EMPLOYMENT TRIBUNALS

Claimant: **Miss N Browne-Marke**

Respondent: **NR Solicitors Limited**

Heard at: **East London Hearing Centre**

On: **21st April 2021**

Before: **Employment Judge Mclaren**

Representation
Claimant: In person
Respondent: Ms D Baker, director of the respondent

JUDGMENT ON LIABILITY AND REMEDY

1. **The reason or principal reason for the claimant's dismissal was her raising on 19 March 2020 a complaint that she had suffered an unauthorised deduction of wages. Her dismissal was because she had asserted a statutory right and is automatically unfair under section 104 of the Employment Rights Act 1996.**

2. **The claim for breach of contract for failure to pay notice is upheld.**

3. **I make a declaration that the respondent has failed to provide employment particulars as required by section 1 and section 4 of the Employment Rights Act 1996. The claimant is awarded four weeks' pay under section 38 of the Employment Act 2002.**

4. **The claimant is awarded a compensatory award of £14,251 (which includes her notice pay and 4 week's pay under s38)**

5. **The claimant was underpaid wages throughout her employment and is awarded £622 gross.**

6. **The claimant was on authorised leave in December 2019 on January 2020 and the deduction from her wages for this period of leave is unlawful. The claimant is awarded £1130.76 gross.**

7. **Recoupment may apply to this award as follows (taking into account the application of the cap on compensation)**

- **Prescribed period 31/03/2020 to 21/04/2021**
- **Total award £14,251.00**
- **Prescribed element £9,660.58**
- **Balance £4,590.42**

REASONS

Background

1. I heard evidence from the claimant and from Denise Baker on behalf of the respondent and I was provided with a bundle of 95 pages.

2. In reaching my decision I considered all the evidence I heard and those parts of the documents in the bundle to which I was directed. At the end of the hearing I agreed that both parties could provide written submissions and I would consider these if they were sent to the tribunal on or before the 28th April. I received a document from the claimant which I have taken into account, but no submissions from the respondent.

The issues

3. The issues in this case had been agreed with the parties at a case management hearing on the 25.11.2020 and are as follows:

Section 104 Employment Rights Act 1996

1. Automatically unfair dismissal under Section 104 ERA 1996 for assertion of statutory right. The statutory right relied upon is the right not to suffer an unauthorised deduction of wages. The assertion of this right was made by the Claimant in an email dated 19 March 2020.

2. The Claimant confirmed that she is not saying that previous requests for payment of wages amount to an assertion of statutory rights.

3. The Claimant contends that in response to this email of 19 March 2020 she was summoned to a meeting on 23 March 2020 to discuss her future, and it had been decided in advance that she was to be dismissed as a result of her sending this email.

4. The Respondent's basic position is that the Claimant was guilty of gross misconduct and that this was the reason for her dismissal. It will set out its response more fully in its Amended Response.

Section 13 Employment Rights Act 1996

5. The Claimant's case is that she was underpaid her wages during the months of June, September, December 2019 and January, February and March 2020. She has been provided with different and conflicting payslips from the Respondent in relation to certain months and was not provided with payslips when the work was undertaken.

6. The Respondent accepts that the Claimant was not paid the full amount to which she was contractually entitled over the full period until her dismissal. The Respondent's case is that it was entitled to deduct the pay that the Claimant was entitled to receive in relation to the period between 10 December 2019 and 7 January 2020, because during this period the Claimant was absent without authorisation. The Claimant's case is that she was absent on authorised holiday during these dates.

7. The Respondent is not contending that it is entitled to deduct wages for any other periods of absence.

8. Therefore, the issue of unauthorised deductions in respect of periods other than 10 December to 7 January 2020 will turn on whether the Claimant was in fact paid what she was entitled to be paid under her employment contract.

Breach of contract – failure to pay notice pay

9. It is common ground that the Claimant was entitled to be paid for one week's notice unless she was in fundamental breach of contract. It is also common ground that the Claimant was not paid any notice pay.

10. There is a dispute as to whether the Claimant was in fundamental breach of contract and if not, what gross sum the Claimant was entitled to receive for one week's notice pay. The Claimant says her rate of pay was £1,200.03 per month which is £14,400 per annum. The Respondent does not accept this as accurate but the Respondent needs to confirm its case as to the rate of pay that applied at the date of dismissal.

11. The respects in which the Respondent alleges that, individually or cumulatively the Claimant was in fundamental breach of contract are as follows:

    a. The Claimant allegedly failed to report to the Respondent daily from 9 March 2020 onwards in order to find out what work was expected to be done from home during the day. At that point she was expected to be working from home as a result of the closure of the office caused by the pandemic.

b. The Claimant allegedly disregarded the deadline imposed for completion of work on the SK file, which should have been completed by 13 March 2020.

c. The Claimant allegedly failed to return SK's files and documents. She was expected to return these documents by 13 March 2020 and failed to return them at any point up until the date of dismissal.

12. The Respondent does not contend that there were other performance failures in relation to the quality of the Claimant's work or other absences without authorisation which justified summary dismissal.

Failure to provide a statement of employment particulars

13. The Claimant contends that the Respondent has failed to comply with the duty imposed by Section 1 and Section 4 Employment Rights Act 1996 to provide the Claimant with an up to date statement of employment particulars. If this is established, the Tribunal will need to decide whether to make an award to the Claimant under Section 38 Employment Act 2002.

Failure to comply with ACAS Code

14. The Tribunal will need to consider whether to make an adjustment to the compensation awarded and if so by what amount, in circumstances where the Tribunal concludes that there has been a failure to comply with the ACAS Code of Conduct on disciplinary procedures.

15. It does not appear that the Respondent provided the Claimant with any advance warning that the hearing on 23 March 2020 would decide on her dismissal, nor was she provided with any right to be accompanied by a work colleague or trade union official.

Finding of facts

Credibility

4. There was very little agreed ground between the parties whose accounts in oral evidence continued to contradict each other. The burden of proof is on the claimant in respect of her unfair dismissal claim. The respondent had, however, produced little documentary evidence to support its position, even where such evidence was apparently available to it, such as employment documentation. Ms Baker asserted that the respondent had complied with requirements of section 1 of the Employment Rights Act but had not included the relevant documents in the bundle and was unclear exactly what particulars the section required. Ms Baker also continued to assert that the respondent had complied with the ACAS code of procedure on disciplinary and grievance matters, but it became apparent from my questions to her that she did not know what this was. While she represented herself, she is a qualified solicitor. These assertions impacted her

credibility.

5. In general, Ms Baker's evidence was unclear. For example, she gave a number of different explanations as to the reason for the claimant's dismissal, at one point contradicting the reasons given at the preliminary hearing by including performance. The claimant gave a consistent account throughout and supported her evidence with relevant contemporaneous documents. On balance, therefore, for these reasons, where there is a dispute between the claimant and Ms Baker, I prefer the claimant's account.

Dispute as to trainee status

6. The claimant was employed as a paralegal from 21 January 2019 by the respondent, a firm of solicitors. It was agreed that her initial employment was on a trial basis of three months. At the end of that three months satisfactory performance the offer letter stated that the claimant would be offered a training contract.

7. It was the claimant's evidence that at the end of three months Ms Baker told her that if she successfully passed a test, then she would be offered a training contract. The claimant's paralegal role was to undertake legally aided immigration work and necessarily she was enrolled to sit the MCQ in March 2019, which she passed. It was common ground between the parties that this was the only test that she took. The claimant understood that her passing this exam was sufficient for her to be offered a training contract. Ms Baker did not accept that, and her evidence was that she had never had any such conversation with the claimant. The exam was needed for her to take on legal aid immigration matters as an accredited trainee caseworker assistant. Any references to the claimant as a trainee were only as a trainee caseworker assistant and not as a trainee solicitor.

8. The claimant further says that on Ms Baker's instructions she completed a training notification form to inform the solicitors regulation authority that she commenced a period recognised training. She said that she handed this form to Ms Baker in June 2019. I was referred to page 49 of the bundle which is an email the claimant says she sent to Ms Baker on 18 June. This asks for a meeting to discuss changing seats and undertaking the professional skills course and it uses the phrase as I am now a trainee. The professional skills course is relevant to a trainee solicitor.

9. Ms Baker did not address this point in her witness statement and in answer to cross examination questions simply asserted that the claimant had never been told she was a trainee. It is common ground between the parties the claimant was not registered with the Law Society as a trainee. The claimant gave evidence that she only become aware of that after her dismissal when, in speaking to 2 other members of staff, she was told that Ms Baker had informed them that she had not sent the form in.

10. On the balance of probabilities, I prefer the claimant's account for the general reasons set out above and for these specific reasons. The offer letter clearly stated that after 3 months satisfactory performance the claimant would be given a training contract. The claimant had already passed the LPC and was extremely keen to complete her training. I conclude that it is unlikely that she would not have pursued a conversation with

Ms Baker about the conversion to a training contract once three months were passed. The claimant's actions are consistent with her having been told this would occur and the contemporaneous email sent at the time confirmed this. I find the claimant was told she was a trainee solicitor.

Documents

11. Both parties agree that in the course of February to May 2019 various documents regarding the claimant's employment were signed. The claimant states that this was an employee confidentiality agreement and induction record but did not include a written statement or contract of employment.

12. Ms Baker told me that the documentation sufficient to comply with section 1 of ERA 1996 were included in the original bundle prepared for the November hearing which was postponed, but had not been included in today's bundle. I was able to locate the previous bundle and identified that it did contain some pages from a staff handbook, but I was not provided with a full copy of this and was not therefore able to identify all the particulars that it might contain.

13. Ms Baker confirmed that the claimant was not given a contract of employment or any documentation that was individual to her. She was given a generic copy of the company handbook. Ms Baker said that she had been advised by HR consultants this was all that she needed to do. In answer to my question, she confirmed that, while details of holiday pay and sick pay were included in the handbook, it would not, for example have contained the particulars of the name of the employer and the claimant, the date when the employment began or any statement regarding the employee's continuous employment. On her admission I find that the respondent has not complied with this obligation.

Deductions from wages

14. Ms Baker accepted that payment of the claimant's wages was not always as smooth as it could be. She was not paid her salary in one lump sum into her bank account, sometimes she would be paid part of it in cash and payments were made intermittently. The bundle contains some texts from the claimant to Ms Baker pointing out that she did not have enough funds for example to pay her bus fare, to pay her train fare to get to court or general travel money. The respondent accepts that this was the case and I find that its payments were intermittent and erratic which caused the claimant significant difficulties.

15. The parties agree that the starting salary was £14,000 per annum. The claimant says that she was asked which payday she would choose, the end of the month or the 15th of every month and she chose the 15th. The bundle contained at pages 40 – 45 payslips for February to November 2019, but not for October. The claimant says she did not receive payslips for October or December 2019 or for January to March 2020. The respondent disputed this, and the bundle also contained a second set of payslips.

16. It was not disputed that the respondent changed accountants during the

claimant's employment. The first set of payments and indeed the HMRC filing, which was at page 46, had been prepared by the first accountant. The second set of payslips which were at pages 64 – 69 were prepared by the new accountants. The original accountants had told HMRC and the claimant, via her payslips, that her gross monthly pay was £1200. The respondent had in fact paid on the basis that the gross monthly figure was £1166 (that is £14,000 divided by 12). The position was made more complicated by the fact that on some months the respondent had not even paid that lower amount in full. The parties asked for a short adjournment during the hearing and, while the respondent did not concede liability, agreed that it would pay monies w to the claimant. The respondent agreed that it owed the claimant £891 gross to include her weeks' notice. The majority of the unlawful deduction claims were therefore agreed between the parties and the award made reflects this agreement.

17. There was therefore only one issue of unlawful deductions left for me to determine, and that related to deductions in December 2019 and January 2020. The respondent's evidence is that it was entitled to deduct pay between 10 December 2019 and 7 January 2020 because the claimant was absent without leave. Ms Baker also said that looking at the amount of holiday the claimant had taken she had taken more than her annual entitlement and therefore should not be paid for this period in any event.

18. The claimant accepts that she was on leave between 10 December 2019 to 7 January 2020 but does not accept this was unauthorised. I was referred to page 53 of the bundle which is an email sent on 1 December 2019 in which the claimant refers to her upcoming holiday. The claimant also told me that she had done as office protocol required, that is holiday had been put in the office diary.

19. Ms Baker stated that she did not believe the email at page 53 had been sent. This is not something she had said in her witness statement. She was adamant that the holiday was not authorised because the claimant had not asked her for that leave. On her own evidence she had not raised this with the claimant before February 2020. Ms Baker says that there was a meeting in early February to discuss the claimant's absences and performance in general and at this meeting she clearly told the claimant that the holiday of the Christmas period was on authorised and that a deduction would be made from her pay. The claimant did not accept that any such meeting had ever occurred. There are no notes or minutes or emails regarding this meeting in February. If, as Ms Baker says it was a very serious meeting cataloguing the claimant's many failures I would expect, despite the size of this respondent, that there be some written reference to it. There is reference to the claimant's holiday leave in December in a post termination letter sent by Ms Baker, but this was sent in April.

20. The respondent's bundle did not contain any evidence as to documented processes for requesting holiday. I find that the leave was authorised, if it had not been I would expect to have seen this raised in emails at the time. If an employee does not attend for work, I would expect urgent and timely enquires to be made. None were made. I accept therefore, that the claimant had complied with normal office protocol in requesting her December leave, that the respondent was fully aware of it and categorised it as unauthorised only after the event. I find therefore that the leave was in effect authorised.

21. Ms Baker also relied upon her evidence that the claimant had taken more leave than she was entitled to. There was no information from the respondent as to how many days holiday the claimant was entitled to. There was no schedule setting out the holiday the claimant had taken to allow any calculation of the amount of accrued leave under the working time regulations. There is reference in Ms Baker's witness statement to leave from 29th April – 6th May which is 6 days and then the 1-day bank holiday in May before the disputed leave in December. That leave was for 21 days. As the claimant started on 21 January that is the date from which her holiday year runs in the absence of any relevant agreement. She would be entitled to 28 days leave and has taken exactly that in the holiday year based on the dates given by Ms Baker.

The claimant's dismissal

22. As a result of the pandemic and the associated need for social distancing the respondent closed its office on 9 March 2020. The claimant was then required to work from home, and it was agreed that she was given two different client matters to work on. Ms Baker said that the claimant was required to report daily to her via phone or email.

23. The claimant stated that she did attempt to get in touch with Ms Baker on both the 9th and 10th March. The bundle contained at pages 56-57 mobile phone records and Ms Baker confirmed that the numbers shown as being called on those two dates were either her mobile or her house phone line. Ms Baker said that she had been unaware of this contact. I accept the claimant's evidence that she had attempted to contact Ms Baker as requested at least on these two days.

24. It was agreed by both that the claimant had attended the office on 12 March and the two had been there together. Ms Baker also states that the claimant did not in fact do any work but used the opportunity to browse for cheap flights to Barcelona and to submit job applications. Ms Baker was asked where the print outs of the browser history were and said that the respondent had not been able to obtain these because of the office closure. The claimant denied that she had done this. Again, while there is a conflict of evidence from the two parties, I prefer the claimant's account for the reasons I have generally given. It appears that Ms Baker has been in the office fairly regularly and I do not accept that there was no opportunity to provide the relevant evidence of the browsing history if it did in fact exist. I conclude therefore that the claimant contacted the respondent on the 9th and 10th of March and attended the office and worked on 12 March.

25. Ms Baker's witness statement said that on this occasion she had a conversation with the claimant, told her she had not contacted her all week and asked if she was on track to bring the work back the following day and the claimant agreed that she would. In oral evidence Ms Baker said that she had been adamant with the claimant that she had to bring the file back by the 13th. She said that she had told her this on the 9th and reminded her again on the 12th. Ms Baker also said that the claimant had promised the client that the work would be completed and returned.

26. The claimant gave evidence that she had not been given any such instruction and certainly had not been given a deadline and in effect an ultimatum to return the work by that date. The two accounts are wholly opposite. On balance I prefer the claimant's

evidence over that of the respondent for the general reasons I have given. I therefore find that the claimant had not been given any such deadline with the force that Ms Baker now insists.

27. The claimant's evidence was that she was working on this client matter as requested, but that during the relevant week because of the non-payment of the Wi-Fi bill her connection was cut. This was because she had not been paid her full salary. She was not therefore able to send any completed work to the respondent. Given the accepted erratic nature of the salary payments made by the respondent I accept the claimant's evidence that she was unable to email Ms Baker any work because she couldn't pay her Wi-Fi bill. I accept that she had done the work but had not been able to send it on.

28. Ms Baker said that the claimant had made no contact with her after 12 March and said that she heard nothing further from her until the email of 19 March 2020. On the 19th of March, an email was sent by the claimant to both Ms Baker and to Mr Anjum, a director at the firm's other branch, informing them that there were still a shortfall in her wages and requesting an update as to when she should expect the rest of her wages. Ms Baker replied on 20th March when she invited the claimant into a meeting to take place on the 23rd. This was at page 59 of the bundle and stated that the claimant had been made aware of various issues since October 2019 and that there was a financial crisis as well. It stated that the claimant was aware the respondent had been undergoing significant restructuring in these unprecedented times and had to comprehensively revise their business model in the last four months and more deeply with in last two weeks. The communication concluded with a request that the claimant attend a meeting to discuss her future with the firm it concluded by saying will also deal with any issues regarding pay.

29. Ms Baker gave evidence as to the reasons for dismissal and explained that she had taken this decision with a fellow director. She initially said that they decided to dismiss because there had been concerns about the claimant's performance and her attitude and they had not been impressed with her at least since February. It was not viable to carry on. They felt it would be morally inappropriate to place the claimant on furlough because they would not be bringing her back. Ms Baker confirmed that the reason for dismissal was the claimant's failure to return files, her absence and performance. Ms Baker expanded her answer at a later point in her evidence and said that there had been a series of discussions with her fellow director and this was not a matter they would take lightly. This is the first time in 20 years they had stopped a paralegal who had passed the LPC. She referred again to the meeting in February when she said the claimant had been told that she needed to do better and referred again to unauthorised absence as well as failing to report from 9 March onwards.

30. Ms Baker confirmed that she did not follow the respondent's internal disciplinary or grievance process. She said that she would not give information in advance of the meeting such as this, nor would she generally allow someone to bring a companion. At this meeting the claimant was summarily dismissed.

31. At page 60 of the bundle was a letter the claimant wrote on 31 March not having

received anything the respondent in writing. It identifies the claimant's understanding of the reasons given to her for dismissal namely her absence level. It also records that in the meeting Ms Baker stated that she was not pleased that the claimant sent an email request in her outstanding wages. In evidence Ms Baker denied that she had made any such comment, characterising it as a blatant lie.

32. Ms Baker responded to this letter from the claimant on 6 April stating that the claimant's employment was terminated for a number of reasons, the most pertinent being the respondent's inability to meet her monthly salary so that her employment could no longer continue. The letter referred to the claimant's high level of absence, but in the context of whether deductions were or were not made for that. The letter continued that on 9 March the claimant was informed that she was to work from home and to report daily. It also stated that she was required to report back to Ms Baker by the latest on Friday the 13th with a particular file and that since 11th of March the claimant had not reported to her with any work or about any work that she was not aware of anything the claimant had done since 9 March 2020. It states that this situation and the claimant's erratic attendance was untenable and employment by the firm was absently pointless at this stage. On the face of the letter, it would seem the claimant was dismissed without notice for economic reasons, attendance and not returning a client file. It does not respond to the claimant's allegation that Ms Baker had taken objection to her email of 19 March about her failure to be paid wages.

33. The issues list, which was confirmed again by the parties this morning as being correct, stated that the claimant was dismissed for three things, failing to report the respondent daily from 9 March 2020 onwards, disregarding a deadline for completion of the work on a file which should be completed by 13 March 2020 and for failing to return a client file and document by 13 March 2020 and at any point up to the date of her dismissal. It did not specify any economic motive. It did not refer to attendance or performance. It was stated that the only performance failures was a failure to report the respondent daily from 9 March and missing a deadline on return of the file. The respondent's agreed reasons for dismissal explained at the preliminary hearing do not align with the reasons set out in the letter of 6 April, nor the evidence given by Ms Baker today.

34. I find that the respondent has given a muddled and contradictory account as to its reasons for dismissal. These are not set out in any invitation letter which focuses on economic matters. They are not set out in any letter sent immediately after the dismissal purporting to give those reasons, instead some reasons, which differ from those set out to Judge Gardner at the preliminary hearing, are set out in response to the claimant's letter. In particular, the respondent's letter does not address or refute the claimant's allegation that Ms Baker had told her that she was annoyed by the complaint of 19 March. Based on this inconsistent evidence I conclude that in fact the reason or principal reason for dismissal was the 19 March complaint.

Relevant law

35. The claimant has less than two years' service. Her claim is for automatic unfair dismissal under s104 of the Employment Rights Act 1996 for failure to pay wages. The section states

> *(1)An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—*
>
> *(a)brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or*
>
> *(b)alleged that the employer had infringed a right of his which is a relevant statutory right.*
>
> *(2)It is immaterial for the purposes of subsection (1)—*
>
> *(a)whether or not the employee has the right, or*
>
> *(b)whether or not the right has been infringed;*
>
> *but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.*
>
> *(3)It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.*

36. The burden of proof is on the employee to establish the reason for dismissal, on the balance of probabilities.

37. The claimant also brings a claim under s13 of the Employment Rights Act. The statutory prohibitions on deductions from wages are contained in Part II of the Employment Rights Act 1996 (ERA). The general prohibition on deductions is set out in s.13 and the exceptions in s. 14

> *13.— Right not to suffer unauthorised deductions.*
>
> *(1) An employer shall not make a deduction from wages of a worker employed by him unless—*
>
> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
>
> *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*
>
> *……*
>
> *.*

(4) (Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

14 Excepted deductions.

(1)Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—

(a)an overpayment of wages, or

(b)an overpayment in respect of expenses incurred by the worker in carrying out his employment,

made (for any reason) by the employer to the worker.

38. The claimant brings a claim for breach of contract – failure to pay notice pay. The tribunal has to consider is whether the employment contract has been breached. The tribunal is concerned with the factual question: Was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract without payment of notice?

39. The remedy for a breach of the statutory rules regarding written statements is by means of a reference to an employment tribunal under S.11 ERA. Tribunals have the power to award compensation under S.38 of the Employment Act 2002 (EA 2002) where, upon a successful claim being made under any of the tribunal jurisdictions listed in Schedule 5 to that Act, it becomes evident that the employer was in breach of its duty to provide full and accurate written particulars under S.1 ERA. Where under such a claim the tribunal finds the employer was in breach of the duty to give written particulars, the tribunal will make an award of 2 weeks' pay unless it would be unjust and inequitable to do so and may if it considers it just and equitable in all the circumstances make an award of 4 weeks' pay.

Conclusion on Liability

40. Based on the findings of fact set out above and applying the applicable law, I have found that the reason or principal reason for dismissal was the claimant's email of 19 March which set out clearly that she was continuing to suffer from unlawful deductions from wages. This is a relevant statutory right. The respondent has not disputed that the claimant raised this right, that it has been infringed and the complaint was made in good faith. Indeed, the respondent accepts that its payment pattern was erratic. I therefore conclude that this is an automatically unfair dismissal under section 104 Employment Rights Act 1996. The dismissal was not for any act of misconduct, but for raising a complaint and therefore I also conclude that there was no right to summarily dismiss the claimant. Her claim for breach of contract for one week's notice pay also succeeds.

41. The respondent has already agreed that it will pay the claimant a sum for unlawful deductions from wages relating to the claimant's complaints of salary

underpayment. I therefore do not need to reach any conclusion on liability for these sums.

42. Based on the findings of fact set out above I find that the claimant had taken authorised leave in December and January and had not exceeded any statutory entitlement. I conclude that there was an unlawful deduction of 21 day's pay relation to this holiday period.

43. I also make a declaration that the claimant did not receive a statement of particulars as required by section 1 of Employment Rights Act 1996. I now turn to issues of remedy.

Findings of fact on remedy

44. There was some dispute as to the claimant's monthly pay but it was agreed between the parties that her annual salary was £14,000 per annum, this this gives a gross week's pay of £269. The respondent's revised payslips showed a net monthly pay of £1088.14 which is an annual net pay of £13,056 and a weekly net pay of £251. As these are the figures shown on the payslips respondent has produced as a correct record of the claimant's pay, I will accept these and will base the calculation on these figures.

45. The claimant was dismissed with immediate effect on 23 March 2020. She confirmed in her witness statement that she had begun applying for other jobs from February 2020 because she was finding it difficult because of the unlawful deductions from her wages. The claimant produced some evidence that she has been applying for jobs in a legal capacity and the bundle included some comparatively recent applications.

46. Ms Baker challenged these. She expressed the view that it was inappropriate for the claimant to be applying to what she described as corporate firms as she stated that the claimant's "profile" was high street. The claimant did not accept that and said that having approach these firms and had some interviews with them she was exactly the right sort of candidate. She had not, however, been able to secure a position partly because of the circumstances of the pandemic. High street firms was simply not currently recruiting. Corporate firms recruited two years ahead and were therefore still running some recruitment exercises.

47. The claimant had also attempted to find nonlegal roles and she produced evidence of an application as a van driver for Tesco and which had also been unsuccessful. She explained that she was currently waiting to hear from a job with Birmingham City Council also in a nonlegal role and she was hopeful that she might have succeeded in that application. She was adamant she was extremely keen to work and really wanted to be able to qualify as a solicitor. She had been frustrated these efforts partly because the larger firms take trainees two years in advance and the Covid climate has made it difficult to secure employment generally. Ms Baker did not accept that the claimant had made sufficient effort. She criticised the limited number of job applications including the bundle. The respondent did not, however, provide details of any jobs it says the claimant should have applied for.

48. I am satisfied that the claimant has made reasonable efforts to mitigate her loss. She has provided evidence of her attempts to find jobs and I accept her evidence as to the current state of the job market and the difficulty in obtaining legal roles. I accept that she has made efforts to obtain nonlegal roles as well. I conclude therefore that mitigation efforts have been sufficient. The respondent has failed to provide any evidence to challenge this.

49. The claimant has been receiving universal credit payments of £409.89 a month since 6 May 2020. She is currently working as a volunteer food delivery driver. She set out her claim in a schedule of loss. This asked for a basic award of one week's pay. It asked for losses from the data dismissal of the date of the tribunal hearing and then future loss of six months. In oral evidence the claimant was prepared to reduce this and suggested that the lower figure might be appropriate as she hoped to get a job. She confirmed, however, that this was by no means certain and it was not in her chosen field.

50. In her schedule she also asked for 25% uplift on the compensatory award the respondent's failure to follow the ACAS code of practice an additional award four weeks statutory pay for failure to provide written statement of particulars of employment. She included a claim of one week for wrongful dismissal.

Relevant Law

unfair dismissal

51. s123 of the ERA 1996 provides that 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 insofar as that loss is attributable to action taken by the employer'.

52. The object of the compensatory award is to compensate the employee for their financial losses as if they had not been unfairly dismissed - it is not designed to punish the employer for their wrongdoing.

Calculation of remedy

53. The calculation falls under two headings, immediate loss of earnings and future loss. Immediate loss is that suffered between the EDT and the date of the remedies hearing. Loss of earnings will be calculated on the basis of net take home pay (that is, after deduction of tax and national insurance).

54. The employer's liability will normally cease before the date of the remedies hearing if the employee has (or ought to have) got a new permanent job paying at least as much as the old job as there will no longer be a loss arising from the dismissal. For claims relating solely to unfair dismissal the period of immediate loss is the number of weeks between the EDT and the remedies hearing, or the date of a new equivalent job, or the date by which the claimant should have found a new job, whichever is the soonest.

55. The current presidential guidance on mitigation provides as follows:

> 6) All persons who have been subjected to wrongdoing are expected to do their best, within reasonable bounds, to limit the effects on them. If the Tribunal concludes that a claimant has not done so, it must reduce the compensation so that a fair sum is payable.
>
> 7) The Tribunal will expect evidence to be provided by claimants about their attempts to obtain suitable alternative work and about any earnings from alternative employment.
>
> 8) The Tribunal will expect respondents, who consider that the claimant has not tried hard enough, to provide evidence about other jobs which the claimant could have applied for.

56. For dismissals occurring on or after 6 April 2019 the statutory cap (where it applies) is calculated as the lower of £86,444,or 52 weeks' gross pay.

57. An award for compensation can be increased or reduced, by up to 25%, if the employer/employee has unreasonably failed to comply with a relevant code of practice relating to the resolution of disputes. The power is contained in S.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A), which states at subsection (2): 'If, in the case of 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) that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent.'

58. In Holmes v Qinetiq Ltd [2016] IRLR 664 it was said as follows about the code,

> "...it is intended to apply to any situation in which an employee faces a complaint or allegation that may lead to a disciplinary situation or to disciplinary action. Disciplinary action is or ought only to be invoked where there is some sort of culpable conduct alleged against an employee." [12]

59. The reason for the dismissal must therefore involve an allegation involving culpability on the part of the claimant. In Ikejiaku v British Institute of Technology Ltd UKEAT/0243/19 the application of the code to an automatically unfair dismissal for whistleblowing was considered and it was found.

> "In the circumstances of this case the Tribunal was clearly right to hold that the Discipline section of the Code had no application. First, as it held, because a protected disclosure could never be a ground for disciplinary action, i.e. for an allegation involving the culpability of the employee. Secondly, because culpability formed no part of the Respondent's unsuccessful case on the true reason for the dismissal."

60. The EAT in Bethnal Green & Shoreditch Education Trust v Dippenaar UKEAT/0064/15 confirmed that if the employer views the matter as involving culpable conduct on the part of the employee, then it will be expected to comply with the ACAS Code.

Contributory conduct

61. The basic award may be reduced where the tribunal 'considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such as it would be just and equitable to reduce or reduce further the amount of the award to any extent...'. In respect of other awards 'where the tribunal finds that the [act] was to any extent caused or contributed to by any action of the complainant, [the tribunal] shall reduce the amount of the compensatory award by such proportion as it considers just and equitable...'.

62. For the basic award (but not other awards), conduct which was not known to the employer and cannot have caused or contributed to the dismissal can still be taken into account.

63. To fall into this category, the claimant's conduct must be 'culpable or blameworthy'. Save in respect of the basic award, such conduct must cause or contribute to the claimant's dismissal, rather than its fairness or unfairness. Such conduct need not amount to gross misconduct.

Polkey reduction

64. A 'Polkey' deduction is the phrase used in unfair dismissal cases to describe the reduction in any award for future loss to reflect the chance that the individual would have been dismissed fairly in any event.

65. The tribunal must assess any Polkey deduction in two respects:1) If a fair process had occurred, would it have affected when the claimant would have been dismissed? and 2) What is the percentage chance that a fair process would still have resulted in the claimant's dismissal?

66. Where there is a significant overlap between the factors taken into account in making a Polkey deduction and when making a deduction for contributory conduct, the ET should consider expressly, whether in the light of that overlap, it is just and equitable to make a finding of contributory conduct, and, if so, what its amount should be. This is to avoid the risk of penalizing the claimant twice for the same conduct.

67. The compensatory award must be calculated with adjustments made in a prescribed order as follows:

- Calculate the total losses suffered by the claimant;

- Deduct any amounts received from the employer such as payment in lieu of notice or ex gratia payment which made to the employee as compensation for the dismissal. This must exclude any enhanced redundancy payment above the basic award;

- Deduct earnings which have mitigated the loss or a sum which reflects any failure by the claimant to mitigate his or her loss (s123(4) ERA 1996)

- A 'Polkey' deduction to reflect the chance that the claimant would have been dismissed in any event had the employer acted fairly

- Decrease/increase for accelerated/decelerated receipt of compensation in respect of future/past loss

- Percentage increase or reduction up to a maximum of 25% to reflect an unreasonable failure by the employer or employee to comply with the ACAS disciplinary code (s207A TULR(C)A)

- Any extra award for a failure by the employer to provide written particulars of employment (s38 EA 2002)

- Percentage reduction for any contributory conduct on the part of the employee (s123(6) ERA 1996).

- Deduction for any enhanced redundancy payment to the extent that it exceeds the basic award (s123(7) ERA 1996)

- Gross up

- Apply the statutory cap

Conclusion on remedy

68. The claimant only had 4 weeks service and consequently she does not have sufficient service for an ordinary unfair dismissal claim. However, as set out above, her claims of automatically unfair dismissal succeeded. Section 120 of the Employment Rights Act provides for a minimum basic award to be paid in certain cases of automatically unfair dismissal. However, claims brought under Sections 104 and 104A are not included within this section. Accordingly, given that the claimant only had 1 years' service, she is not entitled to a basic award.

69. I have found that the claimant has made sufficient efforts to mitigate her loss I conclude that she is therefore entitled to an award of compensation from 23 March 2022 the date of this hearing 21 April 2021. I have considered the position on future loss and, take into account the claimant's concession, consider that she should be awarded an additional three months of future loss.

70. As I have found that the reason for dismissal was making a complaint about unpaid wages, I have not accepted the respondent's evidence as to any conduct issues. There is therefore no contributory fault which would reduce any compensation. Similarly, I make no Polkey reduction. I have found that there was no raised issue with attendance or performance.

71. The reason for the dismissal is not one on its face that falls within the ACAS code of conduct on disciplinary procedure. The reason given by the respondent was conduct but I have rejected this and found a non-culpable reason for dismissal. I conclude that the code does not apply so no uplift is awarded.

72. I have found that the claimant was not provided with particulars as required by s 1ERA. The respondent is a law firm and should be expected to understand the need to comply with the law. On these facts an award of 4 weeks' pay is appropriate.

73. Compensation for unfair dismissal is calculated as follows:

1. Details

Date of birth of claimant	14/12/1994
Date started employment	21/12/2019
Effective Date of Termination	23/03/2020
Period of continuous service (years)	0
Age at Effective Date of Termination	25
Remedy hearing date	21/04/2021
Date by which employer should no longer be liable	21/07/2021
Contractual notice period (weeks)	1
Statutory notice period (weeks)	0
Net weekly pay at EDT	251.00
Gross weekly pay at EDT	269.00
Gross annual pay at EDT	14,000.00

2. Basic award

Basic award Number of qualifying weeks (0) x Gross weekly pay (269.00)	0.00
Total basic award	**0.00**

3. Damages for wrongful dismissal

Loss of earnings Damages period (1) x Net weekly pay (251.00)	251.00
Total damages	**251.00**

4. Compensatory award (immediate loss)	
Loss of net earnings Number of weeks (55.3) x Net weekly pay (251.00)	13,880.30
Plus loss of statutory rights	500.00
Total compensation (immediate loss)	**14,380.30**
5. Compensatory award (future loss)	
Loss of future earnings Number of weeks (13) x Net Weekly pay (251.00)	3,263.00
Total compensation (future loss)	**3,263.00**
6. Adjustments to total compensatory award	
Compensatory award before adjustments	**17,643.30**
Total adjustments to the compensatory award	**0.00**
Compensatory award after adjustments	**17,643.30**
7. Failure to provide written particulars	
Number of weeks (4) x Gross weekly pay (269.00)	1,076.00
Total	**1,076.00**
8. Summary totals	
Basic award	0.00
Wrongful dismissal	251.00
Compensation award including statutory rights	18,719.30
Total	**18,970.30**
9. Grossing up	
Tax free allowance (Â£30,000 - any redundancy pay)	30,000.00
Basic + additional awards	0.00
Balance of tax free allowance	30,000.00
Compensatory award + wrongful dismissal	18,970.30
Other salary (net)	14,000.00
Figure to be grossed up	0.00
Personal allowance	12,500.00
GROSSED UP TOTAL	**18,970.30**
AFTER COMPENSATION CAP OF £14,000.00 (GROSS ANNUAL PAY)	**14,251.00**

74. In addition, the claimant is awarded £622 (£891- £269) as agreed by the parties less for underpaid salary less one week's notice compensated for above, together with £1,130.76 for 21 days unpaid holiday. A total of £1752.76 less tax and employee national insurance contributions as applicable.

Employment Judge McLaren
Date: 4 May 2021