EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/ 4110763/2021

Final Hearing Held remotely on 10 January 2021

Employment Judge: Mr A Kemp
Tribunal Member: E Coyle
Tribunal Member: P Fallow

Ms V Stewart	**Claimant** **In person**
Allied Healthcare Ltd	**Respondent** **Represented by** **Ms C Barnard** **Head of HR**

JUDGMENT

The unanimous decision of the Tribunal is that:

1. **The claimant was unfairly dismissed under sections 98 and 99 of the Employment Rights Act 1996**

2. **The claimant is awarded the total sum of SIX THOUSAND FIVE HUNDRED AND EIGHTY TWO POUNDS EIGHTY EIGHT PENCE (£6,582.88).**

3. **For the purposes of the Employment Protection (Recoupment of Benefits) Regulations 1996, as amended:**
   - **(i) The monetary award is SIX THOUSAND FIVE HUNDRED AND EIGHTY TWO POUNDS EIGHTY EIGHT PENCE (£6,582.88).**
   - **(ii) The prescribed element is FOUR THOUSAND NINE HUNDRED AND FOURTEEN POUNDS (£4,914.00)**
   - **(iii) The date to which the prescribed element relates is 13 January 2022, and the prescribed period is that from 9 May 2021.**
   - **(iv) The amount by which the monetary award exceeds prescribed element is ONE THOUSAND SIX HUNDRED AND SIXTY EIGHT POUNDS EIGHTY EIGHT PENCE (£1,668.88)**

4. **The claim for a failure to provide written reasons for dismissal under section 92 of the Employment Rights Act 1996 does not succeed and is dismissed.**

REASONS

Introduction

1. This was a Final Hearing held remotely by Cloud Video Platform into claims made by the claimant against the respondent. There had not been a Preliminary Hearing but case management orders had been made. The claimant represented herself, and the respondent was represented by Ms Barnard. The claimant had no experience of Tribunal proceedings, but Ms Barnard had.

2. Before the hearing started the Judge explained about how it would be conducted, how evidence would be given by each witness, that there would then be cross-examination, Tribunal questions and re-examination. He

explained that documents should be referred to in evidence and explained, and that save in exceptional circumstances no further document would be admitted into evidence once the evidence for each party had concluded. He explained that after the evidence was heard each party would be able to make submissions after which the Tribunal would consider matters and issue a Judgment, which would be sent to parties and later added to the Register of Judgments maintained online.

3. Ms Barnard explained that the persons at the respondent who had dealt with the claimant's case were no longer in their employment. She gave evidence herself although she had not been involved in the detail of the case at the time, and spoke to documents that had been in the claimant's HR file. She confirmed that the respondent accepted that it had dismissed the claimant.

Issues

4. The Tribunal identified the following issues for its determination, after discussion with the parties:
   (i) What was the reason or principal reason for the dismissal?
   (ii) Did the reason fall within section 99 of the Employment Rights Act 1996 ("the 1996 Act") so as to be automatically unfair?
   (iii) In that regard, did the respondent comply with its obligations under the Maternity and Parental Leave etc Regulations 1999 ("the Regulations"), in particular Regulations 7 and 20?
   (iv) If the reason was a potentially fair one, was the dismissal fair or unfair having regard to section 98(4) of the 1996 Act?
   (v) Did the claimant request written reasons for her dismissal, and if so did the respondent fail to provide them, under section 92 of the 1996 Act?
   (vi) If the claimant succeeds to what remedy is she entitled?

The evidence

5. A short Bundle of Documents had been prepared and was spoken to. It was supplemented during the hearing without objection. Ms Barnard gave evidence first, then the claimant.

The facts

6. The Tribunal held that the following facts, material to the case before it, had been proved:

7. The claimant is Ms Victoria Stewart. Her date of birth is 25 May 1997

8. The respondent is Allied Healthcare Ltd. It provides domiciliary care throughout the UK, and has about 2,600 employees.

9. The claimant was employed by the respondent from 18 September 2018 as a care worker. No written contract of employment was presented to the Tribunal, nor was any statement of principal terms of employment.

10. The claimant worked providing care to people in their homes. To be able to work as such the claimant required to be registered with the Scottish Social Services Council, and to undergo necessary training as required.

11. The claimant worked for three days per week Mondays to Wednesdays 7am to 2pm, and on Saturdays and Sundays from 7am to about 1pm then 3pm to 9pm. She was paid an hourly rate of about £9 per hour to do so. She had one child at that time, and childcare was provided by her partner and mother who at that stage worked part-time.

12. On 11 February 2020 the claimant met the then Branch Manager of the Dundee branch where she worked, Ms Fiona Cargill. They had a discussion about the claimant's maternity leave. The claimant was entitled to ordinary maternity leave of 26 weeks and additional maternity leave of 26 weeks. The claimant stated that she wished to take the full period of both ordinary and

additional maternity leave, commencing on 21 February 2020 and lasting until 21 February 2021. Ms Cargill completed a form prepared under the respondent's policy (which policy was not before the Tribunal). It recorded that the claimant would take ordinary maternity leave, and then both that she would take additional maternity leave commencing on 22 August 2020 and also return to work on 21 August 2020. It later referred to the claimant taking annual leave after her full entitlement to maternity leave. The form was signed both by the claimant and Ms Cargill that day. The claimant was not provided with a copy of it.

13. The claimant commenced her maternity leave on 21 February 2020. Her gross weekly wage was £222.96 in the period prior to commencing maternity leave. Her net weekly wage in that period was £211.06.

14. The claimant was paid statutory maternity pay by the respondent for the period from 21 February 2020 to November 2020 (no specific date or details were given in evidence).

15. At no point did the respondent write to the claimant to inform her of the date of her return to work.

16. On 19 October 2020 Ms Cargill left the employment of the respondent and she was replaced as Branch Manager of the Dundee branch by Ms Kayleigh Walker..

17. In January 2021 on a date not given in evidence the claimant sought to contact the respondent about her return to work. She telephoned the office in Dundee and was informed that Ms Cargill had left and been replaced by Ms Kayleigh Walker. She left a message asking Ms Walker to contact her. Ms Walker did not do so.

18. The claimant tried subsequently to contact Ms Walker by telephone on several occasions on dates not given in evidence, and left similar messages asking her to call her. Ms Walker did not do so.

19. On 26 March 2021 the Scottish Social Services Council ("SSSC") emailed the respondent to state that the claimant was no longer on their register as she had not paid an annual membership fee. That membership fee was £25. Payment of that fee and completing the necessary form would allow re-instatement on the register.

20. On 29 March 2021 Ms Walker emailed the claimant asking if she intended to return to work. The claimant replied to her by email that same day to state that she did intend to do so, that she had tried to speak to her on several occasions, but that as her childcare arrangements had changed she was not able to work the same hours, and raised the issue of working part-time hours. She said that she would call to discuss that in the following week.

21. She did so, but could not get through to Ms Walker and again left a message. Ms Walker did not return her call.

22. At all material times the respondent was seeking to recruit carers, and would have had work available for the claimant to undertake.

23. On 9 May 2021 the claimant received a form P45 from the respondent (which was not presented to the Tribunal). It had been sent to her by Ms Walker.

24. On 21 May 2021 the claimant telephoned Ms Walker and they had a discussion. The claimant raised the P45 she had received and was told that it had been sent as the claimant had not returned to work after her maternity leave ended in August 2020. The claimant did not understand the reference to that date, as she understood that her maternity leave was to end on 21 February 2021. The claimant was told that an email had been sent to her. She requested to see that as she was not aware of having received any email. The claimant mentioned her own email sent to Ms Walker on 29 March 2021. Ms Walker said that she had not seen it and said that she wondered if the right email address had been used by the claimant . The claimant explained that she had clicked "reply" to Ms Walker's email that day to email her. Ms Walker then asked if she wished to return to work and she said that she did. Ms Walker

said that she would contact HR and see if the P45 could be recalled, and that she would be in touch with her once she had heard from them.

25. On 1 June 2021 Ms Walker emailed the claimant further to state that she was waiting to hear from HR, and mentioned her SSSC registration. The email referred to her undergoing moving and handling training. The claimant replied that day asking again for the earlier email that led to the P45.

26. On 4 June 2021 Ms Walker emailed the claimant asking her to come into the office and provide photographic ID. The claimant replied on 6 June 2021 to state that she did not then have her driving licence to do so. The claimant did not attend the office. Ms Walker did not respond to the email.

27. On 28 July 2021 the claimant emailed Ms Walker asking if she had received the earlier email.

28. On 9 August 2021 Ms Walker responded saying that she was waiting for the claimant to attend the office with her ID, and that as the claimant had left it for two months she would need to apply for a position again (although the claimant had sent the said messages on 6 June 2021 and 28 July 2021).

29. On 9 August 2021 the claimant commenced early conciliation. The certificate was issued on 10 August 2021 and the Claim Form presented to the Tribunal on the same day.

30. After being dismissed by the respondent the claimant was in receipt of benefits. She sought new employment on a part-time basis as she was then caring for two young children.

31. She found new employment commencing on 6 December 2021. She works as a care worker for 18 hours per week, earning £10 per hour, £180 per week.

Submissions

32. The parties each made brief submissions of which the following are a summary.

33. Ms Barnard argued that the claimant had not responded regarding a return to work, and that had she done so the outcome could potentially have been different. The claimant was not able to return to work at the same hours and shifts as she had carried out before maternity leave. Even in August 2021 she did not have the ID paperwork, and the claimant was not compliant with registration. She asked that the Tribunal take that into account. She added that the respondent was in the social care sector and would never wish to lose care staff as it was looking to recruit. The sole reason for dismissal was that the claimant was not compliant, and that was some other substantial reason under section 98 of the Act.

34. The claimant did not wish to make a detailed submission but said that she had tried to contact the office and had they responded she would have been able to do things differently. Matters should have been discussed on the phone or face to face. There had been a more detailed discussion on 21 May 2021. She did not want to have to look for a new job.

The law

35. Section 98 of the Act provides as follows:

> **"98 General**
>
> (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.

……

(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.”……..

33. Section 99 states as follows:

“99 Leave for family reasons

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

(a) the reason or principal reason for the dismissal is of a prescribed kind, or

(b) the dismissal takes place in prescribed circumstances.

(2) In this section “prescribed” means prescribed by regulations made by the Secretary of State.

(3) A reason or set of circumstances prescribed under this section must relate to—

(a) pregnancy, childbirth or maternity,

(aa) time off under section 57ZE,

(ab) time off under section 57ZJ or 57ZL,

(b) ordinary, compulsory or additional maternity leave,

(ba) ordinary or additional adoption leave,

(bb) shared parental leave,

(c) parental leave,

(ca) paternity leave,

(cb) parental bereavement leave, or

(d) time off under section 57A;

and it may also relate to redundancy or other factors.

(4) A reason or set of circumstances prescribed under subsection (1) satisfies subsection (3)(c) or (d) if it relates to action which an employee—

(a) takes,

(b) agrees to take, or

(c) refuses to take,

under or in respect of a collective or workforce agreement which deals with parental leave.

(5) Regulations under this section may—

(a) make different provision for different cases or circumstances

(b) apply any enactment, in such circumstances as may be specified and subject to any conditions specified, in relation to persons regarded as unfairly dismissed by reason of this section."

34. The Maternity and Parental Leave etc Regulations 1999 provide in Regulation 7 as follows:

"**7 Duration of maternity leave periods**

(1) Subject to paragraphs (2) and (5), an employee's ordinary maternity leave period continues for the period of 26 weeks from its commencement, or until the end of the compulsory maternity leave period provided for in regulation 8 if later.

(2) Subject to paragraph (5), where any requirement imposed by or under any relevant statutory provision prohibits the employee from working for any period after the end of the period determined under paragraph (1) by reason of her having recently given birth, her ordinary maternity leave period continues until the end of that later period.

(3) In paragraph (2), "relevant statutory provision" means a provision of—

(a) an enactment, or

(b) an instrument under an enactment,

other than a provision for the time being specified in an order under section 66(2) of the 1996 Act.

(4) Subject to paragraph (5), where an employee is entitled to additional maternity leave her additional maternity leave period continues until the end of the period of 26 weeks from the day on which it commenced.

(5) Where the employee is dismissed after the commencement of an ordinary or additional maternity leave period but before the time when (apart from this paragraph) that period would end, the period ends at the time of the dismissal.

(6) An employer who is notified under any provision of regulation 4 of the date on which, by virtue of any provision of regulation 6, an employee's ordinary maternity leave period will commence or has commenced shall notify the employee of the date on which [her additional maternity leave period shall end]—

(a) . . .

(b) . . ..

(7) The notification provided for in paragraph (6) shall be given to the employee—

(a) where the employer is notified under regulation 4(1)(a)(iii), (3)(b) or (4)(b), within 28 days of the date on which he received the notification;

(b) where the employer is notified under regulation 4(1A), within 28 days of the date on which the employee's ordinary maternity leave period commenced."

35. Regulation 20 provides as follows:

"**20 Unfair dismissal**

(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if—

(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3), or

(b) the reason or principal reason for the dismissal is that the employee is redundant, and regulation 10 has not been complied with.

(2) An employee who is dismissed shall also be regarded for the purposes of Part X of the 1996 Act as unfairly dismissed if—

(a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant;

(b) it is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and

(c) it is shown that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was a reason of a kind specified in paragraph (3).

(3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with—

(a) the pregnancy of the employee;

(b) the fact that the employee has given birth to a child;

(c) the application of a relevant requirement, or a relevant recommendation, as defined by section 66(2) of the 1996 Act;

(d) the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave [or additional maternity leave];

(e) the fact that she took or sought to take—

(i) . . .

(ii) parental leave, or

(iii) time off under section 57A of the 1996 Act;

[(ee) the fact that she failed to return after a period of ordinary or additional maternity leave in a case where—

(i) the employer did not notify her, in accordance with regulation 7(6) and (7) or otherwise, of the date on which the period in question would end, and she reasonably believed that that period had not ended, or

(ii) the employer gave her less than 28 days' notice of the date on which the period in question would end, and it was not reasonably practicable for her to return on that date;]

(eee) the fact that she undertook, considered undertaking or refused to undertake work in accordance with regulation 12A;

(f) the fact that she declined to sign a workforce agreement for the purposes of these Regulations, or

(g) the fact that the employee, being—

(i) a representative of members of the workforce for the purposes of Schedule 1, or

(ii) a candidate in an election in which any person elected will, on being elected, become such a representative,

performed (or proposed to perform) any functions or activities as such a representative or candidate.

(4) Paragraphs (1)(b) and (3)(b) only apply where the dismissal ends the employee's ordinary or additional maternity leave period.

(5) Paragraphs (3) and (3A) of regulation 19 apply for the purposes of paragraph (3)(d) as they apply for the purposes of paragraph (2)(d) of that regulation.

(6) . . .

(7) Paragraph (1) does not apply in relation to an employee if—

(a) it is not reasonably practicable for a reason other than redundancy for the employer (who may be the same employer or a successor of his) to permit her to return to a job which is both suitable for her and appropriate for her to do in the circumstances;

(b) an associated employer offers her a job of that kind, and

(c) she accepts or unreasonably refuses that offer.

(8) Where on a complaint of unfair dismissal any question arises as to whether the operation of paragraph (1) is excluded by the provisions of paragraph . . . (7), it is for the employer to show that the provisions in question were satisfied in relation to the complainant."

36. Where a dismissal is admitted by the respondent it is for the respondent to prove the reason for that dismissal under section 98 of the Employment Rights Act 1996 ("ERA"). The burden of proof for doing so is on the employer.

37. In ***Abernethy v Mott Hay and Anderson [1974] ICR 323***, the following guidance was given by Lord Justice Cairns:

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

38. These words were approved by the House of Lords ***in W Devis & Sons Ltd v Atkins [1977] AC 931***.

39. In ***Beatt v Croydon Health Services NHS Trust [2017] IRLR 748,*** Lord Justice Underhill observed that Lord Justice Cairns' precise wording was directed to the particular issue before that court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which caused him or her to take that decision.

40. Some other substantial reason is a potentially fair reason for dismissal. If the employer has a fair reason which he genuinely believes to be substantial the case may fall within this category: ***Harper v National Coal Board [1980] IRLR 260***.

41. Whether the reason was a substantial one is for the tribunal to answer, using its common sense and experience ***Priddle v Dibble [1978] ICR 148.*** There is a substantial body of case law on the issue, but it is primarily one of fact and degree with cases determined by their own facts.

42. If the reason proved by the employer is not one that is potentially fair under section 98(2) of the Act, the dismissal is unfair in law. If the reason or principal reason for dismissal is one that is potentially fair, the issue of whether it is fair or not is determined under section 98(4) of the Act and

> "depends on whether in the circumstances…..the employer acted reasonably or unreasonably in treating [that reason] as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case."

43. There is no onus on either party to prove fairness or unfairness under the terms of section 98(4). The onus under that part of the section is neutral.

44. If section 99 is engaged, a dismissal is automatically unfair and it is not possible to apply section 98(4) and argue that it is fair. The social policy behind the terms of section 99 (and the Regulations) was made clear in a decision of the House of Lords in ***Brown v Stockton-on-Tees Borough Council 1988] IRLR 263***. It was held, in relation to predecessor provisions and in the different context of a dismissal for redundancy that it was automatically unfair, and the following was said:

> "[Section 99] must be seen as part of social legislation passed for the specific protection of women and to put them on an equal footing with men. I have no doubt that it is often a considerable inconvenience to an employer to have to make the necessary arrangements to keep a woman's job open for her whilst she is absent from work in order to have a baby, but this is a price that has to be paid as a part of the social and legal recognition of the equal status of women in the workplace. If an employer dismisses a woman because she is pregnant and he is not prepared to make the arrangements to cover

her temporary absence from work he is deemed to have dismissed her unfairly. I can see no reason why the same principle should not apply if in a redundancy situation an employer selects the pregnant woman as the victim of redundancy in order to avoid the inconvenience of covering her absence from work in the new employment he is able to offer others who are threatened with redundancy. It surely cannot have been intended that an employer should be entitled to take advantage if a redundancy situation to weed out his pregnant employees."

45. Section 99 and the Regulations were introduced to give effect in UK law to the Pregnant Workers Directive 92/85/EEC, which is part of retained law under the European Union (Withdrawal) Act 2018. The provisions are construed purposively in that context.

46. In the event of a finding of unfair dismissal, the tribunal requires to consider firstly whether to make an order for re-instatement under section 113 of the Employment Rights Act 1996. The matter is further considered under section 116 as follows:

> "(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—
>
> (a) whether the complainant wishes to be reinstated,
>
> (b) whether it is practicable for the employer to comply with an order for reinstatement, and
>
> (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement."

47. In the present case the claimant sought a monetary award as her remedy. The tribunal requires also to consider a basic and compensatory award if no order of re-instatement or re-engagement is made, which may be made under sections 119 and 122 of the Employment Rights Act 1996, the latter reflecting the losses sustained by the claimant as a result of the dismissal.

The amount of the compensatory award is determined under section 123 and is "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". The Tribunal may increase the award in the event of any failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. Awards are calculated initially on the basis of net earnings, but if the award exceeds £30,000 may require to be grossed up to account for the incidence of tax. The Tribunal may separately reduce the basic and compensatory awards under sections 122(2) and 123(6) of the Act respectively in the event of contributory conduct by the claimant.

48. Breach of section 99 of the Act can give rise to an award for injury to feelings. Three bands were set out for injury to feelings in ***Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102*** in which the Court of Appeal gave guidance on the level of award that may be made. The three bands were referred to in that authority as being lower, middle and upper, with the following explanation:

> "i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.
>
> ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.
>
> iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings."

49. In ***Da'Bell v NSPCC [2010] IRLR 19,*** the EAT held that the levels of award for injury to feelings needed to be increased to reflect inflation. The top of the lower band would go up to £6,000; of the middle to £18,000; and of the upper band to £30,000.

50. In ***De Souza v Vinci Construction (UK) Ltd [2017] IRLR 844***, the Court of Appeal suggested that it might be helpful for guidance to be provided by the President of Employment Tribunals (England and Wales) and/or the President of the Employment Appeal Tribunal as to how any inflationary uplift should be calculated in future cases. The Presidents of the Employment Tribunals in England and Wales and in Scotland thereafter issued joint Presidential Guidance updating the ***Vento*** bands for awards for injury to feelings, which is regularly updated. In respect of claims presented on or after 6 April 2020, the ***Vento*** bands include a lower band of £900 to £9,000, a middle band of £9,000 to £27,000 and a higher band of £27,000 to £45,000.

51. Section 92 of the 1996 Act requires the employer to give any employee dismissed after two years of employment a written statement of the reasons for dismissal, but only provided there has been a specific request **(*Catherine Haigh Harlequin Hair Design v Seed [1990] IRLR 175*).** The statement must be given within 14 days of the request. If the provision is breached between 2 and 4 weeks pay is the remedy.

Observations on the evidence

52. The Tribunal was satisfied that both witnesses gave honest evidence. Ms Barnard did the best that she could, but she was not the person involved in the matters raised at the time, and could only provide comments based on the written material she had. The claimant was, we considered, both credible and reliable. We accepted her evidence, which we considered was given in a straightforward manner.

53. There were some difficulties with the evidence for the respondent. Firstly, the maternity leave form completed by Ms Cargill was at best ambiguous, and at worst hopelessly contradictory. She did not give evidence. We accepted the claimant's evidence that she intended to take the year of maternity leave to which she was entitled, and that the suggestion in the form that she would return to work on 21 August 2020 was wrong. That suggestion that the return date was 21 August 2020 made no sense given that the form also referred to her taking additional maternity leave, which commenced on 22 August 2020. It was compounded by reference to annual leave, but the respondent was unaware of what leave was accrued to then, if any. Secondly, the 1999 Regulations require the respondent to write to the claimant and state her return to work date. They did not do so. The form that was completed was entirely ambiguous at best, and did not amount to notice under the Regulations as it was not what was discussed, and not clear on its terms given the inconsistencies within it. It was not sent to the claimant in any event. The onus of proving compliance with the Regulations falls on the respondent, and they did not discharge that onus. In short, the terms of Regulation 7 require the employer to inform the employee of when the return to work is to take place, and the respondent failed to do so. That was a breach of Regulation 7 of those Regulations. Thirdly Ms Barnard said in her evidence that the respondent had a policy requiring the employee to contact the company eight weeks before the return date to discuss that, but that policy was not before us, and in any event it was not, on the face of it, an answer to the breach of the Regulations. Fourthly Ms Barnard in her evidence referred to an email she understood had been sent to the claimant by Ms Walker on 2 April 2021, and then a letter in essentially the same terms on 6 April 2021. The claimant denied receiving either of them. We accepted the claimant's evidence on that. The email said to have been sent to the claimant did not have the claimant's email address, unlike the email sent to her on 29 March 2021 by Ms Walker. The claimant had replied to that email that same day by clicking on the reply button to that message. We accepted the claimant's evidence as to that. It made no sense at all that Ms Walker would write to the claimant about the supposed lack of reply on 2 and 6 April

2021, when there had been, and that reply was about returning to work. It appeared to us likely that the email produced on 2 April 2021 was part of an email internally sent to Ms Clark by Ms Walker with what she intended to send the claimant, but not what the claimant herself had been sent. As Ms Walker did not give evidence we did not consider that it had been proved that an email on 2 April 2021 was sent to the claimant. The claimant's emails also referred to her attempts to contact Ms Walker which had failed and again we accepted the claimant's evidence as to that. A similar issue arose later in 2021 when Ms Walker's latter email referred to the claimant not having been in touch for two months, which was not the case at all. It appeared that there was a pattern of Ms Walker not either reading, or perhaps not receiving (although as she did not give evidence this could not be known) emails that the claimant did send to her, which was itself part of a pattern of Ms Walker not returning messages that the claimant had attempted to telephone her. The evidence as a whole was of a failure of communication on the part of the respondent for the period from January 2021 to the time of the commencement of the claim. We should also state that there was a slight difference between the parties as to when the dismissal was, between 7 and 9 May 2021, but the respondent did not either produce the P45 or evidence as to when it was sent, and we accepted the claimant's evidence that she had received it on 9 May 2021. No issue as to the jurisdiction of the Tribunal was taken by the respondent, and it appeared to us that none arose.

Discussion

(i) Reason for dismissal

54. Ms Walker appears to have sent out the P45, and it was not disputed that her doing so amounted to a dismissal, in the face of the claimant's email, and without any further enquiry or meeting or similar. There were said to be two bases for the dismissal. The first was that the claimant was not registered with SSSC at that point. That was true, but it was simply an issue of paying a £25 membership annual premium, and the claimant was at that stage on benefits. She said that she would do so when a return to work was arranged,

and again we accepted that. The second issue was the failure to return to work. There is an element of truth in that too, but only a small element. Firstly, the respondent was in breach of its obligations under Regulation 7. Secondly, it did nothing to contact the claimant to arrange her return to work prior to 21 February 2021. Thirdly, if it did think that she was returning on 21 August 2020 it did nothing at or around that time. Fourthly it paid her maternity pay after that date in any event, up to November 2020. Fifthly Ms Walker did not reply to the claimant's messages left by telephone from and after January 2021. Sixthly when there was an email exchange on 29 March 2021 the claimant stated in clear terms her intention to return, but wished to have a discussion about working part-time. That discussion the respondent did not follow up on. It simply sent out a P45 on or about 7 May 2021 and received on 9 May 2021.

55. As stated Ms Walker did not give evidence. We did not consider that the respondent had proved a potentially fair reason for the dismissal. The position it took made no sense from the documentation before us, and in any event was contradicted by the claimant's evidence and particularly the email she sent on 29 March 2021. There was no substantial reason within the terms of section 98 that the respondent had established. The dismissal must be unfair for that reason alone.

56. In any event, we considered that the dismissal was in breach of the terms of section 99 and Regulation 7 of the Regulations for the reasons stated. The respondent wholly failed in its obligation to inform the claimant of the date of return to work after maternity leave. It then, having failed to do so, did not respond to her attempts to arrange a discussion about the return to work. It is again true that the claimant did not intend to return to the same hours of work as before, but the terms of contract were not committed to writing, no written contract or statement of principal terms under section 1 of the 1996 Act was presented to us, and the evidence Ms Barnard gave was that the respondent was seeking carers, and wished to retain its staff. The dismissal followed the claimant being on maternity leave, and the failure of the

respondent to manage that within the terms of the Act and Regulation as stated. We concluded that the terms of section 99 had been breached by the respondent and that the dismissal was automatically unfair.

(ii) Fairness

57. We considered that the dismissal was unfair under section 98(4) even if it was both not automatically unfair and if a potentially fair reason for dismissal had been established. No reasonable employer would have sent out the P45 to the claimant in the circumstances. Firstly there was no real issue with SSSC registration as that was simple and quick to resolve, and would have been if there had been a discussion as to a return. Secondly the claimant had made clear her intention of returning to work in her email of 29 March 2021. The suggestion of her not returning to work as a basis for the dismissal ignores the respondent's own failure to provide confirmation of the date for that, their failure to respond to her enquiries about that in and from January 2021 and that although the claimant sought part-time work rather than a simple return to the hours she had been working before taking maternity leave the respondent wished to retain staff and recruit new staff. Any reasonable employer would have discussed these issues with the claimant, and had that been done it is clear that terms suitable to both parties would have been agreed without undue difficulty, and no dismissal would then have taken place. On that basis it was not within the band of reasonable responses to dismiss the claimant, particularly in the absence of any appreciable procedure or process at all. That was most surprising for an employer of this size.

(iii) Written reasons

58. We did not consider that there had been a sufficiently clear request for written reasons for the dismissal to engage a claim for that. The claimant did email about the earlier message that led to the P45, but that was more a matter of background rather than a request for written reasons. That claim is therefore dismissed.

(iv) Remedy

59. We then considered the remedy to which the claimant should be entitled. We addressed the basic award first of all. We considered that the appropriate starting point was her pay prior to maternity pay, rather than the maternity pay itself or the period without pay. Given her age and service she is entitled to three weeks' pay at £222.96, a total of £668.88.

60. We considered the issue of the compensatory award. This has a number of factors to consider. Firstly, the claimant would not have been able to return to full-time working given that she had different childcare facilities, as she accepted. We considered that she would have been able to work the same hours as her current employment, being 18 hours per week. She would have been paid £9 per hour. That is £162 per week. In view of the amount of that wage there are no statutory deductions. Secondly we required to consider when that would have started had the respondent met its obligations. In that regard we must also take into account the actions of the claimant. Whilst she did telephone the respondent and left messages, that is in essence all she did to seek to return to work, and it did not succeed up to the point of the date she anticipated returning, being 21 February 2021. We considered that it would have been reasonable to expect her to have done more, such as to call in to the office in Dundee, or to contact HR at the Head Office for example. That was so especially as she was seeking to make new arrangements for part-time work. There was then something of a gap to 29 March 2021 when it seems nothing happened, and further gaps in time as matters progressed. The claimant did not go to the office in Dundee when she had that raised with her, and there was an issue over her ID which was also raised. It was not made clear in evidence precisely what that issue was. It was not, we concluded, a fundamental impediment to returning to work, and was more likely to have been a requirement from the dismissal. If that dismissal had not taken place, no new ID would we concluded have been required. If it was required for other reasons it was not set out in evidence. We considered that as an existing employee it would not have taken a great

deal of time to discuss the part-time work she sought, agree how that would take place which we concluded would have been for 18 hours per week, and then to make arrangements for whatever necessary refresher training or other arrangements were required to allow her to return to work.

61. Our conclusion is that had the respondent provided the notice of return to work required, and made appropriate initial contact with her in sufficient time before 21 February 2021, the claimant would have been able to return to work and be working for 18 hours per week by early May 2021, which is to say by the time she was in fact dismissed. We conclude that her losses continue for the period from then to 6 December 2021, which is effectively seven months. That is a total loss of £4,914. We did not have much in the way of evidence as to mitigation and proof of loss, but we accepted that the claimant had done sufficient, there was indeed no cross examination on that issue, and we also accepted her evidence on her pay with the respondent, as partly established by records in the Bundle to February 2020, her maternity pay, and the pay in her new role, including when that started.

62. There is a further element to consider, which is whether to make an award for injury to feelings given the breach of section 99. It was not specifically set out within the terms of the Schedule of Loss that the claimant belatedly produced, but we took into account that she is a party litigant, with no prior experience of Tribunal proceedings, and that she gave evidence at her frustration at how matters developed, together with her attempts to return to work which were in effect thwarted by the lack of response from Ms Walker, and that in a discrimination claim an award for injury to feelings is appropriate to make. We concluded that an award at the low end of the lower band of the ***Vento*** guidelines was appropriate. We awarded £1,000 under that head, inclusive of interest.

63. The total award for unfair dismissal is therefore £6,582.88.

64. For completeness we should add that we considered whether the ACAS Code of Practice on Disciplinary and Grievance Procedures was applicable

and in particular whether an increase in the award under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 was appropriate. The circumstances of this case are far removed from the areas that that Code would ordinarily apply to. There is however some differing authority on whether it is relevant to a some other substantial reason ground of dismissal. In ***Lund v St Edmund's School, Canterbury UKEAT/0514/12*** the EAT held that there could be an uplift in compensation in such a case, where the employer had not complied with the Code. In ***Hussain v Jurys Inn Group UKEAT/0283/15*** the EAT considered that the employer had been wrong to assume that the Code did not apply, however in ***Phoenix House Ltd v Stockman [2016] IRLR 848***, the EAT held that the Code does not apply at all to such cases. These authorities are not easy to reconcile, but in any event the Tribunal did not consider that in all the circumstances any increase in the award was just and equitable.

Recoupment

59. The claimant stated in evidence that she received benefits after the dismissal. The Employment Protection (Recoupment of Benefits) Regulations 1996 as amended therefore apply to the award. For the purposes of those Regulations:

(i) The monetary award is £6,582.88

(ii) The prescribed element is £4,914.00.

(iii) The date to which the prescribed element relates is 13 January 2022 2020, and the prescribed period is that from 9 May 2021..

(v) The amount by which the monetary award exceeds prescribed element is £1,668.88

60. The effect of these Regulations is that the sum of £1,668.88 is now payable. There is a period of 21 days after this Judgment is sent to the parties for the service on the parties of a Recoupment Notice, which sets out the amount if any that must be deducted from the prescribed element and paid to the Department for Work and Pensions. The balance of the prescribed element

is then payable to the claimant. If there is no Recoupment Notice served within that time, the full amount of the prescribed element is payable to the claimant, save where there are sufficient reasons for any delay in serving such a notice. The effect therefore is that firstly the award may be paid in two tranches, and secondly that the claimant may or may not receive the full amount of the prescribed element, dependent on the terms of the Recoupment Notice if it is served.

Conclusion

61. The Tribunal makes the awards set out above. Ms Barnard did the best that she could with the evidence that she was able to give when she was not involved at the time of the events, and addressed matters before us in a pragmatic manner, which was to her credit. It may well be that had she been involved in matters personally at the time, she would have handled them very differently and this claim would not have arisen.

62. The respondent may wish to review its policy and any procedures for communicating with staff on maternity leave. The form it tendered for the return to work was not properly completed. It does not seem that it was reviewed by anyone, including HR, given its obvious inconsistencies. There was a breach of Regulation 7. The written records were not sufficient, and there was, as we found, a failure properly to communicate with the claimant who was trying to contact them to arrange her return to work. In circumstances where the claimant did wish to return to work after maternity leave on a part-time basis, which is far from a rare occurrence, and where the respondent wished to retain its staff, it is disappointing that more was not done to resolve matters between the parties by discussion at the time.

Employment Judge: **A Kemp**
Date of Judgment: **26 January 2022**
Date sent to parties: **27 January 2022**