [2017] ICR 84, EAT and *Ezsias v North Glamorgan NHS Trust* [2011] IRLR 550 in considering whether the Respondent could fairly have dismissed the Claimant for that reason at that point. We take from those cases in particular that normally in such cases the employee should be given an opportunity to demonstrate whether they could fit back into the workforce following a breakdown in working relations (see *Stockman* at [21] *per* Mitting J), but that if a truly irremediable situation has arisen a dismissal for SOSR may be fair even if there is no formal procedure or even a final meeting in relation to the dismissal itself (as happened in *Ezsias*).

23. Further, the ACAS Code of Practice on Disciplinary and Grievance Procedures does not apply to SOSR dismissals (see *Stockman* at [21]), although it will apply where a step along the way to an SOSR dismissal involves the Respondent dealing with a potential disciplinary matter in relation to an employee: see *Lund v St Edmund's School Canterbury* UKEAT/514/12/KN at [12].

24. The claimant is under a duty to take reasonable steps to mitigate her loss. We direct ourselves by reference to *Edward v Tavistock and Portman NHS Trust* [2023] EAT 33, a recent decision of the EAT in which Gavin Mansfield KC (sitting as Deputy HCJ) undertook a thorough review of this area. At [20] he noted:

> The parties agree that the general approach to mitigation is summarised by Langstaff P in Cooper Contracting Ltd. v Lindsay UKEAT/0184/15 at paragraph 16: (1) "The burden of proof is on the wrongdoer; a Claimant does not have to prove that he has mitigated loss. (2) It is not some broad assessment on which the burden of proof is neutral. I was referred in written submission but not orally to the case of Tandem Bars Ltd v Pilloni UKEAT/0050/12, Judgment in which was given on 21 May 2012. It follows from the principle — which itself follows from the cases I have already cited — that the decision in Pilloni itself, which was to the effect that the Employment Tribunal should have investigated the question of mitigation, is to my mind doubtful. If evidence as to mitigation is not put before the Employment Tribunal by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works: providing the information is the task of the employer. (3) What has to be proved is that the Claimant acted unreasonably; he does not have to show that what he did was reasonable (see Waterlow, Wilding and Mutton). (4) There is a difference between acting reasonably and not acting unreasonably (see Wilding). (5) What is reasonable or unreasonable is a matter of fact. (6) It is to be determined, taking into account the views and wishes of the Claimant as one of the circumstances, though it is the Tribunal's assessment of reasonableness and not the Claimant's that counts. (7) The Tribunal is not to apply too demanding a standard to the victim; after all, he is the victim of a wrong. He is not to be put on trial as if the losses were his fault when the central cause is the act of the wrongdoer (see Waterlow, Fyfe and Potter LJ's observations in Wilding). (8) The test may be summarised by saying

> that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate. (9) In a case in which it may be perfectly reasonable for a Claimant to have taken on a better paid job that fact does not necessarily satisfy the test. It will be important evidence that may assist the Tribunal to conclude that the employee has acted unreasonably, but it is not in itself sufficient."

25. At [76]-[81], he held that mitigation is to be assessed on a balance of probabilities, not a percentage chance basis. At [81] he further observed:

> I would add the following remarks: a. The starting point is the EAT's guidance set out in Cooper Contracting (quoted above at paragraph 20). The burden of proof is on the respondent at all times. b. The tribunal should consider the questions identified by Gardiner-Hill: (a) what steps was it unreasonable for the claimant not to have taken? (b) when would those steps have produced an alternative income? (c) What amount of alternative income would have been earned. Judgment approved by the court for handing down Edward v Tavistock and Portman NHS Trust © EAT 2023 Page 30 [2023] EAT 33 c. While the questions raised in Gardiner-Hill will be live in most cases, they are not exhaustive and may not be applicable in every case. Mitigation arguments may arise in a range of different circumstances, and may therefore give rise to a range of different issues. d. The questions (a) did the claimant fail to take reasonable steps? and (b) what would have happened had the claimant take the steps he should have taken? are interrelated and will need to be considered together. The reasonableness of steps may, for example, be affected by the state of a particular job market at the relevant time. e. Although Gardiner-Hill requires the tribunal to make findings as to when the claimant would have found a job and what it would have paid on the balance of probabilities, the tribunal should bear in mind that nature of the exercise is the assessment of a counterfactual. That is not the same as determining whether a past alleged fact happened or did not happen. The tribunal should make a finding based on a broad evaluation of all the available evidence. As Lord Summers said in Hakim, the tribunal should not strive for a false appearance of precision; the tribunal is entitled to use its judgment to fix a suitable point in time. f. It is not necessary for the tribunal to find that a claimant would, on the balance of probabilities, have been successful in obtaining a specific job at a particular point in time. In most cases that would be a very difficult exercise, if not impossible. Apart from anything else, it would depend upon the evidence of the decision makers for specific jobs and an assessment of the field of competition for the jobs. In my experience, that sort of enquiry has not been necessary in order to prove a failure to mitigate. The passages from Hakim (paragraph 63 above) and from BCCI v Ali (paragraphs 73-75 above), which I have cited support the view that in finding that a claimant would have obtained employment by a stated date it is not necessary to identify the particular job that they would have obtained.

26. The duty to mitigate applies to the notice period as well as the period thereafter: *Stuart Peters Ltd v Bell* [2009] EWCA Civ 938, CA. The only circumstances in which the duty to mitigate does not apply to the notice period is where the employee has an entitlement under the contract to a payment in lieu of notice on termination: *Abrahams v Performing Right Society Ltd* [1995] ICR 1028, CA; *Cerberus Software Ltd v Rowley* [2001] ICR 376, CA and *Breakspear v Colonial Financial Services (UK) Ltd* [2002] EWHC 1456.

Discussion and conclusions

Basic Award

27. The parties are agreed that the Claimant is entitled to a Basic Award of **£4,080.80**, being 5 weeks x 1.5 (the Claimant being aged over 42 for all 5 years of service from 1 May 2016 to 28 February 2022) x £544 (the statutory maximum week's pay for a dismissal effective 28 February 2022).

28. We have considered whether there has been any conduct by the Claimant that would make it just and equitable to reduce this under s 122(2). Mr Cameron invited us as part of his closing submissions to consider this possibility as a matter of discretion, but made no specific arguments on it. He also confirmed at the start of the hearing that the Respondent was not relying on contributory fault at this hearing. We do not consider there was any conduct by the Claimant that would make it just and equitable to reduce the basic award.

29. The context here is a breakdown in marital relations. Although that was instigated by the Claimant, it is not for us to judge whether there was 'fault' in relation to the ending of that relationship; our jurisdiction is the employment relationship. We do not consider that the Claimant's conduct as regards the employment relationship was 'culpable or blameworthy' (cf *Nelson v British Broadcasting Corporation (No. 2)* [1980] ICR 110. Indeed, we found that there was merit in some of her protected disclosures about her employer's conduct, in response to which she was penalised, albeit that ultimately those protected disclosures did not influence any of the matters about which she brought in-time claims.

30. Though not relevant to contributory fault, we add this further observation: the Respondent's original purported reason for dismissal was that she was redundant. Such a decision ought in the ordinary course to have been accompanied by a redundancy payment (which is equivalent to a Basic Award). If the Claimant had been dismissed in the summer of 2021, it would have been for redundancy and again she would have been an entitled to a redundancy payment.

Notice pay

31. The parties are agreed, subject to arguments about mitigation, that the Claimant was entitled to 5 weeks' notice pay. Her gross weekly wage was £576.92 and her net weekly wage was £447.69. In accordance with current tax law, the Claimant will be liable to tax on her notice pay and, given her level of earnings in the 2021/2022 tax year, tax would be payable at 20%. Her gross notice pay for five weeks on which tax will be payable is therefore **£2,884.60**.

Polkey

32. We have concluded that there is a 100% chance that the Claimant would have been fairly dismissed for SOSR within two weeks of the date that she was originally dismissed. We reach that conclusion for the following reasons.

33. We found in the Liability Judgment that the Claimant's role was redundant in the summer of 2021 and that employment after that point was being, almost artificially, continued as part of the divorce settlement arrangements. Between the summer of 2021 and the termination of the Claimant's employment the relationship between the Claimant and Mr Belson (in all its respects: marital, personal and work) broke down - in our judgment, irretrievably. Both parties conducted themselves in a way that was calculated or likely to destroy the relationship of trust and confidence between them and which did as a matter of fact in our judgment destroy that relationship. As recorded in our liability judgment, both parties accused each other of lying and malpractice during this period. The Claimant for her part accused Mr Belson (among other things) of accounting malpractice, of theft from Person X (both of the Trust fund money and a locket), of forging her signature and other documents, of lying about the rental of their flat. He accused her of lying about her whereabouts, about her relationship with Mr Y and many other matters. They both accused each other of lying about property they owned and taking/retaining property belonging to the other and they both contacted the police about each other's conduct.

34. Moreover, they continue with this conduct. At this hearing, they levelled at each other further accusations of lying. They argued about almost every point of the evidence. They have been unable as yet to reach an amicable settlement in relation to their divorce even though their split took place now 2.5 years ago. The Claimant has brought not only these legal proceedings against Mr Belson, but also has brought or supported at least three other sets of legal proceedings that we have heard about (the Will/Trust litigation, litigation about Council Tax and a claim under the Protection from Harassment Act 1997).

35. The Claimant maintains that none of the above ought to have affected their ability to work together, but in our judgment that is fanciful. She points to the fact (which is not disputed) that Mr Belson did not stop her access to Respondent's accountancy software until some months after she was dismissed. She argued that she also continued to have access to other confidential information of the Respondent, including its safe, jewellery and client data. This was disputed by Mr Belson and we accept his evidence on this point as although neither party has proved to be a reliable witness, he has been marginally more reliable and also these are matters that are within his knowledge. As there is no evidence (and the Claimant did not argue) that she has actually tried to get access to any other aspect of the business, we consider that she cannot know what data and property of the Respondent she still had access to. In any event, we accept Mr Belson's evidence that he was (despite everything) trying to avoid unnecessarily antagonizing the Claimant and that was one reason why he did not close down her access to

the accounting software. We accept his evidence on this point because it is consistent with what we have seen about the parties' dealings with each other. It is the Claimant in general who has 'made the running' in the accusations and action against each other, while he has generally been 'responsive'. There is also no evidence that the Claimant ever actually tried to do anything with the company's accounting or client data or anything else that would have prompted Mr Belson to take the active step of cutting out her access.

36. It does not follow, however, contrary to the Claimant's contention, that as at February 2022 there was any realistic prospect of them being able to work together in this very small family business.

37. Moreover, our judgment is that in reality the Claimant knew that, once the marriage was over (in the way that happened in the summer of 2021), they could not maintain a working relationship. That is reflected in her handing over of her work to Mr O'Driscoll without protest as we recorded at paragraph 46 of our Liability Judgment.

38. While it remains the case that both parties may be able to live with an essentially artificial continuation of the employment solely for financial reasons connected with settling the divorce (such as to give the Claimant access to private health insurance, for example), we do not consider that undermines the view we have formed about the unsustainable nature of the employment relationship. The employment relationship is supposed to be one in which there is mutuality of obligation to provide work and to work through personal service coupled with a sufficient degree of control by the employer over the employee. That relationship had irretrievably broken down by February 2022.

39. In those circumstances, we accept the Respondent's submission that a dismissal for SOSR could fairly have taken place at that point and if the Respondent had not unlawfully alighted on the idea of purportedly terminating for redundancy, we are satisfied that it could fairly have dismissed for SOSR. Although an SOSR dismissal is not one to which the ACAS Code of Practice on Disciplinary and Grievance Procedures applies, the Respondent was (as its original ET3 put it) contemplating labelling the matters that were of concern to Mr Belson at that point as regards the Claimant as matters of gross misconduct and, as such, we consider that the Respondent is right to accept as it has done that it ought to have followed a formal procedure before dismissing the Claimant. We agree that following such a procedure would have taken it about two weeks. Any appeal beyond that would have been after termination of employment (or during the notice period) and thus would not have extended employment further.

40. It follows that the Claimant's compensatory award must be limited to a period of two weeks in addition to the notice period.

Mitigation

41. The Claimant was suffering from anxiety and depression between October 2021 and at least May 2022 (see p 180 of the Liability Bundle), but did not contend at this hearing that this prevented her seeking employment. Indeed, our Liability Judgment at paragraphs 96 to 110 records some of the Claimant's activities during this period in pursuing litigation which do not seem to have been markedly affected by her health at this point.

42. She gave evidence that she registered with Reeds Specialist Recruitment Agency on 1 April 2022. She has produced no documentary evidence of that. While we are prepared to accept that she had a conversation with Reeds at some point, we find that she did not follow up and did not make any real effort to obtain alternative employment whether through them or anyone else. She artificially limited her search by reference to whether the employment offered private health insurance. We are satisfied that was unreasonable because healthcare is available on the NHS and anyone acting reasonably to mitigate their loss ought to seek available employment without limiting their search in that way.

43. From September 2022 medical evidence in the Liability Bundle indicates that she was awaiting heart surgery, which was scheduled for May 2023 but has not happened yet. There is, however, no medical evidence that she was not fit for work while awaiting surgery. Her condition only deteriorated, on her evidence, in May 2023, and it is only since that point that she has obtained 'unfit' notes from her GP and started claiming benefits (EESA) from DWP.

44. The Claimant says that she has a verbal job offer from her former employer Viking Cruises to take up after her heart surgery. It was unclear when the Claimant had approached her former employer, but given that the discussion appears to have been about waiting for the heart surgery, we infer the conversation must have taken place after September 2022, which is the first point (on the evidence before us) that the need for heart surgery was identified.

45. The Respondent for its part has produced evidence of book-keeping jobs in the London area currently advertised by reed.co.uk. There are a number of them and they attract salaries of £25k-£40k. We are prepared to infer, given that bookkeeping is a service almost universally required by businesses, that the job market would have been much the same at all times since February 2022. The Claimant's salary with the Respondent was £30k. She was an experienced bookkeeper. If she had acted reasonably to mitigate her loss by making applications to multiple companies in the usual way, we find that she would on the balance of probabilities have obtained employment at a salary commensurate with that she enjoyed with the Respondent within six to eight weeks.

46. In other words, we are satisfied that, even if we are wrong about her compensation being limited by our *Polkey* conclusion to 7 weeks (5 weeks' notice plus 2 weeks for a fair procedure), the Respondent has shown that if

she had acted reasonably to mitigate her loss, she would have fully mitigated it within that same period.

Holiday pay

47. In our Liability Judgment at paragraph 21 we recorded Mr Belson's evidence, not disputed by the Claimant at that hearing, that the Claimant had historically taken holiday when she wanted without seeking authorisation from Mr Belson. However, we did not regard the Liability Judgment as having finally determined that point as the Claimant's entitlement to holiday pay was not in issue at that hearing. It is now, so we have heard further evidence.

48. At this hearing, the Claimant maintained that she had not taken any holiday at all during the 2021/2022 leave year (which began for her on 1 May). She said that she had worked every day, not taking a day off even for medical reasons. She denied choosing which days she worked and maintained that she always consulted with Mr Belson. She said that even during holidays she would make sure that she was everyday online and answering questions because that was what was needed in a small business. She said that Mr Belson *"always calls me workaholic and responsible like a Swiss train"*.

49. The Respondent for this hearing produced the call records for the Claimant's work mobile phone from 2018 through to March 2022 which apparently showed her as having been abroad for substantial periods, including for approximately 22 weeks between September 2021 and March 2022.

50. The Claimant maintained that from the summer of 2021 this number was not her work mobile number, that it had been 'cancelled' by Mr Belson or Mr Kjellin, and that she was only using it for WhatsApp after that. She emphatically denied ever having been in Jamaica (one of the countries from which calls appeared to have been made), but did not deny having been in France or Antigua and Barbuda, although she disputed whether the phone records actually showed that she had been in those countries. When we the Tribunal put to her that it was the number that she had given the Tribunal as being her phone number when she commenced her claim on 4 March 2022, she said that she had got confused when filling in the Tribunal form as she was only using it for WhatsApp at that point.

51. The phone records include data in a column labelled "Destination" which sometimes says the name of a country, sometimes says "Incoming call – France" (or similar), sometimes says "France to UK Vodafone". It was initially unclear whether this column could be relied on to show where in the world the Claimant was when making the call. However, some light was shed on this by a phone record from 26 December 2020 of the Claimant's mobile calling Mr Belson's mobile. This call is marked as "Antigua and Barbuda" in the Destination column. At that time we know from our findings at the Liability Hearing that the Claimant was in Antigua and Barbuda while Mr Belson was in the UK. It is thus clear that "Destination" data can mean that that is where the person is calling from, not the destination of the call.

52. In the light of the evidence we have heard, we find that it had always been up to the Claimant when she took holiday. She may have discussed it with Mr Belson when their relations were cordial, but there was no process of 'authorisation' and the Claimant was free to choose when she worked and when she took holiday.

53. We reject the Claimant's evidence that her work mobile number had been stopped in the summer of 2021 or that she was only using that number for WhatsApp. We find that her evidence about this was untruthful. It was the mobile number that she gave the Tribunal in March 2022 and we find that is because it was still the number that she was using for telephone calls. Her evidence as to her whereabouts during the period September 2021 to March 2022 was evasive. Although she did not deny being in Antigua and Barbuda or France, she did not expressly accept that she had been in either. She maintained that she had been working every day during that period although we already found as a fact in the Liability Judgment that she was not and nothing we have heard at this hearing causes us to doubt our conclusion on this point.

54. We find based on the call records that she was abroad in France or the Caribbean for 22 weeks between 27 September 2021 and 15 March 2022. We are, however, prepared to accept as truthful her adamant evidence that she had not been in Jamaica (where her call records show her making calls on about 11 days over the 22 weeks). We can think of no explanation for these references on the call records that is not mere speculation about, for example, the possibility of overlapping mobile networks between islands (despite the very large geographical distance between them) or the possibility of travel by yacht which might have brought someone within reach of a Jamaican mobile network. We therefore recognise that the references to Jamaica on the mobile records are anomalous and do not reflect the Claimant's movements, but they do not cause us to doubt the genuineness of the records as a whole, which we have no reason not to think are genuine records (indeed, if they had been fabricated by Mr Belson it is unlikely they would have an 'error' on them in relation to Jamaica). They also cannot be phone records for someone else not only because we find that the number was the Claimant's, but because the records tally with a pattern of movement which she has apparently established in recent years of spending the UK winters in the Caribbean, particularly in Antigua and Barbuda.

55. We therefore find that the Claimant was abroad in France or Antigua and Barbuda for most of 22 weeks during the period September to March 2022, during which time as we found in our Liability Judgment she was not expected to do any work and in fact did little or none. As she could choose when she took holiday, we find as a fact that she did treat that period, or most of it, as holiday. It was, at least for the most part, a period of rest and relaxation away from work and accordingly counted towards, and wholly exhausted, her statutory annual leave entitlement for the period.

56. We therefore find that as at the termination of her employment the Claimant was not entitled to any payment under the Working Time Regulations 1998 by way of accrued but untaken holiday.

Loss of statutory rights

57. The Claimant and Respondent are agreed that **£500** represents the appropriate amount for loss of statutory rights and, having regard to the Claimant's length of service, we consider that is an appropriate amount to reflect her loss of her statutory rights.

ACAS Uplift

58. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992) provides that if, in cases to which that 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%"*.

59. In this case, the Respondent accepts that a relevant Code of Practice, namely the ACAS Code of Practice on Disciplinary and Grievance Procedures (March 2015) applies. The Respondent submitted that 15% would be the appropriate uplift. The Claimant suggested 25%.

60. We have first of all to consider whether the Respondent's failure to follow any procedure at all in relation to the Claimant's dismissal was unreasonable. The Respondent dismissed the Claimant purportedly for redundancy. Redundancy is not a ground for dismissal to which the ACAS Code of Practice on Disciplinary and Grievance Procedures applies. However, we found as a fact that redundancy was not the true reason for dismissal at the time. The Respondent at the time based on its ET3 was contemplating in the alternative a dismissal for conduct. The ACAS Code of Practice on Disciplinary and Grievance Procedures would have applied to that even though ultimately a different reason for dismissal has been relied on: see the *Lund* case referred to in the Law section. Although we have found that the breakdown in working relations between the parties was irretrievable, we nonetheless consider that it was unreasonable for the Respondent not to follow any procedure at all in relation to the Claimant's dismissal. The Respondent has not sought to argue the contrary. It would in our judgment have been reasonable in the circumstances for there at the least to have been a staged process of advance notification, an opportunity for the Claimant to respond in writing to the proposed reasons for dismissal, and a paper appeal to an independent third party, even if there were no meetings.

61. However, while we are satisfied that the ACAS Code of Practice applied as a result of the contemplated gross misconduct allegations and that the failure

to follow any procedure was unreasonable, we do not consider that the failure was very serious. This is both because the purported reason for dismissal (redundancy) and the potentially fair reason for dismissal that could have been adopted (SOSR) were not reasons to which the ACAS Code of Practice applied so that the failure to follow a procedure is more excusable, and because, in the light of the irretrievable breakdown in working relations, it is unlikely that a procedure would have made any difference.

62. We therefore judge the appropriate uplift to be **7.5%**, this being the figure on which we were as a panel able to agree having initially been divided as to the appropriate uplift.

Section 38 Employment Act 2002

63. Under Section 38(3) of the Employment Act 2002 if, in the case of proceedings to which the section applies (such as the present), the Tribunal makes an award to the worker and at the time the proceedings were begun the employer was in breach of his duty to provide her with a statement of terms and conditions of employment as required by ss 1, 4, 41B or 41C of the ERA 1996, the Tribunal must (save if there are exceptional circumstances which would make an award or increase under the subsection unjust or inequitable) uplift the award by two weeks pay and may, if it considers it just and equitable in all the circumstances, increase the award by four weeks pay: EA 2002, s 38(3)-(5). The statutory cap on a week's pay under s 227 of the ERA 1996 applies for this purpose: section 38(6).

64. The Claimant maintains that she was never offered a written employment contract by Mr Belson. We accept that evidence, but we also accept Mr Belson's evidence that the reason for this was because of the informal nature of the employment relationship, because the Claimant wished to be free to work or not as and when she wanted, because her employment in the business was in part to maximise their joint income from the business in a tax efficient way and because she was (at least until relations soured) regarding the business in some ways as being as much 'hers' as his. The Claimant was, we find, in a position where she could have asked for a written contract at any point if she wanted one. Indeed, as the person within the small team of 5 or 6 employees prior to the pandemic who was responsible for administration, she was in a position where she could have written her own statement of terms and conditions if she wanted to. While the fact that she wanted flexibility did not prevent her from having a statement of terms and conditions of employment, which can of course be on flexible terms, the nature of the employment and personal relationship in this case explains why there were no written terms as required by the ERA 1996.

65. In most cases of employment like this in a small family business, we would be inclined to say that those are circumstances that explain but do not excuse the failure to provide written particulars of employment and that at least the minimum increase of two weeks pay should be awarded. However, in our judgment there are circumstances in this case that are exceptional so that it

is just and equitable not to make any award. This is not just because of the extent to which the Claimant bears responsibility for not having any written terms and conditions of employment, but also because her last few months of employment were, essentially, holiday going well beyond her statutory entitlement and for which she has been paid. In those circumstances, we consider that the compensation we have already awarded the Claimant is sufficient to recognise the wrongs that were done to her and it is not just and equitable to award her a further uplift as a result of her not having a written statement of particulars of employment.

Conclusion

66. It follows from the above that the Respondent must, within 14 days of the judgment being sent to the parties, pay to the Claimant a total of **£8,922.50**, comprising:

    a. Basic Award for unfair dismissal: **£4,080.80;**
    b. Compensatory award for unfair dismissal (including wrongful dismissal):
        i. Notice pay: £2,884.60 gross notice pay (subject to tax at 20%, for which the Claimant will be liable);
        ii. Pension loss £31,99 x 7 weeks = £223.93;
        iii. Two further weeks' wages net £447.69 x 2 = £895.38;
        iv. £500 loss of statutory rights;
            Sub-total: £4,504.91
        v. Plus ACAS Uplift at 7.5%: **Total: £4,841.70**

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Employment Judge Stout

10 November 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

16/11/2023

FOR THE TRIBUNAL OFFICE