Reserved **Case No: 2600021/2017**

EMPLOYMENT TRIBUNALS

Claimant: **Ms V Wileman**

Respondent: **Lancaster & Duke Limited**

Heard at: **Leicester** **On:** **25 May 2017 and in Chambers on 16 June 2017**

Before: **Employment Judge Clark (sitting alone)**

Representation

Claimant: **Mr Bignell-Edwards of Counsel**
Respondent: **Mr J Weaver, Director**

JUDGMENT

1. The claim for unfair dismissal **succeeds.** The respondent shall pay the claimant the sum of £7,684.34 made up of.

    a. A basic award of: £1,077.75
    b. A compensatory award of £6,606.59

2. The Recoupment Provisions apply:-

    a. Monetary Award: £7,684.34
    b. Prescribed Element: £5,349.89
    c. Period to which (b) relates: 20/9/2016 – 25/5/2017
    d. Excess of (a) over (b): £2,334.45

3. The respondent shall further pay the claimant her costs under rule 76(4) of Sch. 1 to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, summarily assessed in the sum of £1,200.

REASONS

1. Introduction

1.1. The claimant brings a single claim for unfair dismissal relating to the decision to terminate her employment on grounds of gross misconduct. The claimant confirmed that there are no other claims and, to the extent that the tribunal record shows a claim relating to a deduction from wages, that was in error.

2. Preliminary Issue

2.1. The respondent's ET3 pleads as its first line of defence that the claimant did not have sufficient qualifying service to bring a claim of unfair dismissal. This has been dealt with by the claimant during interlocutory correspondence but the challenge is maintained and the issue has been left for me to determine as a preliminary point.

2.2. It is common ground that the claimant commenced employment on 22 September 2014 and that her employment was terminated summarily, by telephone, on 20 September 2016. For most purposes, that latter date is the effective date of termination ("EDT") and results in a length of service, 2 days short of the necessary two years' qualifying service.

2.3. By section 94 of the Employment Rights Act 1996 ("the Act"), an employee has the right to bring a claim of unfair dismissal against his employer subject to sections 108-110 of the Act. Section 108(1) disapplies section 94 where the employee has not been continuously employed for a period of not less than two years ending with the EDT. The EDT is defined by s.97(1) as either (a) the date on which notice expires, (b) termination takes effect, or (c) a fixed term contract expires. If that were all it provided, s.97(1)(b) would mean 20 September 2016 was the EDT. However, s.97(2) goes on to create a deeming provision to determine a different EDT in a limited number of statutory contexts, one of which is s.108(1). That provides that:-

> ***97(2) Where (a) the contract is terminated by the employer and (b) the notice required by s.86 of the Act to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination as defined by s.97(1) of the Act, for the purpose of s.108(1), 119(1) ….. the later date is the effective date of termination.***

Section 97(3)(b) of the Act defines the "material date" as the date when the contract of employment was terminated by the employer.

2.4. As at 20 September 2016, the provisions of s.86(1) of the Act entitled the claimant to a statutory right to notice of one week. The material date is 20 September 2016 and that period of statutory notice was not given. Had it been given, the notice would have expired on 27 September 2016. The effect of s.97(2) is that that later date is to be treated as the EDT for the purpose of calculating the period of qualifying service required by s.108(1). At that date, the claimant had 2 years and 5 days' continuous service and is therefore entitled to bring a claim of unfair dismissal.

2.5. I have considered the respondent's only argument against that analysis which is that the effect of s.86(6) of the Act in this case is to bring the EDT back to the 20 September 2016. The section provides:-

> ***(6)This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party.***

2.6. That provision does not, in my judgment, alter the analysis set out above. Firstly, there is no reference to s.86(6) in any of the other relevant provisions by which the otherwise clear effect could have been qualified. Secondly, there is no mention in any of the deeming provisions that they are subject to this provision. Thirdly, the purpose of s.86(6) is in my judgment merely there to make clear that the statutory regime does not alter the common law. It would be odd for a party to be released from his contractual obligations in the face of a repudiatory breach at common law, but to remain bound by it under the statute. A clear statutory purpose for such an effect would be necessary and is not found here. For those reasons I reject the respondent's argument and conclude that the ordinary EDT of 20 September 2016 is in this case deemed to be 27 September 2016 for the purpose of s.108(1) (and s.109) with the result that the claim for unfair dismissal may proceed.

3. **Issues**

3.1. I discussed the issues in the case with the parties at the outset. They are limited to:-

a. Whether the respondent has established a potentially fair reason for dismissal.
b. If so, whether the respondent acted reasonably in treating that as a sufficient reason to dismiss the claimant.
c. If not, the measure of loss including whether any adjustment should be made in respect of "Polkey" or contributory conduct.

4. **Evidence**

4.1. I received a bundle running to 153 pages together with some supplementary photographs. In support of her own case I heard from the claimant and Mrs Hayley Walker. In support of the respondent's case, I heard from Mr James Weaver, a director and the dismissal decision maker; Mrs Phillipa Weaver, a director; and Sarah Peacock and Jayne Thomas, both employees and ex colleagues and friends of the claimant. All witnesses provided written statements which they adopted on oath and on which they were questioned. I heard oral closing submissions from both parties.

5. **The Facts**

5.1. It is not the role of the Employment Tribunal to resolve each and every last dispute of fact arising between the parties but to focus on those facts necessary to determine the issues and to set them in their proper context. On that basis, and on the balance of probabilities, I make the following findings of fact.

5.2. The Respondent is an employment agency. It is a small company operated by two directors and employing three further employees. Mr Weaver's background was as an engineer in the Royal Navy. I find neither director had any meaningful past experience of managing employees and particularly so in respect of managing performance or disciplinary matters. I found no meaningful systems, procedures or policies to be in place in respect of its employment obligations. There is no written statement of terms and conditions. In fact, there is next to nothing in the way of documentation. Even for such a small employer like this, I find the management systems to be particularly undeveloped which I find is prone to generating confusion and inconsistency and, in part, has allowed the issues in this case to arise.

5.3. The claimant commenced employment on 22 September 2014 as a recruitment consultant. She successfully completed an initial probationary period and received a letter from Philippa Weaver following a meeting in February 2015. It said:-

> ***"Further to our recent meeting I would like to confirm your 6 month period comes to an end on 22 March 2015. As James and I are very pleased with your work ethic and commitment to the business, your job title is now recruitment manager and, to reflect this new position within the company and also we will increase to £26,500 PA with effect from 1 April 2015.***
>
> ***Looking forward to many more years of success together."***

5.4. There was in fact a further pay rise discussed at that meeting and a further letter was sent to the claimant on 3 August 2015 confirming her pay would be increased to £28,000 with effect from 1 July 2015.

5.5. There are no job descriptions, person specifications or other documents which defined the claimant's role. She was a senior employee by virtue of her experience. There was a dispute as to the meaning of the claimant's job title. Mr Weaver insisted that this was a "courtesy" title only and she had no role as a manager in the business. That may well be what was in Mr Weaver's mind. However, I find the claimant was led to believe that she had a role to play in supervising and managing the staff that would join the business during 2015/2016. Firstly, it is clear Mrs Weaver's letter referred to a new "position" within the company. Secondly the claimant was instrumental in identifying two new recruits to the business namely Sarah Peacock, who started in 2015, and Jayne Taylor who started in January 2016. Thirdly, the directors acquiesced in allowing the claimant and the other staff to undergo periodic performance review meetings. Fourthly, it is also clear that the claimant was particularly successful in the recruitment agency industry and consistently made money for the business. Those factors and the absence of any explicit management structure set the environment for how the claimant and the others in the business interacted. I find that a combination of Mr Weaver's own management style, which at times bordered on feckless, and the claimant's experience, competence and determination created a challenging relationship for them both. For her part, the claimant would often find herself seeking to engage with Mr Weaver with ideas to improve the business which would sometimes lead to an argument. For his part, he would often shirk from engaging with the claimant and even began to distance himself from the workplace.

5.6. In addition to the basic salary, all employees including the claimant participated in a discretionary bonus scheme. There were two elements to this scheme. For each placement the employee secured, they will receive a single bonus payment according to the fees generated by that placement of between £125 and £500. Additionally, where the total monthly placement fees exceeded £10,000, employees became entitled to an additional bonus payment of between £500 and £2,500.

5.7. I find there were only informal targets set and performance was measured subjectively and without reference to any fixed targets. The only target, in broad terms, was for each employee to generate enough fee income to meet the cost their salary.

5.8. I find the claimant was a productive worker. She made placements regularly which consistently generated average monthly bonuses of £500. She was making money for the business. Her contribution to the business in this commercial sense was never questioned by the respondent.

5.9. Despite her success in making placements, the respondent asserts that the claimant had to be spoken to on several occasions about what it now characterises as offensive behaviour amounting to bullying and harassment. On Mr Wheeler's own evidence, volunteered in the course cross-examination, he stated how the phrase "bullying and harassment" had arisen from his contact with ACAS and were not his words. I do not know the detail of the exchange he may have had with an ACAS officer but it is significant that whatever criticism there is of the claimant during the course of her employment, it was not characterised as bullying or harassment by the respondent at that time. Moreover, whatever concerns there may have been did not lead to any formal action and did not displace the respondent's otherwise extremely positive assessment of the claimant's contribution to its business.

5.10. I find the complaints now levelled at the claimant to have taken on a new light in hindsight following the decision to terminate the claimant's employment. The employer's reference to various "reprimands" and "warnings" are also retrospective descriptions of what I find was at best no more than passing discussions and, in some cases, I cannot be satisfied that discussion on the issues now referred to in fact took place with her. However, that is not to say that there were not aspects of the claimant's personality and demeanour that could give rise to issues in the workplace generally and particularly in respect of her relationship with Mr Weaver. I have seen complaints from third parties, such as the Respondent's landlord, a Mr Hartshorn, who emailed Mr Wheeler on 9 August 2016 complaining about the claimant's rude attitude to one of his staff. I have seen an email from Mr Paine, who was employed for a matter of days in August 2016 who would describe her as "quite toxic" and "behaving like a playground bully", albeit not until after he was contacted after the claimant's dismissal [41]. Of course I had also heard the evidence of the respondent's witnesses. Each of them sets out their own experience of the claimant's demeanour in the workplace. It is not insignificant that a distinction was drawn by the other employees between the claimant's demeanour in work and out of work because the claimant was friends with both other employees and they continued to meet socially even after her dismissal. I find it highly likely that the claimant's work ethic (something for which she is otherwise praised) and experience in this industry is of a type that could come across as potentially abrasive in certain

situations and is probably one aspect of why she was so good at the job she did. Nevertheless, that could leave her open to being perceived as being rude and demanding. I am also satisfied that her experience and work ethic would lead to frustration when she felt systems of work needed to be changed but such changes were quashed by the directors. Mr Weaver recalled how he and the claimant had clashed over work issues and she had said things to him in a raised tone ending with outbursts such as "because it's your fucking business". The claimant accepted in evidence that towards the end of her time with the respondent she was aware Mr Weaver "had issues with her".

5.11. Whereas the other staff had been taken on following recommendation by the claimant, in August 2016 Mark Paine was taken on without her input. I find she had little contact with him during his short time with the company. He started on Monday 22 August 2016. I find that within the first two days Mr Weaver had formed a settled view that he was not cut out for the job. Significantly, I find that he shared his view of Mr Paine with the claimant. In the event, Mr Pain resigned on day three, before the employer could act on his poor performance, and he cited an inability to work with the claimant as the reason. I draw two conclusions from this. The first is that I must accept the claimant's evidence that there was some level of performance expectation placed on the staff, even if they were not expressed in formal or explicit targets. Such must be the case to answer the fundamental question whether someone was doing a satisfactory job or not. The second is that despite the allegation that Mr Pain's resignation followed his inability to work with the claimant, there was, yet again, an absence of any challenge by the employer to the claimant's apparent demeanour with other staff.

5.12. On Thursday, 25 August a meeting did take place between the claimant and Mr Weaver and the respondent relies on this meeting as being the meeting in which the claimant was issued with a final warning, albeit it accepts it was issued verbally and not in writing. I find that there was indeed a meeting between the claimant and Mr Weaver but I find that the meeting was instigated at the claimant's behest, not the employer's. Whatever had happened between the claimant and Mr Paine, it did not bring about any formal or informal action by the employer and it seems the purpose of this meeting was operational issues in the business. There is an acceptance on both sides that both parties could lose their temper in discussions such as this and this meeting was no different. I find the claimant to have become disillusioned with the business around this time and in the course of this meeting she told Mr Weaver how she was looking for another job. I find his response, said to have been given in "a retaliatory manner", was to suggest "maybe we should be looking for an exit strategy as this has to be the last time, we cannot continue like this". I find the meeting to have got out of hand on both sides, Mr Weaver described tempers being frayed and the claimant being in tears and how Mrs Weaver had to intervene to "calm the situation down". Mrs Weaver made her own file note following this meeting. It stated:-

> ***"Thursday August 25th***
> ***Today James Weaver verbally gave Vicky Wildman a final warning for her behaviour. He made it very clear to her that this must never happen again. If it does then her employment with Lancaster & Duke would not continue. This was the result of an almighty outburst from her where she shouted at him. Her outbursts and general disrespect for him and others in the office has gotten out of hand."***

5.13. I find this note to reflect Mrs Weaver's own thoughts on the matter which were not shared with the claimant. It does not accurately reflect what I find was

actually said, which in fact made no explicit reference to the potential future consequences to her employment nor could it be said that anything that was said in that exchange could be said to have "made anything clear", nor does it reflect the fact that both were shouting. This note was not shown to the claimant and I find she had no knowledge of it until it was disclosed in these proceedings. The note makes no mention of the ongoing discussion with the claimant to vary her working hours to a four-day week. This discussion was described by Mr Weaver as an attempt to persuade her not to leave the business and is another example of where it has been difficult to reconcile the respondent's position with the claimant and whether she truly was the problem that has been described in this hearing.

5.14. The claimant continued to work within the business and with her other colleagues for a further four weeks or so. During that time she undertook a review meeting with Jayne Thomas. I find the two were friends outside of work and that, whilst the claimant acted in her capacity as recruitment manager, the discussion that happened was very much in the context of their friendship, the claimant being well aware of Mrs Thomas's personal circumstances. I find Mrs Thomas had not achieved more than a small handful of placements in the 8 months or so that she had been with the business. It is common ground that the conversation referenced her performance and nowhere in the evidence is there any suggestion that Mrs Thomas disagreed with that assessment or sought to challenge it. I also find Mrs Thomas was displaying a lack of confidence in her role around this time which was apparent to Ms Peacock. I find the claimant was concerned about this level of performance and, whether it was stated explicitly or not, had understood Mr Weaver to be equally concerned. I find the notion that September would be "make or break" was something that had been said by Mr Weaver and the claimant had applied this to Mrs Thomas's level of performance. The meeting between the claimant and Mrs Thomas was chosen during a quiet moment in the office when only the two were present. The claimant asked her if she was enjoying the work to which Mrs Thomas replied that she was not. The claimant questioned whether this was the right role for Mrs Thomas and shared, in similar terms, how the next month would be make or break. She suggested Mrs Thomas might be better off to consider alternative jobs as if she didn't make more placements, her employment would come under pressure from management. I find this was a discussion which was given and received in the context of their friendship and Mrs Thomas's own dissatisfaction with her work at the time. I find the topic continued to be discussed out of work when to two talked, emailed and messaged on social media. I also find this discussion extended within the friendship group including Ms Peacock. The claimant even forwarded a job she had seen and Mrs Thomas made a number of applications, one of which was successful.

5.15. The claimant was on annual leave during week commencing Monday 19th September 2016. During that leave, however, it is clear that the claimant and Mrs Thomas remained in contact through social media. I have seen various exchanges around this time, the exact dates of which are not clear save that they obviously span the period shortly before and shortly after the claimant's termination. From those exchanges it is clear that the nature of the exchanges is that of friends. It is also clear that the claimant, Mrs Thomas and Ms Peacock all remained in contact after the claimant's dismissal.

5.16. On Monday 19 September 2016, Jayne Thomas handed in her resignation. The Weaver's accepted the resignation and discussed a finish date. I find Mrs Thomas did not initially raise the fact of her discussion with the claimant. However, the discussion took place as a four-way discussion in the office including Ms Peacock and the fact of the discussion with the claimant came out. I find it was not raised as a criticism but simply as a fact that came up in conversation.

5.17. The social media exchanges between the claimant and Mrs Thomas are the best contemporaneous evidence of their views at the time [102-103]. They show the continued contact between the two, the concern for long term employment of both of them. Significantly, they show an exchange following the claimant's dismissal in which the claimant says:-

> ***"James has just finished me. He said you told him that I told you to look for another job! Thanks very much as I now don't have a job! I was being a supportive friend to you!!"***

Mrs Thomas replied:-

> ***"Vicky I'm sorry but I didn't say it like that it just came up in conversation that I'd spoken with you"***

5.18. Following the resignation, the focus of the four-way discussion turned from the resignation to the claimant. I find that Mr Weaver sought to distance himself from the performance concern which the claimant had relayed to Mrs Thomas and that the discussion turned into an analysis of the claimant's personality over the time she had been with the company. Each shared their perception and view about her interpersonal style. That four-way meeting resumed the next day, 20 September 2016. I find that although the discussion with Jayne Thomas was the catalyst for what happened, it was only part of the story. The focus of discussion was still a retrospective about the claimant's past relationships rather than the discussion with Mrs Thomas. I find this was led by the Weaver's and the focus was principally on Mr Weaver's relationship with the claimant. The four decided together that this was affecting all of them and they began to discuss what options there were. They decided that the claimant was guilty of gross misconduct which warranted instant dismissal. It is significant that at this point the decision to dismiss was not only made, but all four agreed that that there was no other option available. That then sets the scene for the telephone call that followed.

5.19. Mr Weaver telephoned the claimant later that morning. I find that the sole purpose of that phone call was to convey the decision to dismiss the claimant. I find that the reasons given in the phone call included a statement to the effect that things had not been working out for a while and that their relationship had not been good for a while. I do not find the purpose of this call to have been to undertake any form of enquiry or investigation. In that context, I am satisfied that the "admission" that Mr Weaver relied on was no more than her natural request for the details of why she was being dismissed to which Mr Weaver included reference to the discussion with Jayne Thomas. The claimant accepted she did have a discussion but was deprived any opportunity to set out the full account or the context. Without a proper enquiry into the circumstances of the disciplinary

charge against her, I find it is putting it too high to label this statement of fact as an admission.

5.20. Mr Weaver confirmed his decision by email [37]. The reason for dismissal was stated as being:-

> ***"…due to your misconduct both in and out of the office. I have come to the decision enough is enough and to terminate your employment with Lancaster & Duke with immediate effect".***

The email went on to reference the fact that the claimant had less than 2 years' service and therefore was entitled only to one week's notice. It set out the remaining payments that would be made to the claimant, either as of right or at the respondent's discretion. It did not convey any right to appeal the decision.

5.21. That the claimant's discussions with Jayne Thomas was not the only reason for dismissal is seen in the broad terms of the reason stated by the employer and also in the fact that later on 20 September, Mr Weaver emails Mr Paine out of the blue [41] in which he said:-

> ***"I hope things are going well for you mate? I just wanted to drop you a note (not that you're probably bothered) to let you know that I took on board what you had to say to me and I fired Vicky, her behaviour towards you was disgraceful and for that I apologise."***

5.22. There is no evidence that Mr Paine had any input to, or knowledge of, the facts of the claimant's discussions with Jayne Thomas. It is clear from this email, however, that factors other than this were in Mr Weaver's mind at the time of dismissal and, by extension, all of those participating in the four-way discussion. I also find that whatever criticism's Mr Paine had of the claimant when he resigned the month before, they were dismissed by Mr Weaver at the time. The apology given in this email is not a repeat of one given earlier but appears to be Mr Weaver coming to accept the criticism for the first time.

5.23. The claimant attended the offices after hours to collect her personal belongings. She attended with a friend, Hayley Walker. She had been in Mrs Walker's company at the time she received the dismissal phone call earlier that day and Mrs Walker witnessed her emotional distress in response to the call. Mr Weaver was present when they arrived around 5 pm. Her belongings had been gathered up. I reject Mr Weaver's assertion that this encounter was a meeting at which the claimant was represented by Mrs Walker. Not only was it after the dismissal, it was solely for the purpose of collecting personal effects and, moreover, I find Mr Weaver refused to engage in any meaningful discussion about the decision to dismiss. He repeated only that they had not been getting on for some time and that the Jayne Thomas issue was the final straw. It was not characterised as bullying her into resigning, as was the picture painted by him during the hearing before me.

5.24. The claimant lodged a grievance later that evening [39]. She disputed the fact she had less than 2 years' service by reference to the effect of the minimum statutory notice; she disputed the entitlement to notice by reference to the offer letter which stated four week's contractual notice; she disputed the reason for dismissal and that she had been given no examples of any incidents or

complaints; and she disputed the procedure adopted by the respondent leading to her dismissal.

5.25. No grievance hearing took place and there was no further consideration of the substance of the disciplinary or the points raised in the grievance. On 22 September 2016, the parties engaged in a telephone discussion and further email exchanges which focused on the detail of the final financial payments in the form of an informal settlement agreement, i.e. an agreement which did not comply with the statutory requirements for compromise agreements. The claimant agreed to the payments and terms which included an agreed reference. The claimant stated her acceptance as being subject to the proviso, which I find was accepted by the respondent, that she:-

> ***"can review and agree standard wording for my reference. I would like it to state confirmation of dates of employment and that I completed my role satisfactorily?"***

5.26. Following her dismissal, the claimant claimed job seekers allowance and received £616.14.

5.27. The claimant obtained new employment on 7 November 2016 at TNT Express. This employment ended on 14 December 2016 when she was dismissed. At the time of appointment, and in furtherance of what she understood to be the agreement with Mr Weaver, she indicated that she had left her previous employment on good terms. Mr Weaver was asked for a reference for the claimant. On 8 November 2016 he provided TNT with the bare minimum in which he did not complete any value assessment of the various qualities listed. He stated the dates of employment and gave the reason for leaving as "Vicky was dismissed" He also stated he would not re-employ.

5.28. For some reason that does not seem to have led to any immediate action by TNT. The claimant was invited to a standard probationary review in mid-December 2016 and this process would ultimately lead to her failing that probationary review. In her dismissal letter, two reasons were cited. They were unsatisfactory conduct, attitude and/or performance and unsatisfactory reference. I find they are general labels derived from TNT's own procedures. The particulars under each reason were, in respect of the poor performance, this was a job in which the claimant was expected to do more than merely fill vacancies and her output in areas such as advert writing had not met the desired standards. She had not been able to hit the ground running as the employer had expected. In respect of the reference, it was not merely that the reference was unsatisfactory, but that it disclosed a degree of dishonesty in that she had not declared the true reason that she had been dismissed. During that period the claimant earned £3807.28

5.29. On 6 February 2017 the claimant obtained temporary employment at Interaction Recruitment. This was a specific project based role which concluded and the placement ended on 17 April 2017. During that period the claimant earned £4,200

5.30. She has continued in employment, now with Hays, from 18 April 2017 earning £398 per week net. This is expected to continue and she has recently been informed that there is a possibility of this becoming permanent. Her personal assessment of the prospects of this were described as "very optimistic".

6. The Reason for Dismissal

6.1. The first issue for the Tribunal is to identify the reason, or principal reason, for dismissal. Section 98 of the 1996 Act states, so far as relevant:-

> ***"(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 sub-section (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)…***
> ***(b) relates to the conduct of the employee,***
> ***(c)…"***

6.2. The true reason for dismissal is a question of fact for me to determine on the evidence. The reason required by s.98(1) is simply the set of facts or beliefs operating on the mind of the employer at the time it takes the decision, and causing him, to dismiss. (*Abernethy –v- Mott Hay and Anderson [1974] ICR 323*). That reason must fall into one of the categories of potentially fair reasons defined in s.98(1). In this case dismissal is conceded and it is therefore for the respondent to show, the legal burden resting with it, what was the reason that it dismissed the claimant. The respondent relies on conduct which is a potentially fair reason for dismissal.

Discussion and Conclusion

6.3. The reason for dismissal advanced by the respondent during these proceedings was the claimant's discussions encouraging Mrs Thomas to find alternative work. It was put in firm terms that she was told to find another job and in the ET3 that she had "harassed Jayne Thomas" into finding another job. In line with my findings of fact, I am satisfied that the true factual reason for dismissal goes beyond the reason relied on before me, namely the discussion with Jayne Thomas. The reasons put in writing at the time were expressed differently. They are in the broad terms of "the claimant's recent behaviour and misconduct both in and out of the office". I am satisfied that this extends the reasons beyond the Jayne Thomas matters and includes the view that Mr Weaver and the claimant had not been getting on for some time. That, in part, flowed from the way she interacted with him and others. I have considered whether it is correct to describe the way in which someone interacts with others as a matter of (mis)conduct or whether it is more in the nature of capability. I have concluded that in this case it does fall within conduct, in part because I have found that the claimant apparently had a different style outside of work to that adopted in a working environment. It follows that although I have concluded the true reason to be wider than that advanced by the respondent before me, it remains a potentially fair reason for the purpose of the Act.

7. The Reasonableness of the Dismissal.

7.1. The respondent having established a potentially fair reason for dismissal, I must then go on to consider on the evidence before me, the burden being neutral, the reasonableness of dismissing the claimant for that reason under the

general test of fairness set out in 98(4), having regard to the authorities below. The Section 98(4) of the Act states:-

> ***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 reasons 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."**

7.2. Following *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439*, the approach to adopt in answering the question posed by section 98(4) of the 1996 Act is as follows:

> ***"(1) the starting point should always be the words of section [s.98(4)] themselves:***
>
> ***(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;***
>
> ***(3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;***
>
> ***(4) in many (though not all) cases there is a 'band of reasonable responses' to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;***
>
> ***(5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is far; if the dismissal falls outside the band it is unfair."***

7.3. In *Post Office v Foley [2000] IRLR 827*, Mummery LJ commented on the approach set out in Iceland Foods, and observed:

> ***"…that process must always be conducted by reference to the objective standards of the hypothetical reasonable employer which are imported by the statutory references to 'reasonably or unreasonably' and not by reference to their own subjective views of what they would in fact have done as an employer in the same circumstances. In other words, although the members of the tribunal can substitute their decision for that of the employer, that decision must not be reached by a process of substituting themselves for the employer and forming an opinion of what they would have done had they been the employer, which they were not."***

7.4. The approach to be adopted where an employee is dismissed based on a suspicion or belief of misconduct was explained in *British Home Stores Ltd v Burchell [1978] IRLR 314*. That requires me to ask two further questions:

> a. did the Respondent (in this case Mr. Weaver) have reasonable grounds for the belief which he held, and
>
> b. at the time the belief was formed had the Respondent carried out as much investigation as was reasonable in the circumstances.

7.5. If both these questions are answered in the affirmative then I must consider whether dismissal was within the band of reasonable responses open to a reasonable employer.

7.6. In *Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588* Mummery LJ made clear that it is necessary to apply the objective standards of the reasonable employer to all aspects of the question whether the employee had been fairly and reasonably dismissed:-

> ***"… the range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) apply as much to the question of whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason." (See also para 34).***

7.7. The 2015 ACAS Code of Practice No1 on Disciplinary and Grievance procedures applies to conduct dismissal. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 requires me to take into account compliance with the code in determining any questions to which it is relevant. Similarly, s.207A of the 1992 Act permits an adjustment to be made to compensation upon there being breach of a relevant code.

Discussion and Conclusion

7.8. I start by considering the substantive decisions reached. This is a small employer and in constructing the appropriate hypothetical reasonable employer, I have regard to the size and administrative resources available to it and the nature of the industry it operates in.

7.9. Whatever concerns it may have had about the claimant, the respondent had chosen not to tackle the claimant at the time with any formal process, or even anything approaching one. At the same time, it had continued to value her contribution to the business. I recognise how a small employer with inexperienced directors, might prefer to overlook matters and fail to address problems at the time and I take that into account as far as it goes. However, there comes a point where even the smallest of employers must deal with issues and the size of an employer does not absolve it form the obligation to act reasonably in doing so. The respondent's case is confused. On the one hand, it says it repeatedly addressed its concerns with the claimant at the time she displayed inappropriate conduct and issued a final warning. I have rejected that contention as a fact. However, if those earlier matters had been subject to censure and formal warning, as this employer believes was the case, I have to conclude that no reasonable employer could then act reasonably in bringing them into account for a second time as justification for a later dismissal.

7.10. The reality is that the deliberations on 19 and 20 September 2016 amongst the directors and other staff were the first time this employer had given thought to actually imposing any disciplinary sanction. Whilst it had a catalyst for action in what it wrongly construed, out of context, as harassing Jayne Thomas into find alternative employment, the real motivating factor for the dismissal was Mr Weaver's view about the claimant and her interaction with him and others. I reject Mr Weaver's analysis of his compliance and satisfaction with the ***Burchell*** test. The reasonableness of belief and the investigation that underpins it are

interrelated matters. In the absence of any process of investigation with the claimant about any concerns the respondent had, I cannot accept that any belief held can have been reasonable and/or founded on a reasonable investigation. There simply was no investigation and the views held were entirely one sided, clouded by a generality of negative perceptions of the claimant, all of which was compounded by Mr Weaver's own inability to manage the claimant. I am therefore not at all satisfied that the evidence shows reasonable grounds for holding a belief in the misconduct founded on a reasonable investigation. To that extent the decision to dismiss was unreasonable and unfair.

7.11. For completeness I have considered the sanction of dismissal based on the true reasons for dismissal where there was a reasonable belief based on a reasonable investigation. In those circumstances I am not satisfied that dismissal fell within the range of reasonable responses of the hypothetical reasonable employer. In the first instance, a reasonable employer would not reasonably rely on historic matters which had been ignored and certainly which had not given rise to any disciplinary censure at the time. Secondly, the reasonable employer, having investigated the issue of the discussion with Jayne Thomas with the claimant would have had before it the context in which the claimant and her discussed matters. I have found there was some factual basis for the view that Mrs Thomas's performance was not good and it is common ground she was not happy in her job. Against that context, I do not accept it was open to a reasonable employer to dismiss.

7.12. Whilst my liability conclusions so far render it unnecessary, I further conclude that the procedure adopted by this employer paid no regard to the general procedural requirements of fairness or the minimum standards expected by the ACAS code of practice. For a small employer such as this, I would have allowed a large margin in how it demonstrated fair procedural compliance. However, in this case and even after stretching the procedural requirements to breaking point, I cannot accept that a reasonable employer could act reasonably in adopting the course taken by this employer. There was no notice given to the claimant that her conduct was in question. There was no articulation of the actual disciplinary charges she faced and no evidence provided of the basis for those charges. At no point before the confirmation of dismissal was anything reduced to writing. There was no meeting with the claimant, no opportunity to be represented and no opportunity for her to put her side of the case. However, small the employer, they are minimum procedural requirements in this case. The issues were then rehearsed before an impromptu committee of all directors and all staff without any input from the claimant and on which Mr Weaver concluded the only option was summary dismissal. There was no opportunity given to appeal. In fact, it is hard to identify any of the minimum requirements of the ACAS code which have been complied with. For that reason, I have concluded it was an unreasonable failure and it is therefore just and equitable to make an adjustment to any award of compensation under s.207A of the 1992 Act. That provision allows an adjustment of up to 25%. It is for me to set the figure within that bracket and, in doing so, I acknowledge that the level of uplift should reflect the extent of the failure. In this case, I am satisfied it is appropriate to set the uplift at the maximum of 25%.

Remedy

7.13. It follows that the claim succeeds and the claimant is entitled to a remedy. The claimant does not seek reinstatement or re-engagement, but compensation only. Before assessing her financial losses, I must first consider whether there are grounds for making any adjustment to any award of financial compensation.

7.14. I have found the dismissal to have been substantively unfair. Consequently, questions of any Polkey reduction insofar as there is any procedural unfairness do not arise. I have, however, reached a conclusion that there should be some adjustments to compensation in respect of contributory conduct. I have considered the three requirements as set out in *Nelson v BBC No2 [1979] IRLR 346* that to make such an adjustment the claimant's conduct must be culpable or blameworthy, that the conduct caused or contributed to the dismissal and, thirdly, that it is just and equitable to reduce the compensation to such an extent as is assessed.

7.15. I have found there were aspects of the claimant's conduct in her interactions with others at work in which she did present as rude, abrupt or abrasive. I have found this is her approach to work. Whilst I would be cautious to find that in itself to be culpable or blameworthy, especially as she was otherwise a successful employee in her role, I do find there to be elements of culpability or blameworthiness in the later months of her employment where her relationship with Mr and Mrs Weaver had clearly begun to deteriorate. I do find the manner in which she dealt with Mr Weaver to have been confrontational. It is in that period when things had deteriorated with the Weaver's that she has the discussion with Jayne Thomas. Whilst I accept her motive was concern about Jayne Thomas's future employment with the respondent, I find her own sense of disillusion with the business was instrumental and her advice about moving on was influenced by her own decision to look for alternative work at the same time. Had that not been the case and had she not herself been looking, the approach to dealing with Jayne Thomas's performance would in all likelihood have been quite different. I therefore find that those matters do amount to culpable or blameworthy conduct. It is also clear they operated on the mind of the employer to some degree in reaching the decision to dismiss and, therefore, contributed to the dismissal. I must then consider the level at which it would be just and equitable to adjust any award for compensation. In this case I do not view it appropriate for the adjustment to be high, particularly with regard to the employer's past acquiescence and the context in which her advice to Mrs Thomas arose. In my judgment, a reduction of 25% is appropriate to both the basic and compensatory awards under s.122(2) and s.123(6) of the Act.

7.16. I have considered the claimant's schedule of loss, the evidence before me of loss and the matters that the respondent challenged and accepted.

7.17. Arriving at the basic award is formulaic. The EDT as modified by s.97 of the Act is 27 September 2016 at which date the claimant had 2 completed years' service and was 46 years of age. Her weekly earnings at the date of dismissal was in excess of the applicable cap on a week's pay of £479. In the claimant's case, the provisions of s.119 give an entitlement to 1½ week's pay for each completed year of service. That is 2 x 1½ x £479 = £1437. I reduce that by 25% to arrive at a figure of £1,077.75.

7.18. The immediate loss under the compensatory award is for losses flowing between 20 September 2016 and the date of hearing on 25 May 2017 which is

also the prescribed period for the purposes of the recoupment regulations. I have considered whether the circumstances of the claimant being dismissed from her employment with TNT are such as to amount to a break in the causation of the losses flowing from her dismissal from the respondent. There are three matters relevant to the TNT dismissal. The first is the reference provided by the respondent, the second is the account given by the claimant of how she left her employment with the respondent, and the third is her suitability for the role, in respect of which TNT deemed her not to be suitable. The latter factor is not one which serves to break causation. She was simply not suitable for the role. The first two relate to the agreement the claimant and the respondent had in respect of the reference. The facts of the reference itself cannot be used to limit the respondent's liability. The only matter than potentially could is the claimant's own account of the reason for leaving the respondents employment. However, whilst there clearly is an untruth in what the claimant told TNT and on which they were entitled to rely in terminating her employment, it arises from the agreement the parties had come to adopt a certain course, and the respondent then deviated from that course. Consequently, I do not regard the TNT dismissal to amount to a break in causation and it is just and equitable for losses to continue thereafter.

7.19. I calculate the period of immediate loss to be a period of 35.29 weeks although the respondent has paid a sum in respect of four weeks' notice such that I reduce the period of immediate loss to 31.29 weeks to avoid double recovery. The claimant's net pay was made up of basic salary of £28,000 together with an average bonus entitlement of £500 per month. That equates to an average weekly net pay of £505.56 at the date of dismissal (the weekly net pay of a gross salary of £34,000 earned during the 2016/17 tax year). Her immediate financial loss is therefore 31.29 x £505.56 = £15,818.97.

7.20. From that must be deducted sums received in mitigation. The claimant's schedule of loss gives credit for £616.14 received in job seekers allowance during the prescribed period. However, no credit is to be given for that at this stage of calculating loss. Instead, it falls to be accounted for within the recoupment provisions. The claimant has obtained three episodes of employment for which credit does have to be given. I deduct £3,807 for the disclosed earnings in employment with TNT, £4,200 for the disclosed earnings during the temporary employment with Interaction Recruitment and £2,105.42 in respect of the disclosed earnings during employment with Hays, (being 5.29 weeks x £398). The total sum to credit is therefore £10,112.42 meaning the award before adjustments is £5,706.55.

7.21. As to the adjustments, the first to apply is the uplift for the respondent's failure to comply with the relevant ACAS code of practice. This increases the figure to £7,133.19. That, in turn must be reduced by 25% to reflect my assessment of contributory conduct on the part of the claimant contributing to the dismissal. This reduces the figure to £5,349.89.

7.22. I award a notional figure of £450 in compensation for the claimant's loss of statutory rights. I make no separate award in respect of the loss of bonus as I have included the average bonus entitlement within the calculation of a week's pay. The claimant has claimed a further sum of £500 in respect of money borrowed from friends in the aftermath of her dismissal. I accept as a fact that the claimant did borrow money but the capital amount is not the correct measure of loss and the evidence I have heard does not establish the cost of borrowing or

the repayment terms. I therefore decline to make any award for this head of loss which has not been proved.

7.23. I then turn to future loss. I have found that the claimant is currently in temporary employment which is likely to continue for the foreseeable future. The current temporary employment amounts to approximately 80% of her previous earnings with the respondent. However, the claimant is very optimistic the present placement will turn into permanent employment in the next month or so and I accept her assessment of that. Either way, she will remain in employment and her progress in employment with Hays as her new employer is where she is currently focusing her job prospects. For that reason, whilst there is currently a shortfall in earnings I find that it is just and equitable to limit the future losses to a period of a further 8 weeks before which I anticipate the claimant will either obtain comparable permanent employment or that it would be otherwise just to treat that date as the date by which she should such that the respondent should not be liable for losses thereafter. I am reinforced in the decision to limit future loss as the evidence does show that the claimant was herself dissatisfied with her relationship with her employer and had begun to make job applications by august 2016, some weeks before her dismissal. Had the dismissal not occurred, I have no reason to think that she would not have continued to look elsewhere for employment and, on balance, would have contemplated alternative employment with this level of pay.

7.24. The future loss is therefore £860.48 (calculated as 8 x £505.56 = £4,044.48 loss less 8 x £398 = £3,184 to credit). To that figure, the same adjustments must be applied. I increase it by 25% to reflect the failure to comply with the ACAS code which uplifts it to £1,075.60. I then reduce it by 25% to reflect contributory conduct which results in a figure of £806.70.

7.25. The total award is therefore a basic award of £1,077.75 and a total compensatory award of £6,606.59 amounting to £7,684.34 all together.

7.26. I also make an order for costs under rule 76(4) of the 2013 rules of procedure in respect of tribunal fees paid by the claimant which I summarily assess in the sum of £1,200.

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Employment Judge R J Clark

Date 16 June 2017

REASONS SENT TO THE PARTIES ON
15/7/17

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S.Cresswell

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FOR THE TRIBUNAL OFFICE