EMPLOYMENT TRIBUNALS

Claimant: Mrs G Baker
Respondent: Bartco Ltd

Heard at: Reading
On: 11, 12, 13, 14 September 2023 (liability) and 10 October 2023 (remedy)

Before: Employment Judge Shastri-Hurst,
Members: Mrs A Brown
Ms H Edwards

Representation
Claimant: Mr N Baker (claimant's husband)
Respondent: Mr D Parry (solicitor)

JUDGMENT on liability having been sent to the parties on 20 September 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant commenced working for the respondent as the Office Manager on 3 April 2017, and held that position until her dismissal on 17 November 2020.

2. The claimant started the ACAS early conciliation process on 10January 2021. That process ended on 21 February 2021. The claim form was presented on 22 February 2021.

3. The claimant presented claims of unfair dismissal, sex discrimination and unauthorised deduction of wages. The issues were set out in the Case Management Summary of Employment Judge Eeley following a preliminary hearing on 24 March 2022.

4. In reaching our decision, we heard witness evidence from:

    4.1. Stephen Bartlett

4.2. Melanie Bartlett
4.3. Gina Baker and
4.4. Nigel Baker.

5. Melanie Bartlett and Nigel Baker were not cross examined to any extent but confirmed their evidence and answered a few questions. Gina Baker and Stephen Bartlett were cross examined. We also had a bundle of 210 pages before us and we heard oral submissions from both representatives.

6. We dealt with matters of liability (including Polkey and contribution) during four days in September 2023. We reconvened in order to deal with remedy on 10 October 2023.

7. We are grateful for the professional, courteous and respectful manner in which both representatives dealt with the hearing throughout.

The issues

8. The issues for us to determine are those as set out in the case management order at page 31 to 34 of the bundle. They are set out below for ease of reference:

1. <u>Unfair dismissal</u>

1.1. What was the reason or principal reason for dismissal? The respondent says the reason was conduct, capability or some other substantial reason. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

1.2. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

1.2.1. there were reasonable grounds for that belief;

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

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

1.2.4. dismissal was within the range of reasonable responses;

1.2.5. the claimant also alleges inconsistency of treatment in that the claimant was dismissed whereas Mike Wells, Graham Jones, Peter Lunt and Tony Bartlett were not dismissed for gross misconduct.

1.3. If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

1.3.1. The respondent adequately warned the claimant and gave the claimant a chance to improve;

1.3.2. Dismissal was within the range of reasonable responses.

1.4. If the reason was some other substantial reason (breakdown in the relationship of trust and confidence between the parties) did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

2. <u>Remedy for unfair dismissal</u>

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

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

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

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

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

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

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

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

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

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

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

2.1.11. Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?

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

2.3. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

3. <u>Direct sex discrimination (Equality Act 2010 section 13)</u>

3.1. Did the respondent do the following things:

3.1.1. Dismiss the claimant?

3.2. Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

The claimant says she was treated worse than Mike Wells, Peter Lunt, Graham Jones, Tony Bartlett. She says that they were guilty of gross misconduct (either smoking or arguing at work) but were not dismissed for it.

3.3. If so, was it because of sex?

4. <u>Remedy for discrimination or victimisation</u>

4.1. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

4.2. What financial losses has the discrimination caused the claimant?

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

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

4.5. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

4.6. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

4.7. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

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

4.9. Did the respondent or the claimant unreasonably fail to comply with it by [specify breach]?

4.10. If so is it just and equitable to increase or decrease any award payable to the claimant?

4.11. By what proportion, up to 25%?

4.12. Should interest be awarded? How much?

5. <u>Unauthorised deductions</u>

5.1. Did the respondent make unauthorised deductions from the claimant's

wages and if so how much was deducted? The claimant's complaint is that she did not agree to be put on furlough. During furlough she received only 80% of her normal wages whereas she would have been paid 100% if she had been at work. She says that during furlough someone else did her job.

The law

Reason for dismissal – conduct

9. Section 98 of the Employment Rights Act 1996 ("ERA") sets out the legal framework regarding "ordinary" unfair dismissal:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> (3) In subsection (2)(a)—
>
> (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
>
> (b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

10. The burden of proof is on the respondent. It is for the employer to show the reason for dismissal and that it is a potentially fair one, such as conduct. It is not a high threshold for a respondent.

Substantive fairness

11. The statutory terminology under s98(2)(b) ERA is "conduct" rather than "misconduct", although we often refer to misconduct in the Tribunal. Generally, an act of misconduct must be so serious in nature as to justify dismissal.

12. The case of British Homes Stores Ltd v Burchell [1978] ICR 303 encompasses the relevant test for fairness:

    9.1 Did the respondent have a genuine belief that the claimant was guilty of the misconduct alleged?

    9.2 If so, were there reasonable grounds for the respondent in reaching that genuine belief? and

    9.3 Was this following an investigation that was reasonable in all the circumstances?

10 In all aspects of such a case, including consideration of sanction, in deciding whether an employer has acted reasonably or unreasonably under s98(4) ERA, the Tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances. Whether the tribunal would have dealt with the matter in the same way or otherwise is irrelevant and the tribunal must not substitute its view for that of any reasonable employer – Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, London Ambulance Service NHS Trust v Small [2009] IRLR 563.

Procedural fairness

11 Following the case of Polkey v AE Dayton Services Ltd [1988] ICR 142, it is well established that fairness in procedure is a vital part of the test for reasonableness under s98 ERA. It is not relevant at this liability stage to consider whether any procedural unfairness would have made a difference to the outcome, this is a matter for remedy. If there is a failure to adopt a fair procedure, whether by the ACAS Code of Practice or by an employer's internal processes, this will render a dismissal procedurally unfair.

12 Regarding dismissal for conduct issues, the reasonableness of the procedure rests fairly heavily on the reasonableness of the investigation and the provision of opportunity for the employee to make his or her position, explanation, and mitigation, heard and understood.

13 Procedural and substantive fairness do not stand as separate tests to be dealt with in isolation – Taylor v OCS Group Ltd [2006] ICR 1602. It is ultimately a view to be taken by the Tribunal as to whether, in all the circumstances, the employer was reasonable in treating the reason for

dismissal as a sufficient reason to dismiss.

Reason for dismissal – capability

14 The evidence necessary to establish that the employer acted reasonably in treating capability as the reason for dismissal requires certain factors to be taken into account:

14.1 honestly held views of superiors may be relevant to whether dismissal is fair particularly where the nature of the job means it is difficult to get clear objective evidence of incompetence;

14.2 objective evidence is more useful in proving that incompetence was the fair reason;

14.3 rebuttal evidence – if there is evidence that an employee is of long service, and has done the job without issue, it will be difficult for an employer to say that the employee has become incapable of doing it, unless there is a change of circumstances such as illness.

14.4 inconsistent statements or actions by the employer – for example, if an employer has said or done things to cast doubt on its assertion of the claimant's incapability, those actions may be taken into account by the Tribunal.

16. In terms of procedure for capability there are three main steps:

16.1 to carry out a thorough appraisal of the employee's performance and discuss any issues with the employee;

16.2 the employer should give a warning to the employee of the consequences of a failure to improve; and

16.3 The claimant should be given an opportunity to improve.

Reason for dismissal – some other substantial reason

17 In the case of a breakdown of trust and confidence, the Employment Appeal Tribunal ("EAT") in Governing Body of Tubbenden Primary School v Sylvester UK EAT 052711 considered a particularly radical submission by a respondent. It was submitted that in a case of loss of trust and confidence on the part of the respondent, the Tribunal must take it at face value that there has in fact been a loss of trust and confidence, as long as the loss could be proven to be genuine. The EAT rejected this argument, saying that the Tribunal was entitled to look at the facts behind the loss of trust and confidence and whether in all the circumstances the dismissal was unfair.

18 The general position is that:

18.1 loss of trust should not be relied upon too swiftly as a solution to absolve employers of the procedural requirements of a conduct dismissal;

18.2 if there are allegations of misconduct then they should be relied

upon, and the respondent must be prepared to prove them;

18.3 a strong case of terminal loss of trust may be a fair reason for dismissal under the umbrella of some other substantial reason;

18.4 however, the fact of loss of trust and confidence may not be enough as the Tribunal can look into the factual background to determine whether dismissal was fair in any event.

19 In terms of substantive fairness for some other substantial reason the requirements, as set out in British Homes Stores v Burchell, are applied in cases under this head of fairness as well.

20 In all aspects of such a case, in deciding whether an employer has acted reasonably or unreasonably, the Tribunal must decide whether the employer acted within the band of reasonable responses open to a reasonable employer in the circumstances.

21 In terms of procedural fairness and some other substantial reason dismissal, what is reasonable or unreasonable pursuant to s98 ERA will depend very much on the individual facts of the case. No set procedure is required by statutory provision, and it would be wrong to find that a "some other substantial reason" dismissal could not be fair without a specific process having been followed. Where it would be futile to carry out a proper process it may be reasonable to dismiss without that process.

Inconsistent treatment.

22 Inconsistent treatment can be a factor affecting fairness of dismissal. This argument has to be approached with care, and will only apply in limited circumstances where the cases relied upon show disparity in treatment are "truly similar or sufficiently similar to afford and adequate basis for the argument" –Hadjioannou v Coral Casinos Ltd [1981] IRLR 352.

Polkey reduction

23 The decision in Polkey v AE Dayton Services Ltd permits the reduction of compensation when, even if a fair procedure had been followed, the claimant would have been dismissed in any event. Compensation can be reduced as a percentage if the Tribunal considers that there is a percentage chance of the employee having been dismissed in any event. Alternatively, where it is found that a fair procedure would have delayed dismissal, compensation should reflect this by compensating the employee only for the length of time for which dismissal would have been delayed.

Contribution

24 Under s123(6) ERA, a reduction may be made to any compensatory aware when the Tribunal finds that any of the claimant's conduct prior to dismissal was culpable or blameworthy – Nelson v BBC (No.2) 1980 ICR 110, CA. This requires the Tribunal to look at what the claimant in fact did as opposed to being constrained to what the respondent's assessment of the claimant's culpability was – Steen v ASP Packaging Ltd [2014] ICR 56. The questions for us to ask are:

24.1 identify the conduct which is said to give rise to possible contributory fault;

24.2 ask whether that conduct was blameworthy irrespective of the respondent's view on the matter;

24.3 ask for the purposes of s.123(6) whether the conduct which is considered blameworthy caused or contributed to the dismissal and; if so,

24.4 to what extent the award should be reduced and to what extent it is just and equitable to reduce it.

25 Under s122(2) ERA, the relevant test is whether it is just and equitable to reduce compensation in light of conduct of the claimant prior to the dismissal. The conduct need not contribute to the dismissal. The EAT has confirmed that the same test of "culpable or blameworthy" applies to the s122(2) reduction question as to s123(6) ERA – Langston v Department for Business, Enterprise and Regulatory Reform UKEAT/0534/09.

Direct sex discrimination

26 Direct discrimination is set out under s13 of the Equality Act ("EqA") which requires:

> "13 Direct discrimination
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

27 There are two parts for direct discrimination;

27.1 The less favourable treatment, and

27.2 The reason for that treatment.

28 Sometimes however it is difficult to separate these two issues so neatly. The tribunal can decide what the reason for any treatment was first, if the reason is the protected characteristic then it is likely the claim will succeed – Shamoon v Constable of the Royal Ulster Constabulary [2003] UKHL 11.

"Because of": reason for less favourable treatment

29 In terms of the required link between the claimant's race and the less favourable treatment she alleges, the two must be " inextricably linked" - Jyske Finands A/S v Ligebehandlingsnaevnet acting on behalf of Huskic: ECLI:EU:C:2017:278.

30 The test is not the "but for" test, in other words it is not sufficient that, but for the protected characteristic, the treatment would not have occurred – James v Eastleigh Borough Council [1990] IRLR 288.

31 The correct approach is to determine whether the protected characteristic, here race, had a "significant influence" on the treatment – Nagarajan v

London Regional Transport [1999] IRLR 572. The ultimate question to ask is "what was the reason why the alleged perpetrator acted as they did? What, consciously or unconsciously, was the reason?" - Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48. This is a question of fact for the Tribunal to determine, and is a different question to the question of motivation, which is irrelevant. The Tribunal can draw inferences from the behaviour of the alleged perpetrator as well as taking surrounding circumstances into account.

32 If there is more than one reason for the treatment complained of, the question is whether the protected characteristic (in this case, sex) was an effective cause of the treatment – O'Neill v Governors of ST Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372.

33 In terms of comparators, s23(1) EqA sets out the meaning of comparator:

> "On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case."

34 Whether the comparator to be used is actual or hypothetical, the claimant and the comparator must be in the same as in not materially different) circumstances. It is for the claimant to show that the hypothetical comparator would have been treated more favourably: this is often done by asking the Tribunal to draw inferences, which requires some primary evidence. Real individuals may be useful in considering how a hypothetical comparator would have been treated; the more similar those individuals' circumstances are to those of the claimant the more relevant they will be. These are called "evidential comparators".

35 In terms of the burden of proof for discrimination, this is set out at s136 EqA and requires:

35.1 that there be evidence from which we can draw an inference that dismissal was because of sex; then,

35.2 if there is such evidence, we must uphold the claim unless the respondent can prove that the dismissal was in no way because of the claimant's sex.

Unauthorised deduction of wages

36 Under s13 ERA, a deduction of wages will be lawful if:

36.1 Firstly, the deduction is required or authorised to be made by virtue of any statutory provision;

36.2 Secondly, it is required or authorised to be made by virtue of any relevant provision of the worker's contract; or

36.3 Thirdly, the worker has previously signified in writing her agreement or consent to the making of a deduction.

Findings of fact – liability

37 The respondent's business specialises in vehicle painting, accident repairs

and coach building. It is a very small business. At the time of Mrs Baker's dismissal its annual turnover was about £300,000 and it employed only nine staff members. It does not employ anyone who specialises in HR.

38 This was very much Mr Bartlett's business. He, on several occasions during his evidence, said words to the effect of "This is my company, and I can do what I want". For example, in cross examination he said, "I wasn't happy, it's my company, I decided the claimant wasn't doing her job properly". In an email dated 2 December 2020 he referred to the requirements of "my Company", "myself as Company director" and "My lawyer" – page 119. In a letter of 9 January 2021 at page 131, he stated:

> "Having spoken to my lawyer I am unwilling at this time to pass decisions on such matters onto a third-party representative. I wish to proceed with Charing the meeting with you myself."

39 We find that Mr Bartlett was not up to speed with Employment Law or the requirements it places on an employer.

40 The claimant started as Office Manager for the respondent on 3 April 2017. Her contract is at page 45. We refer particularly to clause 8 at page 47, which reads as follows:

> "The company reserves the right to introduce short time working on proportionately reduced pay or period of temporary layoff without pay with the exception of any statutory entitlement where this is necessary to avoid redundancies where work cannot be performed due to exceptional circumstances or where there is a shortage of work."

41 The claimant was subject to the disciplinary procedure and conduct standards, where one can find a non-exhaustive list of gross misconduct matters – page 54.

42 In December 2019, the claimant was paid a Christmas bonus. On Monday 23 March 2020 the Prime Minister announced a lockdown and advised that everyone should be working from home. The following day, the claimant attended the office and suggested she take a computer home to work from home, as she was nervous about Covid-19, particularly given her age. Mr Bartlett agreed. From the claimant's perspective this was intended to be a short-term arrangement.

43 On 24 March 2020 the claimant, on behalf of Mr Bartlett, emailed the respondent's accountant at page 58 to ask about furlough information: she received a reply explaining how furlough works. After about a week Mr Bartlett asked the claimant to bring the computer back to work as the working from home arrangement was not working for him.

44 On the day the claimant came into the office to return the computer, she asked what the plan was for furloughing staff. Mr Bartlett was unsure. To assist, the claimant suggested she take a two-week holiday whilst Mr Bartlett decided what he wanted to do.

45 Mr Bartlett suspicions about the claimant were raised when the claimant was seen shredding documents on this day. Her explanation when asked about this during the disciplinary process was that she had been shredding

copies of documents that she had taken to allow her to work from home. We accept this evidence. There is no evidence to the contrary and it makes sense that the claimant would have copied documents to work from home and then would need to shred them when they were no longer required.

46 Once the computer was returned to the office, Mr Bartlett told us that the first problem was that he could not access Microsoft or One Drive accounts with the passwords he had.

47 On 9 April 2020, Mr Bartlett messaged the claimant asking for the password to the office computer, which she gave him. Mr Bartlett did not respond further on this. These facts were not denied by Mr Bartlett.

48 We find that the claimant did not change the passwords, as has been alleged by Mr Bartlett. At the stage of returning the computer to work she was not aware that she would be furloughed and was not aware that there would be an investigation into her conduct. Therefore, there was no reason for her to change any passwords. Other people had access to the computer and the claimant answered Mr Bartlett's text request for the password rather than trying to avoid the issue. There would be no point in her deliberately giving a false password as Mr Bartlett would immediately find out it did not work.

49 Nothing further was done by Mr Bartlett to explore who changed the password or why. Mr Bartlett assumed that this was done by the claimant, for an underhand reason, without any evidence to support this.

50 Once the respondent gained access to the computer, the respondent found other issues of concern to it. Mrs Bartlett told us, and we accept, that she had dealt with a couple of issues with customers and had raised them with Mr Bartlett, who then asked her to have a look around the claimant's work to see if all was in order. Mrs Bartlett then went back to Mr Bartlett with various issues. This was before the claimant's period of furlough started and while she was on holiday.

51 On 17 April 2020, the claimant spoke to Mr Bartlett on the phone and asked if she was going to be furloughed. Mr Bartlett's answer was that he was not sure. That evening, the claimant received a hand delivered letter at page 71. The respondent wrote to the claimant informing her that she would be placed on a period of lay off from work in accordance with clause 8 of her contract because "there is insufficient work for you to do". This "lay off" would commence on 20 April 2020. This letter asked for the claimant to confirm her personal contact details; she did this by writing them on her copy of the furlough letter and returning it to Mr Bartlett. The claimant at no point complained about being laid off or placed on furlough. We find that the claimant's response to being furloughed equated to implicit agreement. In any event, we find that there was in fact no requirement for the claimant to agree to furlough. Under her employment contract at clause 8, the respondent was entitled to lay the claimant off temporarily with no pay in "exceptional circumstances". The claimant accepted in evidence that Covid-19 amounted to "exceptional circumstances". The claimant also accepted that, under clause 8, contractually the respondent had the right to temporarily lay her off with no pay at all.

52 On this point of furlough, the claimant argued that the respondent deliberately placed her on furlough in order to avoid, firstly, placing her on suspension and having to pay her full pay and, secondly, to avoid her being in the office so that they could investigate undisturbed. We do not accept these arguments. We find that Mr Bartlett and Mrs Bartlett's thinking about the claimant's absence was not sophisticated enough to act in the devious way in which these allegations suggest.

53 On 20 April 2020 therefore the claimant was furloughed.

54 On 2 July 2020, Mrs Bartlett sent an email to a charity, "Safe 4 Kids". at page 72(a) stating: "We have recently changed office staff". Mrs Bartlett enquired as to why payments had been made to Safe 4 Kids by the respondent. Mrs Bartlett said she had worded this clumsily but was trying to ask the question about what the donations were for, without it sounding like the respondent did not know its own internal affairs. We accept that evidence. Mrs Bartlett got the reply at page 72(b) saying that, "Over the last couple of years Gina Barker [notably not Baker] has been a very avid supporter of our work".

55 On 7 September 2020, Mr Bartlett reported the payments from the respondent to Safe 4 Kids to the police. This is referenced at page 38 in the Grounds of Response. Mr Bartlett said he reported the matter to the police "to try to establish whether the nature of the payments to Safe 4 Kids was in fact fraudulent", That is at paragraph 11 of Mr Bartlett's statement. Mr Bartlett did not tell us what it was he thought the claimant had done that was fraudulent or what he said her connection to Safe 4 Kids was. The height of the fraud allegation appeared to be that he suspected Safe 4 Kids was a bogus company.

56 We will address Safe 4 Kids at this stage. There is a dispute as to whether the claimant asked for Mr Bartlett's authorisation or not in order to make payments to Safe 4 Kids. We find that she did ask him and that Mr Bartlett gave that authorisation for the following reasons.

56.1 First, the donations were not hidden but were recorded on Sage, denoted with Safe 4 Kids as the name of the company, and "charitable payments" under the category of supplier. We find that, had the claimant made payments without Mr Bartlett's permission she would not have been so open about recording the payments.

56.2 Second, we accept that there were green files sent to the respondent with information about Safe 4 Kids. This piece of evidence is a precise matter of detail from the claimant that we find would be unlikely to be invented. Again, if the claimant had made donations without Mr Bartlett's permission, those documents would have been hidden and not left in the office.

56.3 Third, there is no evidence of any connection between the claimant and Safe 4 Kids. We note that the company got her name wrong, at page 72(b). Therefore, there is no reason why the claimant would have made payments without Mr Bartlett's authorisation.

56. We make it clear that we do not think Mr Bartlett was lying to us in his

evidence. He has told us he is not a paperwork man. He told us he just signed off his accounts without really looking at them in any detail. We find that he approved the payments without really thinking about it. He was asked to give a swift answer without really taking into account what he was being asked. He has now forgotten and/or has convinced himself that this approval was not given. We find he cannot conceive that he would approve a charitable payment from the respondent, and is now adamant that he did not approve it. But we find that an adamant and genuine witness can still be mistaken.

57 On 9 September 2020, the claimant was sent an invitation to an investigation meeting, page 73 of the bundle. This was the first contact from the respondent to the claimant since being placed on furlough. The letter set out sixteen concerns that Mr Bartlett wanted to discuss with the claimant. Mrs Bartlett helped Mr Bartlett draft the letter. Paperwork, wording and spelling etc was not Mr Bartlett's strong point. He is much happier in the workshop. Mrs Bartlett stepped in to help with the letter writing throughout the disciplinary process and gathering the evidence required for the investigation meeting.

58 Mr Bartlett told us that, by this time, he had lost trust and confidence in the claimant and had already decided to dismiss her. At this point the respondent sent to the claimant a "without prejudice" letter at page 75. We find that Mr Bartlett sent the without prejudice letter because he does not like confrontation; he had decided that the claimant was going and wanted it to be as pain free as possible. He was a bit like an ostrich sticking his head in the sand. We do not accept that this shows Mr Bartlett's concern about Safe 4 Kids payments was disingenuous, which seemed to be suggested by the claimant.

59 On 11 September 2020, the claimant sent a response to the invitation. She asked for more details about the allegations, that is at page 76. The following day, 12 September, the respondent replied at page 78, stating that they would be in touch with their legal representative. Mr Bartlett also sent replies to the claimant's enquiries and a separate response to the without prejudice matter, in which he withdrew his previous offer – page 83. He also sent the claimant a copy of her contract of employment and the employee handbook. The letter detailing further information stated that documents would be available at the investigation meeting for the claimant to inspect. Specific details of the claimant's alleged conduct were given, those being:

59.1 Some missing estimates;

59.2 Missing invoices for specific clients;

59.3 Incorrect invoices for certain clients;

59.4 Records not being up to date;

59.5 The job book did not always run in order;

59.6 Missing records for two vehicles;

59.7 Invoices not received by eight specific clients;

59.8 A failure to show sympathy or compassion in relation to one specific client;

59.9 A warning letter being sent out to a customer after payment was received;

59.10 The payments to Safe 4 Kids; and,

59.11 Attitude at work was raised but no specific examples were given.

60 On 15 September, the claimant responded to the without prejudice correspondence making a counter offer.

61 On 18 September, the investigation meeting was held. The claimant provided a written statement at page 85, but Mr Bartlett did not read that statement until after the meeting, at which point he went through it with Mrs Bartlett. The respondent's minutes are at page 90, the claimant's minutes are at page 92. Mr Bartlett chaired the meeting. Margaret Thompson, an independent third party, came to take notes. The claimant attended on her own. The meeting lasted 20 minutes.

62 In the claimant's statement that she produced for the investigation meeting she responded to every allegation. She admitted fault in relation to certain matters:

62.1 The "brain fart" she says that took place in relation to job book numbering, page 88.

62.2 Her attitude, page 87. There had been an altercation with Graham Jones. The claimant, of her own volition, apologised to Mr Jones at the time and accepted that she had been cross with him and made her frustrations clear. The claimant was the one who told Mr Bartlett about this incident and Mr Bartlett told us in his cross examination that as far as he was concerned this had been put to bed. Yet it remained as an allegation against the claimant and the only specific example of her alleged attitude issues.

62.3 Personal use of the computer, page 87. The claimant admitted this but said it was only during quiet times and did not stop her doing her work. We accept this evidence, which was not challenged.

63 The claimant also raised in this written statement that Mr Bartlett had told her he had concerns about another employee, Philip Leech's, work quality and concerns about a third employee, Graham Jones' attitude. The claimant questioned whether they too had been disciplined for gross misconduct.

64 The claimant also raised "Mike and Tony [other employees] smoking on site daily" and an issue about people not wearing the appropriate PPE.

65 The claimant raised sex discrimination in this statement stating that Mike and Philip had not been speaking and this caused difficulties for the business but that this was not seen as an issue. Yet the claimant's alleged attitude was

seen as unacceptable.

66 The claimant says in this statement that "Anything the guys want to do Steve is reluctant to deal with as they are his friends or relatives which is very unfair on me and has not made my job any easier". We find that this is an accurate summary of Mr Bartlett's manner of dealing with colleagues. He did not want to fall out with his colleagues who were also his friends and family. In the investigation meeting itself, the claimant was shown various documents in plastic pockets. She was not given a copy of the documents in advance or given a copy to take away with her. She did not get the opportunity to examine them closely at the meeting. We do not have these documents before us so do not know upon what evidence Mr Bartlett based his decision.

67 At the beginning of the investigation meeting. Mr Bartlett stated that the investigation was currently ongoing although it appears to us that nothing was actually done between this meeting on 18 September and the disciplinary meeting on 17 November 2020. In fact, in evidence Mr Bartlett said that he could not tell us what had been done between those two dates. Mr Bartlett said at the investigation meeting that he would be in touch with the claimant once he had spoken to his lawyer.

68 From both parties' notes we find that not all the sixteen allegations that were set out in the invitation letter were discussed at this meeting.

69 At the end of the meeting there were heightened emotions and cross words. We find that the end of the meeting went as follows:

69.1 Mr Bartlett said, "I don't care what you say, I'm not letting this go and will be reporting it to the police." This is reported in the claimant's witness statement at paragraph 28 . We accept that this was said as there was no reason why the claimant would make it up and as a fact we know that Mr Bartlett had already reported the matter to the police on 7 September;

69.2 In response, the claimant said that she would report the respondent to HMRC if he went to the police. There is a slight disparity on this point. The respondent's note at page 91 recorded that the claimant said, "I will go to HMRC if you take the investigation further" but Mr Bartlett's own letter on page 103 says that this was "If you go to the police". The claimant also said that her comment about HMRC was in response to the police comment from Mr Bartlett. We accept that the reference to HMRC was in response to Mr Bartlett's threat to go to the police, given Mr Bartlett's near contemporaneous record, and the claimant's corroborative evidence;

69.3 The meeting ended by the claimant telling Mr Bartlett that "as he had already made his decision I was wasting my time" and so she left. That is at page 93 of the bundle.

70 On 23 September, we have correspondence from the police seeking to investigate further Mr Bartlett's allegations regarding Safe 4 Kids.

71 On 25 September, the respondent sent a response to the claimant's

investigation meeting statement. Again, Mrs Bartlett helped Mr Bartlett to draft this and this is at page 95. In this letter the respondent informed the claimant that he had reported the charitable payments to the police. In terms of this response we note that it does not really provide any further evidence to support the allegations; it deals mainly with the claimant's points and the respondent's view on them, as opposed to taking the investigation any further. At this point the claimant told us in cross examination that trust and confidence was broken on reporting the claimant to the police. As we have mentioned, she found this out on 25 September 2020. We are not convinced that this was actually the point of the claimant's loss of trust and confidence, and we will return to this point later.

72 In October 2020 Mr Bartlett was diagnosed with cancer. On this point we entirely accept that this diagnosis and the symptoms and treatment associated with it have quite rightly taken priority in Mr Bartlett's thinking over this case and the matters with which it is concerned. We accept that his lack of memory on occasion is because of his symptoms or because of the mental strain of having to deal with his diagnosis.

73 On 23 October the respondent sent the claimant an invitation to the disciplinary meeting, page 105. This letter outlines six allegations. It was admitted by the respondent, that the fourth allegation was not fully aired during the disciplinary process. Further, we find, that the sixth point was not clear on its details but referred to matters previously raised with the claimant. The meeting could not take place on its original date and, therefore, another invitation was sent at page 107 on 2 November for a meeting to be held on 17 November.

74 At the end of October 2020, the claimant told us that she could see the way that the situation at work was going. She thought she may well end up being dismissed, and so she took on a weekend job at Sainsburys, starting the weekend of 31 October 2020, working Saturday and Sunday.

75 On 11 November the claimant attended Witney Police Station for her interview regarding Safe 4 Kids.

76 On 17 November the claimant attended the disciplinary hearing at which the respondent read out a pre-prepared statement at page 108, ending with the fact of the claimant's termination. The claimant had produced a statement to be read at this meeting at page 112. However, that statement was not in fact read prior to the respondent reading out his statement. We find therefore that the claimant did not have an opportunity to give her explanation for the allegations at the disciplinary hearing. The manner in which the disciplinary hearing was conducted was unreasonable: there is no good reason why the claimant was deprived of the opportunity to read out her statement.

77 In relation to the claimant's statement at page 112, although the claimant agreed in cross examination that her letter raised no new points, we find that it does raise matters that could and should reasonably have led to further investigation and could have led to an alternative sanction. We consider that the investigation process was unreasonably flawed: there is no good reason why the respondent did not investigate the matters the claimant raised during the disciplinary process.

78 It is at this point, at the end of the meeting on 17 November, that we find the claimant lost complete trust and confidence in the respondent. Once the respondent read the statement dismissing the claimant, that is the point at which trust and confidence was lost. We find this for the following reasons:

78.1 we note that she did not walk out at any stage prior to the disciplinary meeting, or sue for constructive dismissal;

78.2 She carried on thinking that she could prove her innocence;

78.3 She did not walk out when she found that the matter had been reported to the police; the police appeared to have been looking mainly into Safe 4 Kids and the claimant was helping them with their enquiries;

78.4 The police interview was just before the disciplinary hearing and she still attended that disciplinary hearing. That suggests that there was not a complete lack of trust and confidence on the claimant's part at the point of her attending the 17 November meeting.

79 In terms of the allegations against the claimant we consider now what she actually did.

80 We do not have the evidence that was before the dismissing officer. The only evidence in the bundle we have of alleged wrongdoing other than Mr and Mrs Bartlett's accounts is the list of invoices at page 139 to 141, the earliest invoice being December 2019. The problem we have here is that, although the respondent's statements during the disciplinary process cover the fact of, for example, invoices being wrong or not being sent out, what they do not cover, or explore, is the reason why these errors or mistakes occurred.

81 The claimant gave possible explanations as to why, for example, invoices had not been sent. She told us that, in relation to some invoices, she may have been waiting for information from Mr Bartlett. She was only able to give possible answers as she had not been in the workplace for five months by the time of the investigation meeting and had not had access to the computer or paperwork.

82 It is for the respondent to prove the claimant's wrongdoing. We are not satisfied on the evidence we have seen or heard that the claimant had done things wrong other than what she has admitted. Although we have the respondent's response we have not seen the evidence of invoices or other documents evidencing the specifics that the claimant is said to have done wrong.

83 In terms of the allegation that the accounts were a mess, this is a sweeping statement. Although we have some specifics, there is again no evidence other than the respondent's response, to evidence that the claimant did anything blameworthy other than what she admitted.

84 We accept Mrs Bartlett's evidence as credible that accounts were "in a mess", but the extent of the mess is not clear in terms of what was the claimant's fault and what was not. Without the evidence in front of us for each allegation, we are not satisfied that the respondent has disproved the claimant's explanations. We find that the claimant did do some things that

were alleged against her: as we have mentioned they are as follows:

84.1 The "brain fart" relating to job book numbers;

84.2 The personal use of the computer;

84.3 The harsh words to Graham Jones although we find that these had already been dealt with and that this should therefore not have formed part of this process; and,

84.4 She accepted that some invoices were waiting to go out but, as we have said, she gave an explanation that she was seeking clarity from Mr Bartlett.

85 The claimant's effective date of termination was 30 November 2020. She was paid her wages for the whole month of November. She was also paid a total of three weeks' pay, £1500 gross, as pay in lieu of notice ("PILON").

86 The respondent also paid the claimant an ex gratia payment of £2000. The claimant did not want to muddy the waters in terms of any Tribunal claim, and so returned that £2000 to the respondent.

87 We consider at this juncture the purported difference in treatment between the claimant and the men that she has named in her claim. Starting with Tony, Mike, and Peter, who were the smokers, they smoked inside the respondent's premises. On observing this, the claimant raised it in her written document in preparation for the 18 September meeting. In response to this, Mr Bartlett gave them a talking to, reprimanding them. Mr Bartlett did nothing in writing and just had a conversation with them. No formal process or penalty was put in place. Initially, Mr Bartlett said that they did not smoke again but, in fact, then said that they smoked outside. Post Covid-19 there was a designated outside area on the respondent's premises. We note that, in the disciplinary policy, or conduct standards, smoking on the premises is a gross misconduct offence.

88 In terms of Philp's work quality and Graham's work attitude, the claimant reported that Mr Bartlett grumbled about these two gentlemen. We accept that this did happen, why else would the claimant allege this to Mr Bartlett? If this was not true, Mr Bartlett would have simply denied it, which he did not do. He gives excuses for them both instead, at pages 98 and 99. At page 98 he says that "Philip is getting old and is slowing down" and on page 99 he says that "Graham is a sub-contractor" and therefore Mr Bartlett was of the opinion that could not tell him what to do.

89 In terms of Mike and Philip not speaking and the effect that had on the workplace, at page 99 the respondent said in short that this was none of the claimant's business. We find that, if it affects the workplace, it is her business. We accept that there was a problem between Mike and Philip; this is not denied by anyone. We accept that this would have caused difficulties in the workplace. Two people not getting on in a small team would have an effect. We find that this issue was not addressed by Mr Bartlett.

90 The question for the Tribunal then becomes "why was the claimant treated

differently to the men we have mentioned?". We return to our finding that Mr Bartlett did not like conflict and did not want to fall out with his friends or relatives. He was friendly with the men who worked in the workshop and understood their work; that is where he is comfortable. He was less chummy with the claimant and did not understand her work.

91 In the matters raised relating to male employees we have discussed, Mr Bartlett acted like an ostrich, putting his head in the sand, and taking as light an approach as possible so as not to cause any upset. This is why the gentlemen were treated in the way they were.

92 On 1 December the claimant wrote to the respondent, she says asking for a grievance although, on the face of it, it appears to be an appeal letter. This is at pages 114 and 117. The reason the claimant asked for a grievance meeting was on ACAS's advice. ACAS asked if she wanted to return to work; she said no. On that basis they advised her to do a grievance letter rather than an appeal, presumably because the ultimate point of an appeal is to try to get one's job back.

93 On 3 December 2020, page 120, the respondent invited the claimant to an appeal.

94 On 7 December, Debbie Buckingham started in the role of Office Manager.

95 In February 2021 the appeal meeting was set. The claimant refused to attend. The reason for her refusal is at paragraph 37 of her statement: neither side wanted her to go back to work so an appeal was not relevant. She also thought it would not be a fair process, as Mr Bartlett would be the decision maker. Finally, she thought it was a sham as Mr Bartlett had already filled her role with Ms Buckingham.

96 Mr Bartlett agreed in his cross examination that, really, there was no point in an appeal as he would not have had the claimant back to work for him in any event. The respondent argues that the claimant deliberately deprived the respondent of the opportunity to remedy any procedural errors and make her dismissal fair, as this would in turn deprive her of the opportunity of succeeding in a claim of unfair dismissal.

97 We find that the reasoning behind the claimant's refusal to attend the appeal is slightly more nuanced. We find that it did not occur to the claimant that, by not attending an appeal, she would be depriving the respondent of the chance to make an unfair dismissal fair. She thought she was depriving Mr Bartlett of the chance to give her her job back . She did not want that, and she knew that Mr Bartlett did not either. Furthermore, the claimant thought that Mr Bartlett had already made up his mind, so there was no point in appealing.

98 Further, we accept that Mr Bartlett maintaining the role of Appeal Decision Maker was unreasonable, and would have led to an unfair appeal process. We accept that the respondent is a small employer with limited resources. Had Mr Bartlett approached the appeal process with an open mind, then our finding may be different. The problem here was that Mr Bartlett was very clear that nothing the claimant could say would change his mind. It was his closed mindedness that made it unreasonable for him to take the position of

Appeal Decision Maker.

99 On 13 December 2020 the claimant started working full time at Sainsburys.

100 On 10 January 2021 the claimant started the ACAS early conciliation process.

101 On 29 January 2021 there was communication between the respondent and Safe 4 Kids regarding the four payments that had been paid by the respondent company. We note that reference to four payments is incorrect, as one payment had been refunded. This documentation is at page 135(a) of the bundle.

102 The ACAS early conciliation period concluded on 21 February and the claim form was submitted to the Tribunal on 22 February.

Conclusions – liability

Unfair dismissal

Reason for dismissal

103 We find that the reason for dismissal was some other substantial reason, namely loss of trust and confidence.

104 Mr Bartlett told us that he had lost trust and confidence "by the end of the summer, September time" and that the claimant "was to be under investigation as I had lost trust in her from the start".

105 As Mr Bartlett did not understand the office work, he needed to have complete trust in the Office Manager so that he could completely and utterly leave the running of the office to that person, and not have to worry at all about it all being done correctly. On matters coming to light when Mr Bartlett gained access to the office computer, he was under the impression that the claimant was not doing things 100% accurately. We conclude that, as soon as he even conceived that the claimant may not be doing things 100% perfectly, he felt that he could no longer trust her as he would, from then on, no longer have confidence that he could just leave all matters in the office completely to her. Furthermore, at the beginning of September and before the investigation meeting, he had already reported the claimant to the police: this supports our finding that his loss of trust and confidence came at this time. Mr Bartlett told us that, from the moment he lost trust and confidence he was determined to dismiss the claimant.

106 We accept that Mr Bartlett genuinely believed that the claimant had acted in a way to breach that trust and confidence. The question is whether Mr Bartlett was fair in using this reason as a sufficient reason to dismiss. We therefore consider whether there were reasonable grounds following a reasonable investigation and we deal with the investigation first.

Reasonable investigation and grounds

107 There was not any real investigation other than finding as a fact that, for example, invoices were not sent by the claimant. The claimant, at the

investigation meeting, gave a statement that raised defences or mitigation, for example, Mr Bartlett needed to provide further information before invoices could be sent. However, these answers were not explored or investigated. In fact, we have no evidence that any further investigation was done between 18 September and 17 November . There were lines of enquiry that could and should have reasonably been pursued.

108 Moreover, Mr Bartlett said he was going to wait for the outcome of the police investigation but in fact he did not. The outcome of this should have reasonably weighed into his investigation even though he told us that in fact it would not have changed his mind.

109 There was no evidence of customer complaints or staff complaints regarding the claimant's attitude, which was one of the allegations. No specific examples and no witness statements or written complaints were produced.

110 Mr Bartlett said to the claimant "I came across plenty of evidence to have dismissed you, Gina": this suggests that Mr Bartlett was looking for guilt rather than exploring possible innocence.

111 The respondent's submission to us was that the claimant had already aired all of her answers to the allegations and so no further investigation needed to be done. We do not accept this, as there was no exploration of the claimant's mitigating or defending points. Further, had the claimant been given the opportunity to look at the computer system, Sage, and the documents more closely, she may have been able to give a more specific answer to the allegations; this is particularly so, given that she had not been in the office for five months at the point of the investigation meeting.

112 We therefore find the investigation was not reasonable. On that basis, given the flaws in the investigation, there were not reasonable grounds for Mr Bartlett's belief that there had been a breakdown in trust and confidence.

Sanction

113 Turning to consider the sanction and whether dismissal was within the band of reasonable responses, the claimant's inconsistent treatment argument fits in here.

114 Strictly, on the legal framework, the four male colleagues were not in sufficiently similar circumstances (following Coral Casinos). The male individuals did not hold the same job role as the claimant, and were guilty of very different misconduct to that which was alleged against the claimant.

115 The claimant's argument that the dismissal was unfair because of inconsistent treatment therefore does not succeed. However, we take into account that, evidentially, other colleagues who were on the face of it guilty of gross misconduct, ie smoking on the premises, were given a slap on the wrist rather than any form of more serious penalty. We also note that the smokers continued smoking although in a different outside area. Technically, this was still in breach of the policy not to smoke on the respondent's premises and nothing further was done.

116 In terms of behavioural issues, again, although they are not sufficiently similar for the inconsistent treatment argument to succeed, we do take into account the difference in how Graham and Philip were treated. Nothing at all was done about their work or attitude.

117 We accept that gross misconduct matters do not automatically lead to dismissal. However, in light of how other misdemeanours were treated, and given the holes we have found in the process, we find that dismissal, in all the circumstances, was outside the band of reasonable responses open to a reasonable employer.

118 In terms of procedural fairness, we find that the procedure is unfair. Mr Bartlett's decision was already made before even the investigation meeting. The claimant was not given the documents to consider in advance of the meeting and they were effectively waved under her nose at the meeting itself. We accept that she knew the detail of the allegations she was facing given the contents of the respondent's 12 September letter. However, she was not given the chance to properly consider the evidence behind those allegations. She had no access to the computer system, and we have not heard or seen evidence that investigations was done into why the alleged errors or mistakes had taken place, in light of the claimant's answers in her statement in the investigation meeting.

119 Mr Bartlett did not hold a disciplinary hearing he just told the claimant of the outcome. The respondent says that this makes no difference, but we have found that there were further avenues that should have been fairly and reasonably explored, so a further hearing may have made a difference.

120 There are six points listed in the invitation to disciplinary. It was admitted that one point, the fourth point, was not explored and the sixth point, as we have found, is vague as to what matters of concern Mr Bartlett was going to take into account. Mr Bartlett was in charge of the process throughout: the investigating officer and decision maker at both dismissal and, if the appeal had gone ahead, at appeal stage. Although we accept that this is a small company, given that he told us that he would not have changed his mind at an appeal, maintaining his position of appeal decision maker was unfair. Mr Bartlett did not have an open mind and so, as long as he was the decision maker, the process would never be fair.

121 To conclude, we find that the dismissal was unfair. The respondent did not act reasonably in treating some other substantial reason, namely the loss of trust and confidence, as a sufficient reason for dismissal.

Polkey

122 Turning then to the Polkey argument. The question for us is whether, had the respondent done everything fairly, the claimant would still have been dismissed. We are not satisfied that the outcome would have been the same, either at the same time on 17 November or at a later date, given the flaws we have found in the investigation and procedure. Mr Bartlett's evidence was that he had made up his mind in September and nothing was going to change that. We are not satisfied that, had he had an open mind or had a third party been involved, the outcome of dismissal would have been the same. This was for the respondent to prove. We therefore make

no reduction under Polkey.

123 There is another issue that arose in the evidence that we need to consider, which is whether the claimant would have resigned in any event because of her own loss of trust and confidence. We find that the breakdown of trust and confidence on the claimant's part stemmed from the respondent unfairly announcing the claimant's dismissal at the beginning of the disciplinary hearing without further discussion. The respondent cannot rely on its own unfairness to obtain a reduction in compensation and so again, we make no reduction for Polkey on this basis.

Contribution

124 In terms of contribution, we have found that the claimant did do some things wrong; job numbering and using the computer for her own personal use. We have to question whether those things are blameworthy; we find that are. We also find that they did contribute to the claimant's dismissal. However, this was only in a minor way. We therefore consider a reduction of 10% for contribution to be appropriate. That reduction will apply to the compensatory award.

Direct sex discrimination

125 Turning to sex discrimination and the comparators involved in this case, the four alleged male comparators are not appropriate comparators under s23 EqA. Their circumstances are not sufficiently similar to those of the claimant to be comparators. We can however use them as evidential comparators and take their treatment into account when considering a hypothetical comparator. We therefore turn to consider a hypothetical comparator and the reason for any difference in treatment.

126 Mr Bartlett's evidence was that he would treat a man in the claimant's position in exactly the same way. We take into consideration the treatment of the four male colleagues: we have found that any leniency towards them was because of Mr Bartlett's desire to avoid conflict with those he immediately works alongside in the workshop, which includes his family and friends.

127 We then have to consider whether there are any facts in front of us that could lead us to find that the claimant was dismissed because of her sex. The answer to that question is no.

128 We find that the burden of proof does not shift to the respondent in this case and, therefore, the sex discrimination claim fails.

Unauthorised deduction from wages

129 We have found that the respondent was entitled under clause 8 of the claimant's contract to reduce her pay for a period of lay off. Therefore, the reduction from 100% pay to 80% for a furlough period was authorised by the claimant's contract. Furthermore, the claimant had, prior to the reduction being made, signified in writing her agreement to that reduction by signing her contract.

130 This claim therefore fails.

Conclusions – remedy

131 Having delivered our judgment on liability on 14 September 2023, we were asked on that day to make a finding on two matters, in order to assist the parties in attempting to agree remedy:

131.1 The amount of any appropriate uplift to the compensatory award for failure to follow the ACAS Code, pursuant to s207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A"); and,

131.2 Whether it would be just and equitable to make a reduction to the basic award under s122(2) ERA.

ACAS uplift under s207A TULR(C)A

132 In terms of an uplift under s207A of the Trade Union and Labour Relations (Consolidation) Act 1992, we had found that there was an unfair process in this matter. In the ACAS code of Practice, there are six points set out at paragraph 4 of the Code, as follows:

132.1 Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions;

132.2 Employers and employees should act consistently;

132.3 Employers should carry out any necessary investigations, to establish the facts of the case;

132.4 Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made;

132.5 Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting;

132.6 Employers should allow an employee to appeal against any formal decision made.

133 In light of our findings, we considered that three of these points were unreasonably breached or impaired, namely:

133.1 The investigation was flawed;

133.2 The claimant was not given the opportunity to give her explanation during the disciplinary process; and

133.3 Although an appeal was granted, it was not a genuine appeal as the decision maker did not have an open mind, and was determined that any appeal would not succeed.

134 The claimant's representative made the point that any uplift should be greater than the reduction of 10% we applied for contribution. We accepted

this argument; we considered that the respondent's fault was greater than that of the claimant.

135 We had in mind to uplift the compensatory award by 15%. The Tribunal is required to consider the real monetary effect of a percentage uplift in light of the overall value of the compensatory award. The compensatory award was, at this point, likely to be in the range of £10,000. We considered that an uplift of around £1500 seemed to us to be just and equitable in all the circumstances.

Reduction to basic award under s122 ERA

136 We considered that it would not be just and equitable to make a reduction to the basic aware. In making this decision, we took into account that the claimant had worked for the respondent for around 3 years without any issues. Although we found there was some minor blameworthy conduct, we considered that this was fairly and appropriately reflected in the deduction to the compensatory award of 10%. To make a further reduction would, in our view, be unjust.

Remaining remedy issues on 14 September 2023

137 On 14 September 2023, the Tribunal stated that, in light of the claimant being paid up to the end of November 2020, any compensatory award would commence from 1 December 2020. Furthermore, credit would have to be given for the respondent's payment of £1500 for pay in lieu of notice.

138 The Tribunal confirmed that the correct calculation for basic pay gave a figure of £2,250, and that it would award £500 to compensate the claimant for her loss of statutory rights.

139 It also confirmed that the order for uplifts and reductions was that the ACAS uplift of 15% would be applied to the compensatory award, followed by the reduction of 10% for contribution.

140 It was hoped that, with those conclusions in mind, the parties would be able to agree the total figure for the award for the unfair dismissal claim. We however decided to put a date of 10 October 2023 in the diary for a remedy hearing, just in case agreement could not be reached.

Remedy hearing 10 October 2023

141 Having reconvened the hearing in order to deal with remedy in light of the parties' inability to reach agreement, we were told by the parties that there were only four points on which they needed our guidance:

141.1 The claimant argued that, because her contract was terminated on 17 November 2020, the notice period started from that date. Therefore the £1500 (gross) PILON figure had to take effect from 18 November, not 1 December, as previously indicated by the Tribunal. This would mean that losses starting on 1 December would only need to be credited with 1 week's pay, not 3 weeks' pay. The claimant considered that this was more a sum for garden leave than PILON in any event. The respondent argued that the claimant was paid to the end of

November 2020 and then received 3 weeks' PILON on top of that. Therefore, losses start from 1 December 2020, with the £1500 PILON to be credited.

141.2 The claimant worked for Sainsburys, and commenced that work at the weekends prior to her dismissal. Following her dismissal, she took on shifts during the week. The pay the claimant received from Sainsburys in November 2020 she therefore argues should not be credited as mitigation. The respondent argued that this was income the claimant would not have had but for the fact that the unfair dismissal occurred, and thus credit should be given for these November wages.

141.3 The respondent paid the claimant an ex gratia payment of £2000 around the time of her dismissal. The claimant understandably returned that figure so as not to prejudice her legal position. She argued at the remedy hearing that she should be paid that £2000 as part of her award: it was money that had been in her account for a while, and she considered that this money was hers. The respondent argued that this £2000 should not be paid; it was paid by way of an offer that was in the event not accepted.

141.4 The claimant argued that interest should be payable on any award made by the Tribunal. The respondent argued that interest did not apply to awards for unfair dismissal claims.

PILON payment

142 The claimant was paid her wages up to the end of November 2020, and so the relevant start point for a loss of earnings claim is 1 December 2020, regardless of whether she worked or not during the last weeks of November.

143 The claimant was then paid an additional sum of £1500 (gross) as PILON for her three weeks' notice period. The claimant would not have been paid that figure but for her dismissal: whether we labelled this payment as PILON or as garden leave makes no material difference.

144 The simple point is that the claimant received wages up to and including 30 November 2020, and then received a payment of £1500 (gross) on top. Therefore credit must be given to £1500 (which is £1044 net) to any loss of earnings from 1 December 2020.

Sainsburys wages

145 The claimant should not have to give credit for the money earned at Sainsburys before 17 November 2020. Although we accepted that she took the Sainsburys job because she thought she was going to be dismissed, the actual decision to dismiss was unknown at the time. She would have earned that money regardless of the dismissal on 17 November 2020. Therefore the £397.49 at page 160, earned during November 2020, should not be taken off any award for loss of earnings.

Ex gratia payment

146 The claimant had no legal entitlement to the £2000 ex gratia sum. It was not

loss of earnings, and it was not something that the claimant was legally entitled to in light of her dismissal. As such no additional award of £2000 would be made.

Interest

147 There is no statutory power for the Tribunal to award interest on awards for unfair dismissal. The only two scenarios in which the Tribunal can award interest are in discrimination claims, and when a judgment debt has not been paid in the requisite time frame.

Conclusion on remedy

148 The Tribunal went through all the figures with the parties, in light of their findings and decisions on the various points addressed above.

149 The total judgment sum was agreed as being £11,932.17: £2,250 basic award and £9,682.17 compensatory award.

_____

Employment Judge Shastri-Hurst

Date: 31 October 2023…….

Judgment sent to the parties on

6 December 2023.....

.....
For the Tribunal office