EMPLOYMENT TRIBUNALS

Claimant: **Mrs B Yanquoi**

Respondent: **Abbeyfield Reading Society Limited**

Heard at: **Reading by CVP** **On:** **24 July 2024**

Before: Employment Judge Findlay and

Members: Mr J Appleton and
Mr A Kapur

Representation
Claimant: Mr S Swanson, Consultant
Respondent: Ms A Johns, Counsel

JUDGMENT having been sent to the parties on 12 September 2024 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

The Issues

1. Following a liability hearing on 19-23 February 2024, the claimant's claims of breach of contract/unauthorised deduction of wages (notice pay) and of unfair dismissal succeeded, with her other claims of detriment due to public interest disclosure, victimisation and under section 103A of the Employment Rights Act 1996 (ERA) being dismissed.
2. At the start of the final liability hearing, it was agreed that evidence regarding contributory conduct and the "Polkey" principle (that is, consideration of the chance that this claimant could and would have been fairly dismissed or otherwise would have had her employment terminated prematurely by this employer) would be heard at that hearing and that this would be dealt with in the Tribunal's liability judgment, see paragraph 35 of the liability judgment. The parties had the opportunity to make representations about those matters at the conclusion of that hearing also.
3. In its liability judgment, the Tribunal found that both the basic and compensatory awards for unfair dismissal were to be subject to a 40% reduction under sections 122(2) and section 123(6) of the ERA for

contributory conduct, but no reduction was made based on the Polkey principle; written reason were given in the reserved judgment.

4. Neither party had made any submissions about the claimant's likely age of retirement or the effect that may have on the compensatory award at the liability hearing. The Tribunal indicated at paragraph 78 of the "Application of Law to Facts" section of the liability judgment that it would be prepared to hear submissions about that at the remedy hearing.
5. There was a case management hearing to give directions for the remedy hearing before Employment Judge Findlay sitting alone on 24 April 2024. A remedy hearing date of 24 July 2024 was set, and directions were given. The Tribunal clarified that it could not award damages for personal injury or injury to feelings in respect of compensation for unfair dismissal or damages for failure to pay notice pay. The remaining issues were clarified as set out below.
6. **Remedy for unfair dismissal**

6.1 Does the claimant wish to be reinstated to their previous employment? *The claimant says not*.

6.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment? *The claimant says not.*

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

6.3.1 What financial losses has the dismissal caused the claimant?
6.3.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
6.3.3 If not, for what period of loss should the claimant be compensated?
6.3.4 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
6.3.5 Did the respondent or the claimant unreasonably fail to comply with it?
6.3.6 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
6.3.7 If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct? *The Tribunal has found that she did.*
6.3.8 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion? *The Tribunal has found that there should be a 40% reduction.*
6.3.9 Does the statutory cap of fifty-two weeks' pay or £88,519 apply?

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

6.5 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? *The Tribunal has found that it would be just and equitable to reduce the award by 40%.*

7. **Wrongful dismissal / Notice pay**

7.1 What was the claimant's notice period?

7.2 Was the claimant paid for that notice period?

7.3 If not, was the claimant guilty of gross misconduct? / did the claimant do something so serious that the respondent was entitled to dismiss without notice? *The Tribunal has found that she did not and that therefore notice pay will be quantified and awarded if not agreed/paid in advance of the hearing.*

8. At the start of the remedy hearing on **24 July 2024**, the parties confirmed to the Tribunal that they had **reached agreement** over the amounts to be paid in respect of **breach of contract/unauthorised deduction for notice pay and for the basic award** for unfair dismissal (minus the 40% reduction referred to above). These amounted to £8041.47 (net) and £9792 respectively and those amounts were awarded by consent.
9. This meant that the Tribunal was left with the issues relating to the compensatory award for unfair dismissal.
10. The Judge referred the parties to the statutory cap referred to in sections 124(1ZA) and section 227 of the ERA and suggested that the relevant cap was the claimant's gross weekly pay multiplied by 52 in this case (3834.28 x 52) = £43,382.56. The respondent's counsel agreed; Mr Swanson said he would have to check but did not ultimately dispute this.

The Hearing

11. There was a slight delay in commencing the hearing on the 24th of July 2024 due to connection difficulties experienced by one of the members. The parties were informed, and the hearing commenced at 10:15 am.
12. At the start of the hearing, the respondent's counsel confirmed that it now accepted the figures for salary reflected in the claimant's updated schedule of loss.
13. The tribunal took approximately 30 minutes to conclude its reading, and the claimant's evidence began just before 11:00 am. We heard from the claimant and from the respondent's witness Kathleen Davis, the former chairperson of the trustees of the respondent.
14. Both the claimant and Ms Davis had provided written witness statements, and the claimant had attached various exhibits to her statement. There was also an agreed remedy bundle, and the tribunal and respondent were sent some updated pay slips by the claimant on the morning of the hearing, which we took account of.
15. After hearing from both witnesses, we took a break for 15 minutes until 12.20 to allow the parties' representatives to gather their thoughts. After hearing from the parties' representatives, the tribunal deliberated and were able to deliver an oral judgment that afternoon.
16. The respondent subsequently requested written reasons.

Findings of fact

17. This judgment and reasons should be read together with the liability judgment, which contains our findings in relation to the **Polkey** principle within section 123(1) of the ERA and in respect of contribution within section 123(6).

18. The claimant was aged 62 years and seven months at the time of her dismissal on the 14th of September 2021.
19. We accept that, had the claimant not been unfairly dismissed, she would have continued in her employment until the age of 66, that is until the 22nd of February 2025.She had been employed by the respondent for over 25 years at the time of her dismissal, with no previous disciplinary action having been taken. We accepted her evidence that she intended to continue in the respondent's employment until her state pension became due on her 66th birthday. Although the claimant was extremely distressed by her dismissal and lost confidence as a result, there was no evidence from which we could conclude that if she had not been unfairly dismissed, she would not have been able to continue in her role.
20. The claimant was successful in her claim for notice pay. She was entitled to 3 months' notice, so that her losses began to accrue from 14 December 2021.
21. We can see from the attachments to the claimant's statement that by the 27th of October 2021 she had made an appointment with the national Careers Service to assist her to find work.
22. The claimant was referred to the Disclosure and Barring Service by Kathleen Davis on behalf of the respondent after her dismissal. We accept that the reason that Ms Davis referred the claimant to the Disclosure and Barring Service (DBS) was that she was advised to do so by the national Abbeyfield Society, and because it is set out in the respondent's disciplinary process (at page 483 of our original bundle) that if an employee is sacked for misconduct, they should be referred to the DBS. If the claimant had not been dismissed, there was no evidence to suggest she would have been referred to the DBS.
23. The claimant was told in her dismissal letter that this referral would happen, and we accept that this knowledge had a significant effect upon her.
24. The claimant was aware from her role as a registered manager that if a person applied for a managerial role in a care home more detailed information about a person's history could be supplied to a future employer by the DBS. She believed that if she applied for a role as a registered manager or any other role with significant managerial responsibility in the care sector that details of prior DBS referrals could be disclosed. She was very concerned about this, and about being accused of neglect.
25. As a result, she lost confidence in her own abilities and was reluctant to pursue managerial roles in the care sector. She told us that, understandably, she felt that she would have to be honest about the circumstances in which she had lost her position with the respondent, and that if she disclosed that she had been dismissed and referred to the DBS (and the basis of that), care homes would be unlikely to employ her at that level. We consider that to have been a reasonable belief.
26. She also believed that her age would count against her in applying for managerial roles. We considered that to be a reasonable belief also.
27. We accept that, although the claimant has not kept documentary evidence about this, that she did apply for roles in the care sector and other jobs online. We consider that the evidence that she was seeking advice in October 2021 about how to improve her prospects of obtaining work corroborates her evidence about this.
28. From the exhibit at page 4 attached to her statement, we can see that by 16th of November 2021 she had obtained a role with a company called Hotelcare. In response to questions from Miss Johns, the claimant told us

that she did not want to approach the respondent's "competitors" in the care sector in Reading because she was embarrassed by what had happened and was still very upset by the circumstances in which she had been dismissed. She had tried to find a job which was not related to care.

29. We accept that in the aftermath of her dismissal, she had claimed job seekers allowance and had an appointment with a consultant employed by the DWP. This is corroborated by documents attached to her statement (pages 11-15). The consultant had suggested that it would be sensible for the claimant to start looking for work at a more junior level than she had previously worked at.
30. We accepted the claimant's evidence that the job with Hotelcare was as a room attendant in a hotel. She worked in this respect for approximately two weeks but experienced pain in her neck and back because of the physical work she was doing and could not continue. She told us that she earned a total of about £300 net in that role, and we accepted this evidence.
31. After that experience, the claimant started to look for work in the care sector again, and this is reflected in the documents at pages 11 to 15 attached to her witness statement, which is a record of her contact with the Department of Work and Pensions in early 2022 and shows that she was looking for full time work in the care sector.
32. We can see from page 5 attached to the claimant's statement that by the 31st of January 2022 she had an interview as a "Waking night support worker" with a company called Saliscare. The claimant was successful in obtaining a job offer with that company. We can see at page 9 attached to the claimant's statement that the claimant was successful in obtaining a support worker role. On the 3rd of February 2022, the company contacted the claimant asking her to discuss the next steps.
33. We accept the claimant's evidence that she was told that she would need to provide a reference from the respondent confirming the start and end dates of her employment with it as a condition of being offered that job.
34. The claimant says that she had difficulty getting a reference from the respondent and that as a result she sent the e-mail to Kathleen Davis on the 7th of February 2022 asking her to confirm the start and end dates and confirm if there was "any disciplinary" (page 10 attached to the claimant's statement). The claimant said this was her second e-mail requesting this information. In response, Ms Davis acknowledged receipt of the e-mail but did not reply
35. Ms Davis told us, and we accept, that at the time she was investigating the possibility of the respondent obtaining legal advice and that she was awaiting advice as to how to respond. She says in her witness statement that she did not realise that this request by the claimant was in the context of a job reference, and that she was aware that the claimant had commenced tribunal proceedings.
36. We did not consider that Ms Davis acted maliciously, as suggested by the claimant, in refusing to provide the reference or the information requested, but the result was that the claimant lost the opportunity of employment with Saliscare. The claimant told us that the role with Saliscare would have been a greater number of hours then she has subsequently been able to obtain.
37. The claimant also tried to find work through a recruitment agency called Charles Hunter Recruitment, and there is an e-mail about this at page seven of the exhibits to the claimant's statement dated the 1st of February 2022. The recruitment agency was seeking contact details for Kathleen

Davis, as chairperson of the respondent, to find out more about the claimant's employment and its termination. The person from the recruitment agency also requested a character reference from the claimant. This was due to the gap that in the claimant's employment because of her dismissal.

38. It is apparent from documents in the bundle that it took some time for the recruitment agency to get a reference from Kathleen Davis. At page 6 of the remedy hearing bundle, for example, there is an email from the recruitment agency to Ms Davis dated the 24th of February 2022 referring to a previous request for a reference for the claimant. They provided a link for her to do so.
39. Miss Davis says that she did respond to this request, giving the claimant's start and end of employment dates, but says she only received one request for a reference. She points out that the e-mail from the recruitment agency to Jason, the claimant's replacement, on the 8th of March 2022, contains a misspelling of her name (p8). She suggests that this may have led to other emails being sent to the wrong e-mail address, but we have no evidence of that. On the 8th of March, at page 7 of the bundle, Ms Davis writes to Jason saying that she did respond to the previous request for a reference. She provided wording for a reference and said she would ask the lawyer for advice.
40. It is apparent from pages 85 and 86 of the remedy hearing bundle that by 21st of March 2022 Ms Davis had provided a draft reference to the Abbeyfield Wey Valley Society, which had by then taken over responsibility for the respondent.
41. By mid-April 2022, the claimant had obtained her current employment, as a support worker in a school. This was obtained through the recruitment agency. The claimant does not have guaranteed hours of work but works two or three days per week during term time only.
42. Having obtained this employment, we find that the claimant has not made any significant efforts to find alternative employment or to look for another support worker role for additional hours in the care sector.
43. As noted above, we accept that she suffered a substantial and sustained loss of confidence in her abilities as a manager and was also concerned that her age (and the fact that she had been dismissed for misconduct) would be a disadvantage to her on the job market. As a result, she believed that she was unlikely to obtain a managerial role. We consider those to be reasonable fears.
44. In cross examination, the claimant said that, although she does not drive, she was prepared to undertake a commute of 90 minutes from home by public transport, and she accepted that this would cover several towns and cities. She did say, however that she would prefer to find a role in Reading, This was partly because, for the first year or so when she was unemployed, COVID was still presenting a significant risk and she would have been reluctant to travel by train or other forms of public transport.
45. We accepted Ms Davis' evidence that there are numerous (over 30) care homes in the Reading area, and a shortage of care staff. We also accept that the claimant was (reasonably) reluctant to apply to homes where she had known staff when she was the manager of the respondent due to the circumstances of her dismissal.

Relevant Law

43. Section 123(1) of the Employment Rights Act 1996 provides:

(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.

44. The compensatory award is not punitive, and it is limited to proven financial loss.

45. We have already dealt with the aspect of section 123(1) that involves the **Polkey principle** (1988 ICR 142 HL) and made findings in that respect in our judgment on liability. We also dealt with **section 123(6)**, contribution, in that judgment and found that a 40% reduction in the basic and compensatory awards should be made in that respect.

46. We noted in our previous judgment that there had been no submissions by the parties about the date upon which the claimant was likely to retire and that we would be willing to hear submissions in that respect.

47. Applying **section 123(4)**, at common law, a claimant must take reasonable steps to mitigate their losses. We must consider what steps we think it was reasonable for the claimant to have to take to mitigate her loss – that is, those steps which it would have been reasonable for her to take if she had no hope of securing compensation from her previous employer. Next, we must decide whether she did take reasonable steps to mitigate her loss; and then consider the extent to which she would actually have mitigated her loss if she had taken those steps. These questions depend on the circumstances in each case, and we must consider all of the relevant circumstances, including (but not limited to) the claimant's views.

48. The burden of proof is on the employer in respect of all three of these questions. If the employer does not supply evidence relating to failure to mitigate, we do not need to consider that matter. The employer must show that the claimant acted unreasonably. If the claimant, by the date of the remedy hearing, has secured alternative but lower paid employment, we need to consider whether (and if so by what date) the claimant should have secured employment at the same or better pay than before.

49. **Section 207A(2) of the Trade Union and Labour Relations(Consolidation) Act 1972 (TULR(C)A)** provides that: 'If, in any proceedings to which this section applies, it appears to the employment tribunal that — (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) the 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 per cent.

50. The section applies to unfair dismissal, and as the claimant was dismissed for misconduct, the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 applies. We have found that the respondent breached that Code in our liability judgment (paragraphs 39-47 of the liability judgment, breach of paragraphs 6 and 27 of the Code). The increase only applies to the compensatory award (section 124A ERA). Section 124A also provides that the adjustment shall be applied immediately before any reduction under section 123(6) or (7).

51. **Section 124 of the ERA** provides a limit on the compensation we can order**: 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) [£89,493 – at the relevant date] , and
(b) 52 multiplied by a week's pay of the person concerned.

52. As set out above, the respondent agreed with the Tribunal that in this case the limit of 52 weeks' pay would be appropriate, and that this amounted to **£43,382.56**. We should only consider applying the statutory cap once all relevant adjustments and deductions are made.

53. We should first consider the overall period of loss and the effect of any failure to mitigate. We must consider the employee's net loss in consequence of the unfair dismissal, attributable to the employer. Next, we should consider whether it is just and equitable to make any reduction under section 123(1). We have already decided to make no deduction in respect of the "Polkey" principle aspect of section 123(1).

Application of law to facts:

54. The tribunal accepted the claimant's evidence that had she not been unfairly dismissed she would have continued in her employment as registered manager at the Abbeyfield Reading care home until the age of 66 - that is, until the 22nd of February 2025 when she would have retired. We did not consider that there was any significant chance that her employment would have terminated before that date given the claimant's willingness to cooperate with the trustees and her good employment record up until the pandemic.
55. The respondent argued that the claimant had failed to mitigate her loss and that she should have found an alternative management role at the same salary as before within six months, that is by the middle of March 2022. As we have indicated above, the burden is on the respondent to prove that the claimant acted unreasonably in failing to mitigate her loss.
56. The tribunal accepted the claimant's evidence that she lost confidence in her managerial skills because of being unfairly dismissed and being referred by the respondent, as a consequence of her dismissal, to the

Disclosure and Barring Service, DBS. We accept Kathleen Davis' evidence that she made the referral to the DBS because she was advised to do so by the national Abbeyfield Society as the dismissing panel had found that the claimant placed the resident in question at risk of harm. In those circumstances, because the claimant was dismissed, that is what the respondent's disciplinary policy required in such a case - see page 483 of our original bundle. However, we do not consider that the respondent would have referred the claimant to the DBS if she had not been dismissed, as on the evidence before us there would be no requirement to do so.

57. We next considered the steps that it would have been reasonable to expect the claimant to take to mitigate her loss. We have noted above the claimant's loss of confidence consequent upon her dismissal. Up to the 3rd of November 2021, she was also concerned about the outcome of the DBS referral, which was consequent upon her dismissal, that is, whether she would be barred from working in the care sector. We accept that she would have continued, even after the DBS decided not to take action, to have been required to explain why she was dismissed when applying for a management role in the care sector - that is, that she was dismissed for misconduct, and that she had been referred to the DBS as a result. She knew that a potential employer would have to seek clearance from the DBS were she to undertake a regulated role and that an enhanced level of disclosure would have been supplied by the DBS had she applied to become a registered manager.
58. We did not consider, for the reasons set out above, that it would have been reasonable to expect the claimant to apply for a managerial role up to April 2022, given the factors we have identified in respect of her loss of confidence, the DBS referral and her reasonable concern that her age would be to her disadvantage in seeking a senior role. We find that the respondent has not shown that the claimant was unreasonable in failing to seek a management role up until April 2022 when she obtained her current job. Kathleen Davis, whilst giving general evidence about her awareness of the demand for care workers and managerial staff in the Reading area, and the number of care homes in that area, did not give us evidence about specific roles that the claimant could have applied for, or her likelihood of achieving them.
59. We considered that it would be reasonable, up until April 2022, to have expected the claimant to seek advice as to how she could best obtain an alternative job, which she did, and that she should seek to obtain a non-managerial job within the care sector, by looking for jobs online, via the Job Centre and through a recruitment agency. We are satisfied from the claimant's evidence that she did take these steps, although she did not always document them.
60. We accept that the claimant acted reasonably in seeking care assistant jobs and other more junior jobs between September 2021 and April 2022. We find that the reason she did not obtain the job she was offered by Saliscare in February 2022 was because the agency could not get a reference from the respondent. We accept the claimant's evidence that the recruitment agency was being told by the administrator at the respondent and the claimant's replacement, Jason, that there was no one left at the respondent who could give a her a reference. This was around the time that the management of the respondent transferred to the Wey Valley branch of the Abbeyfield Society. We do not blame Kathleen Davis for that, nor do we consider that she acted maliciously, although it is clear that for whatever

reason she did not receive all of the reference requests. She did not respond in any detail to the claimant's request for her to supply the start and end dates of her employment and the details of the disciplinary action, but the claimant did not expressly say that this was for a job reference and we can understand why, in the circumstances that she had become aware that the claimant was making a complaint to the employment tribunal, Ms Davis was reluctant to engage in discussion of the matter with the claimant. Nevertheless, the claimant cannot be blamed for her failure to obtain the Saliscare role or other care assistant rules before April 2022.

61. It is common knowledge that, in the care sector, staff must be carefully vetted. A lack of a reference for someone of the claimant's age, who had been involved in that sector for such a substantial period at managerial level (and who had been dismissed) is highly likely to have put off possible employers. It was not until late March 2022 that a draft reference was provided by Ms Davis to the respondent. The claimant was then able to obtain her current role via the recruitment agency. We accept that as she had been dismissed and reasonably believed that she needed to be honest about that, it was difficult for her to obtain employment. She could not reasonably be expected to obtain a role in the care sector in the absence of a reference from the respondent.
62. We accepted the claimant's evidence that she had sought advice about obtaining alternative employment from October 2021 and that she had registered with a job coach at the Job Centre in an effort to improve her chances of seeking alternative roles. She also tried to obtain work outside the care sector and succeeded in obtaining some hotel work, but this proved to be too physically demanding. We consider that the claimant took all the steps that it was reasonable for her to take to mitigate her losses between September 2021 and April 2022. Given the delay in the respondent providing her with a reference, she was fortunate to obtain the role she did in April 2022. So, the claimant did not fail to mitigate her losses between September 2021 and April 2022.
63. Regarding the period after April 2022, although the claimant did not provide us with any medical evidence (and we are not making any findings about her medical condition at the time), we do accept, as we have said above, that she continued to be deeply upset by her dismissal after 25 years in the respondent's employment, for 20 years of which she had been the registered manager. This was a severe blow to her confidence. We also accept that she held a firm belief that if she applied for a managerial role, a care home or other registered body would need to check with the DBS, and that a higher level of disclosure would be expected both from her and the DBS. She believed that she would have to disclose that she had been dismissed for gross misconduct and that there had been a referral to the DBS and that this would a significant adverse effect on her ability to find a managerial role. These concerns persisted after April 2022. We also accepted her evidence that she was reluctant to apply to what are referred to as the respondent's competitors in the Reading area as she considered they would have heard about her sacking and was both embarrassed and concerned that they would be unlikely to employ her in those circumstances.
64. We also accept that the claimant was concerned that at her age, over 63 by April 2022, potential employers would be unlikely to employ her in a senior managerial role. We accept that it is common knowledge that the closer an individual gets to state retirement age, the less willing an

employer may be to employ them in a senior role due to the potentially short period they may remain the role, the need for continuity and difficulties with succession etc. We consider that if she had tried to obtain a managerial role after she had been in her current role for about six months it is unlikely she would have obtained one due to the fact of her dismissal for gross misconduct and her age. We consider that as time went on and the claimant got closer to retirement age there was a decreasing possibility that she may obtain such a role, especially as these proceedings remained outstanding. We do not consider that the respondent has proved that the claimant acted unreasonably in failing to seek a managerial role in the care sector or otherwise after April 2022 in these circumstances.

65. We find, however that after she had established herself with her current workplace as a good and reliable employee, she would have been able to get a reference from the recruitment agency which placed her or the school where she is working to that effect. Given the current demand for care workers, both in Reading and within a reasonable travel distance by public transport, whether or not in the elderly care sector, we find that it would be reasonable to have expected the claimant to apply for a full time care job by early 2023, having regained some of her confidence and given her ability to get a reference from her agency or new employer. We consider that she would have been able, on the balance of probabilities, to have obtained such a job by April 2023. We consider that the respondent has established that the claimant was unreasonable by not applying for full time care jobs from early 2023 and that if she had applied, via the recruitment agency or by other means, she would have obtained such a role by April 2023. We have not heard any evidence that would suggest that she would not have been able to work full time. There is no reason and no evidence before us which would cause us to believe that had she obtained a full-time care role at that stage it would not have continued given her good employment history.
66. So we find that it would be just and equitable to award the claimant the losses sustained in consequence of her dismissal which are attributable to action taken by her employer from 14 December 2021 (as she has been awarded damages in respect of failure to pay notice pay up to that date) until 22 February 2025 when she would have retired. We do not consider it appropriate to make any deduction under section 123(1) ERA but we consider that she has failed to mitigate her losses by failing to obtain a full time care worker role at her current rate of pay from April 2023. We have already decided that there will be a 40% reduction under section 123(6) but we must now consider whether there should be any uplift due to the respondent's failure to comply with paragraphs 6 and 27 of the relevant ACAS Code.
67. We decided after hearing submissions to award £544, the capped amount of a week's pay at the time of the claimant's dismissal, in respect of statutory rights. The figures net pay and for monthly pension contribution loss is taken from the claimant's updated schedule of loss as we were told the respondent agreed those figures and the method of calculation, which we thought appropriate given the period of loss.
68. Regarding section 207A of the TULRCA, we have found in our liability judgment that no reasonable employer would have failed to comply with the 2015 ACAS Code in the way that the respondent did. For the avoidance of doubt, we consider that failure to be unreasonable as set out at paragraphs 39 -46 of the "Application of Law to Facts" in the liability judgment.

69. We considered whether it was just and equitable to increase the claimant's compensatory award in this respect. We were mindful of the fact that the respondent is a relatively small organisation and that the Trustees were volunteers, and that most of them were relatively inexperienced in the context of the care sector. They did, however, have access to a large national organisation which has significant administrative resources and they were able to seek advice from external consultants. In all the circumstances we considered a 10% uplift to be appropriate, bearing in mind that there was at least some attempt to seek independent advice.
70. So, taking account of the claimant's failure to mitigate her losses by seeking a full-time care role after April 2023, that 10% uplift and the 40% reduction under section 123(6) we find that the claimants compensatory award should be calculated as follows, using (from April 2023) the claimant's current rate pay of £9.79 per hour for a period of seven hours per day, five days per week (35 hours per week)

70.1 Compensatory award:

Total period of loss: **14.12.21 – 22.02.2025**

Loss of earnings **14.12.21 – 14 April 2022**
£(4 x 2680.49) - £300 earnings = £10,421.96 net

Loss of earnings: **April 2022 – 14 April 2023**
£(32,165.88 – [10965.76 actual]) = £21,200.12 net

Loss of earnings **April 2023 – 24 July 2024**
£ (15 months x 2680.49) – [(35 x 9.79x 52)/12 x15](if had mitigated)
= £(40,207.35 – 22,271.25) = £17,936.10

Future loss **24.7.24 – 22.02.25**
£(7 x 2680.49) – (7 x 1484.75) =
£(18763.43 – 10,393.25) = £8370.18

Net loss of earnings
£(10421.96 = 21,200.12 + 17936.10 + 8370.18) = **£57,928.36**

Loss of statutory rights = £544

Pension loss = £(30 x 83.17) + £(7 x 83.17) = **£3077.29**

Net loss = £(57928.36 + 544 + 3077.29) = **£61,549.65**

Plus 10% uplift under section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992**:** £(61549.65 + 6154.97) = **£67,704.62**

Minus 40% under section 123(6)

£(67,704.62 x 0.6) = **£40,622.77 total compensatory award.**

This figure is less than the statutory cap, which does not therefore apply.

70.2 Recoupment: The following figures are supplied in accordance with regulation 4(3) of the Employment Protection (Recoupment of Benefits) Regulations 1996, as the claimant claimed Job Seekers Allowance:

(a) The **monetary award** is £(8041.47 +50,414.77) = **£58,456.24**

(b) The **prescribed element** is £(49,558[loss of pay for the period below] x 0.6) = **£29734.91**

(c) The **period to which the prescribed element relates** is **14.12.2021 to 24.07.2024**

(d) The **monetary award exceeds the prescribed element** by £(58,456.24 – 29734.91) = **£28,721.33**

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Employment Judge Findlay

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Date: 9.10.2024

REASONS SENT TO THE PARTIES ON

14/10/2024

FOR THE TRIBUNAL OFFICE