EMPLOYMENT TRIBUNALS

Claimant: **Mrs L Cheslin**

Respondent: **Octubre 21st Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: **Birmingham** **On: 14 and 15 January 2019 and in chambers on 8 February 2019**

Before: **Employment Judge Kelly**

Representation
Claimant: Mr J Meichen of counsel
Respondent: Mr M Cameron, consultant

JUDGMENT

The judgment of the Tribunal is that:

The claimant's claim for breach of the right of accompaniment in a disciplinary hearing is dismissed on withdrawal by the claimant.

The respondent failed to give the claimant a written statement of particulars of employment.

The claimant was unfairly dismissed. The respondent is ordered to pay the claimant compensation of £3,505.00.

REASONS

1. The claimant brought claims for unfair dismissal, breach of the right of accompaniment in a disciplinary hearing and compensation for failure to provide her with a statement of particulars of employment.

2. At the start of the Hearing, the claimant withdrew the claim for breach of the right of accompaniment in a disciplinary hearing.

3. The respondent relied on the potentially fair reason for dismissal of conduct. The misconduct relied on was:

   3.1. That the claimant was, on her own account, in the course of setting up a business competing with that of the respondent ("the First Allegation");

   3.2. That the claimant intended to take customers' names and contact details from the respondent and use them in her new competing business ("the Second Allegation").

4. The liability issues in relation to the unfair dismissal claim were:

   4.1. When did the dismissal take place? The claimant said it was on 24 Jan 2018 and the respondent said it was on 28 Feb 2018.

   4.2. The claimant said that, even on the respondent's case, she did not commit a misconduct IE The First Allegation and the Second Allegation could not, as a matter of law, amount to misconduct.

   4.3. The claimant made procedural complaints that:

      4.3.1. There was no warning of possible dismissal;

      4.3.2. There was no investigation. The respondent's case was that there was an adequate investigation;

      4.3.3. There was no disciplinary hearing. This was conceded; the meeting which was held with the claimant was investigatory;

      4.3.4. No explanation of or evidence for the basis of the dismissal decision was provided to the claimant. The respondent said it did give an explanation which was that the dismissal was because of setting up a rival business and that it received this information came from other staff and customers;

      4.3.5. There was no independent appeal manager;

      4.3.6. There was no appeal meeting;

      4.3.7. The claimant was not told of her right to be accompanied in meetings.

   4.4. The respondent conceded that there were procedural flaws.

5. The following remedy issues were raised:

   5.1. The claimant sought a 25% uplift in award for the respondent's failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures.

   5.2. The respondent argued for a *Polkey* reduction in compensation and for a reduction on the basis of contributory fault.

   5.3. The claimant asked for compensation only and not re-instatement or re-engagement.

6. In relation to the claim relating to failure to provide particulars of employment, in its defence, the respondent relied on an email of 28 April 2015 (p34) which it said provided incomplete particulars.

7. For the claimant, we heard oral evidence from the claimant, KN; her daughter-in-law; and JH, her hairdresser and friend. The claimant also presented a written statement of TM, a customer of the respondent, and also of JA, a previous and subsequent employer of the claimant. For the respondent, we heard oral evidence from SD, a director and the dismissing manager; JD, her husband, now a co-director; and KM, an employee of the respondent. The respondent also presented a written statement of JP, its employee.

8. We were given a bundle of documents and a schedule of loss. We were supplied with an update schedule of loss after the Hearing.

9. We were surprised that neither party had come to the Hearing prepared to make submissions on the question of whether the First and Second Allegations (if proved) in fact constituted a breach of contract. Given that they had failed to do so, we referred the parties to the section on Fidelity and Loyalty in the IDS Handbook "Contracts of Employment".

10. Subsequently, we were referred by the claimant to the case of *Laughton v Bapp Industrial Supplies EAT 1986 IRLR 245.* We did not consider this an adequate explanation of the relevant law. We allowed the parties a further week after the second day of the Hearing to make written submissions in relation to whether the First and Second Allegations (if proved) in fact constituted a breach of contract. Both parties sent in written submissions on this point which we have read. Both parties written submissions included submissions on other issues outside this and we have not taken account of these.

11. The claimant also sent in an updated schedule of loss after the Hearing, to reflect new evidence given during the Hearing, in which she substantially reduced the quantum of her claim.

12. References to "the Hearing" are to the Tribunal Hearing, to page numbers are to numbers of the Hearing bundle, and to paragraphs are to paragraphs in this Judgment.

13. We refer to third parties by initials, as agreed with the parties.

What happened

14. We make the following findings of fact relevant to the issues in dispute.

Reliability of witnesses

15. We did not find SD a reliable witness for the following reasons.

15.1. In the Hearing, she maintained that written statements had been taken from two witnesses in relation to the allegations against the claimant, prior to the claimant's dismissal, and that these were not in the Hearing Bundle. She said these written statements were taken between 26 Jan 2018 and 6 Feb 2018. When the claimant made an application for specific discovery of these statements, she said that she could produce them. There was then an adjournment, after which she said that there were no such statements and she had been confused in what she had said.

15.2. When it was put to SD that she missed out of the allegations put to the claimant during the dismissal process the most obvious allegation of stealing

customer information, she replied "That's what we discussed in the initial phone calls". It was then pointed out to her that she was contradicting her earlier evidence, at which point, she withdrew this evidence and said she did not tell the claimant about this allegation.

15.3. When she was being cross examined on whether she had investigated the allegations, SD said that she had had several meetings with KM at the end of January to discuss the issue. This was not mentioned in SD's witness statement and it was denied by KM herself.

16. We did not find JD a reliable witness for the following reasons.

16.1. The notes taken by the respondent of a meeting with the claimant on 26 Jan 2018 stated that JD said "we recorded the phone call", meaning the phone call on 24 Jan 2018 between SD and the claimant. In the Hearing, under cross examination, JD confirmed that this is what he said in the meeting, but stated that "recorded" (in the meeting notes) meant "made a mental note of", and that he made notes on bits of paper, which he did not keep. He denied that "recorded" meant to record electronically. We consider that it is simply not credible to suggest that "we recorded the phone call" could mean anything other than its natural meaning of to record it on an electronic device. Further, he then changed his evidence saying that his notes were in his diary. This diary was not produced.

17. We consider that SD and JD were elaborating on their evidence to try to present the respondent's case in a good light.

18. We found both the claimant and KM to be credible witnesses. As they completely contradicted each other's evidence in elements crucial to the decision in this case, we will have to decide which one was telling the truth by looking at the surrounding circumstances.

Background

19. The respondent is a small business with a small number of retail fashion outlets, employing four people.

20. The claimant was very experienced in retail and had made no secret of the fact she always aspired to run her own clothing retail business. The claimant started working for the respondent as manager of one of its shops on 1 June 2015. Prior to this, and after the end of her employment, she worked for another clothing shop, Revolve, run by JA.

Evidence relating to claim for failure to provide particulars of employment

21. The claimant was sent an offer of employment email on 28 Apr 2015 (p36) which gave the following terms: It was a sales position. The post would start as soon as possible. The claimant would work 3 or 4 days per week Tuesday to Friday 10 am to 5.30 pm at a rate of £9 per hour and be paid at the start of the month. She was not given any other written particulars of employment.

Events leading to dismissal

22. The claimant had a long-standing knee injury and was off work sick with the injury for several weeks from November 2017, and still signed off sick by the end of Jan 2018. She was unable to undertake the physical work needed to run a shop.

23. During Jan 2018, SD heard a report or reports about the claimant which concerned her. The nature of exactly what she heard was in dispute. She said she heard these reports from JS and CM.

24. SD said that JS reported to her that customers had informed her that the claimant was "opening her own business selling clothes etc." According to JS' witness statement for the Hearing, she told SD "On several days, different women came in the shop and queried whether [the claimant]'s absence was because she had left and started her own business". We note that these two versions are materially different and accept the version in JS' witness statement.

25. According to SD, KM gave her details of what the claimant had allegedly said to KM. KM allegedly told SD that the claimant was plotting to open her own mobile boutique and she wanted SD to organise a customer party at the shop because she wanted to collect the customers' numbers and then contact them and sell to them cheaply, undercutting the respondent. The claimant had already written her letter of resignation which she was going to hand in after the party. The claimant was buying a van, her business cards would be black and silver, she had already ordered a card machine and she would be visiting a trade show in February.

26. KM gave evidence in the Hearing of what she alleged the claimant had told her on various occasions.

    26.1. She described a conversation with the claimant in May 2017 when the claimant said their house would be sold the following February and she would have her own mobile clothes business operating from a van and sell to the contacts she had made at Revolve and the respondent's business. She said her business cards would be silver and black.

    26.2. KM said that nothing more was said about this and then after the claimant went sick with her knee injury, she complained about only receiving SSP. She said that the claimant told her "it was all being put in place for starting her own business". She said that the claimant told her that she was getting the respondent to have a customer party at the shop when she came back to work so that she could get all the customers' contact numbers for when she set up on her own. Then she would resign. She said the claimant told her that TM was helping her look for a van, she was going to apply for a card machine, she was going to a trade fair on the Friday and she was going to be at a show to advertise her wares a couple of weeks later. She was hoping to get the money to fund the business from her father-in-law.

27. In the Hearing, the claimant denied she was annoyed at only being paid SSP while off sick. She denied having conversations with KM about starting her own business. She said KM was lying. In response to questions put to her, she denied that she was going to have a black and white logo or she was planning to have a van or get a card machine or that the details given by KM about how she was going to fund the business were correct. She denied that she wanted SD to organise a customer party at the shop so that she could collect customers' details for her own business. She said she did many events for the respondent. She denied she took any steps to set up a business.

28. On 24 Jan 2018, SD called the claimant. The thrust of the conversation is recorded in SD's subsequent letter to the claimant of the same date: "customers have been coming into the shop and saying you are planning to leave our employ to commence trading yourself, retailing clothing. This is something which would be a conflict of

interests". According to the claimant, SD told her she was terminating her employment. SD denied this and claimed she said that they would have to let her go *if* she was setting up her own business.

29. We accept the claimant's version of the call that she was dismissed during the call for the following reasons:

    29.1. As above, we doubt the credibility of SD's evidence;

    29.2. JD stated in a meeting on 26 Jan 2018 that he "recorded" the phone call. As above, we take the natural meaning of this, and consider that he did record it. The only explanation for his failure to produce it (or the diary he said he made notes in of the call) is that it supported the claimant's case;

    29.3. SD immediately started advertising for a new shop manager. SD explained that this was to cover other staff absences and that it was a temporary position. However, the advert made no mention of it being temporary. We do not accept her explanation;

    29.4. In notes of a meeting on 26 Jan 2018, it is shown that the claimant persistently stated that she was sacked, and SD did not contradict her until once, at the end of the meeting.

30. On 24 Jan, SD wrote to the claimant: "as I said customers have been coming into the shop and saying that you are planning to leave our employ to commence trading yourself, retailing clothing". This was the only allegation in the letter. She stated that they wished to discuss whether or not the allegations were true and asked the claimant to come in for a meeting.

31. The claimant responded in writing referring to her upset over the way her employment had been terminated over the phone.

32. The meeting was on 26 Jan 2018. SD informed the claimant "you're here because obviously we have heard rumours about you opening a business". JD told the claimant that they needed to establish whether she was setting up another business and the claimant categorically denied it. SD referred to what they had been told by customers (not staff). The claimant said "I bet someone has walked in and said she has not been here for ages, has she set up her own business". SD and JD said they had a lot more than hearsay comment, but did not elaborate. They said they were not prepared to talk about it and would put it in writing officially. They did not do so.

33. On 31 Jan 2018, SD wrote to the claimant that they were still investigating, without providing any further information.

34. In the Hearing, SD confirmed that she could not produce any evidence of this investigation. She said she only had one interview with KM. She then said she had a phone call with KM and, also, she had several meetings with her. She did not record this in her witness statement. She said she did not take any written notes of these investigations. KM denied that these supposed several meetings with her took place. We do not accept that SD conducted any further investigation.

35. On 6 Feb 2018, SD wrote purporting to dismiss the claimant on 28 Feb 2018 saying "we believe from the information given to us, that you were definitely in the process of starting a business to sell women's clothing, which would be in direct competition to our business. As we rely on a personal relationship with our customers, to

maintain loyalty, we feel that if you returned to your position, this would be compromised and therefore we have lost trust and confidence in you… For this reason, we have decided that we must terminate your employment…"

36. On 14 Feb 2018, the claimant wrote an email of appeal against dismissal (p46). She repeated that SD had told her on the phone on 24 Jan 2018 that she was terminating her employment. She pointed out that this was supported by the fact that SD posted an advert for her job the following day. She said the dismissal was a knee jerk reaction to hearsay. She complained that she had not been provided with any documentary evidence, including witness statements. She said that the respondent's stance that she had not been dismissed on 24 Jan 2018 had been used by it to retrospectively fill in procedural and substantive flaws in the decision making process. She pointed out that there is a huge difference between aspiring to start a business and actually beginning the process. She said she had not taken any actions that would be detrimental to the business.

37. SD considered the appeal herself. She accepted under cross examination that the appeal should have been considered by someone independent, and her action on this was unfair. She did not invite the claimant to an appeal meeting. On 1 Mar 2018, she responded upholding the decision to dismiss. She said "we have considered the information we have received from several sources that you have taken steps to start up your business". She referred to having spoken again to people who confirmed what the customers had been saying "and they have confirmed that you have told them as well about your new business, hence our conclusion that terminating your contract due to loss of trust and confidence is the correct one". She denied terminating the employment on 24 Jan 2018.

38. In the grounds of resistance, the only details of the claimant's alleged misconduct provided were that customers had been telling the respondent and shop workers that the claimant had told them she was planning to start her own business.

39. On 31 July 2018, in response to an enquiry from the claimant's representative, the respondent's representative wrote to the claimant's representative "the people who told [SD] that customers were saying that [the claimant] was setting up her own business are: [JP] and [KM]." There was no reference to any other allegations against the claimant.

40. In the grounds of resistance, the only details of the allegations against the claimant were "In the phone call of 24 Jan and the letter of the same day, the claimant was told that customers had been telling [SD] and other people manning the shop that [the claimant] had told them she was planning to start her own business."

41. It was on serving witness statements in the proceedings that the respondent, for the first time, made the claimant aware of the Second Allegation.

42. The claimant has not in fact started her own business.

43. There was no evidence to corroborate KM's evidence about her conversations with the claimant. The only evidence which the respondent referred to was a face book posting by TM saying that "Van MOT'ed". The entry did not say whether it was his van or someone else's and we do not consider it has any evidential value to the issues.

44. The respondent suggested that it did not raise KM's evidence with the claimant because of the sensitivity of the claimant and KM being friends. It was KM's

evidence that she told SD from the start that she was not bothered if the claimant found out the details.

The law

Duty of fidelity

45. It is implied into all contracts of employment that the employee has a duty of fidelity to his or her employer, which basically means that the employee is under an obligation not to act in a way which is contrary to the interests of the employer.

46. We accept the claimant's contention that a mere intention to compete with an employer is not a breach of the duty of fidelity, where there is no evidence that the employee intended to abuse the employer's confidential (*Laughton)*.

47. Making preparations to compete once employment has ended may be in breach of the duty of fidelity, depending on the circumstances, including the status and position of the employee, whether the preparations are made during working hours and the nature of the preparatory steps. In *Balston Ltd and anor v Headline Filters Ltd and anor 1990 FSR 385*, there was no breach of duty when, outside working hours, an employee set up an off the shelf company for competition purposes, arranged finance and premises and ordered necessary equipment and materials.

48. However, the EAT in *Laughton* states "Were there reasonably solid grounds for the employers to suppose that the employees intended to set up in competition in order to abuse their confidential position and information with the employers? We accept that if there were, then the employers would be justified in dismissing the employees for a breach of the duty of fidelity or loyalty. Thus if at the time of dismissal the employers knew … that they were compiling confidential information such as by making lists of customers or even memorising such lists, for use after their employment had ceased, then the employers could dismiss them for breaches of the implied term".

49. The question of what a particular employee is permitted to do without breaching the implied term is very fact sensitive as emphasised in *Hivac v Park Royal Scientific Instruments Ltd 1946 1 Ch 169 CA.*

Unfair dismissal

50. Under section 94(1) Employment Rights Act 1996 ("ERA"), an employee has the right not to be unfairly dismissed by his employer.

51. Under section 98(1) ERA, 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.

52. Under section 98(4) ERA, 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.

53. In *British Home Stores v Burchell 1980 ICR 303*, dealing with unfair dismissal for misconduct, the EAT stated that the employer must show:

    53.1. it believed the employee guilty of misconduct;

    53.2. it had in mind reasonable grounds upon which to sustain that belief; and

    53.3. at the stage at which that belief was formed on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

Failure to comply with Code of Practice

54. Under s207A Trade Union & Labour Relations (Consolidation) Act 1992, if it appears to the employment tribunal that (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) a party has failed to comply with the Code in relation to that matter , and (c) the failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award by no more than 25%, if the it was the employer's failure, and reduce any award by no more than 25% if it was the employee's failure.

55. The ACAS Code of Practise on Disciplinary and Grievance Procedures (2009) is such a Code of Practice. In disciplinary processes, it requires the employer, among other things, to carry out necessary investigations to establish the facts of the case, to inform the employee in writing of sufficient information about the alleged misconduct and possible consequences to enable the employee to answer the case at a disciplinary hearing, to hold a meeting with the employee to discuss the problem, to hold an appeal hearing where an appeal is made and, wherever possible, to have the appeal heard by a manager not previously involved in the case.

    Written statement of employment particulars

56. Under Section 1(1) ERA, where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.

57. Under s38(3) Employment Act 2002, if, in the case of proceedings to which this section applies, (a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and (b) when the proceedings were begun the employer was in breach of his duty under section 1(1) or 4(1) of the ERA, the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

58. Under s38(4) Employment Act 2002, the above reference to the minimum amount is to an amount equal to two weeks' pay and the reference to the higher amount is to an amount equal to four weeks' pay.

Conclusions

In principle, would the First Allegation or the Second Allegation (if proved) constitute a breach of contract?

59. The respondent had to rely on the implied term of fidelity in the absence of any express contractual duties. With regard to:

    59.1. The First Allegation: Without more details of exactly what the "setting up" of the business involved and when it was being done, we find it impossible to assess whether this could be a breach of the implied duty of fidelity. Therefore, the respondent did not show that this was a breach of contract.

    59.2. The Second Allegation: Taking the respondent's case as better set out in SD's evidence, it was that the claimant wanted SD to organise a customer party at the shop because she wanted to collect the customers' numbers and then contact them and sell to them.

        59.2.1. The claimant argued that this would not be a breach of the implied duty of fidelity because merely asking customers for phone numbers is not misconduct, on the basis that this was not the respondent's confidential information, it was up to the customers whether they wished to share them, and the claimant was not planning to use the contact details before she left the respondent's employment.

        59.2.2. We do not find the claimant's arguments persuasive. We consider that, if true, this allegation would fall within the breach described in *Laughton* of making lists of customers (and their contact details) (para 48). The claimant held a responsible position as shop manager. To persuade an employer to organise a customer party in order to take the contact details of the employer's customers with the intent of selling to them, after leaving, in competition with the employer, is a breach of the duty of fidelity. An employer in this situation could not be expected to wait until the employee had committed the breach but must be able to dismiss in reliance on the intent to do so.

Did the claimant actually commit Allegation 1 or Allegation 2?

60. JS's evidence was that "On several days, different women came in the shop and queried whether [the claimant]'s absence was because she had left and started her own business". This is not evidence that the claimant was engaged in the First Allegation or the Second Allegation. The claimant provided an explanation for the customers' comments in the meeting on 26 Jan 2018 that "I bet someone has walked in and said she has not been here for ages, has she set up her own business" which may equally explain the comments.

61. The only evidence which would support the First and Second Allegations was that provided by KM in her account of her conversations with the claimant, which were denied by the claimant. As we have said, we found both KM and the claimant to be credible witnesses and so we must look at the surrounding circumstances to decide whose account we believe. There is no evidence corroborating KM's account.

62. We consider that, if SD had really had the conversation with KM which she describes (para 25), she would have referred to the allegations made by KM in conversations and correspondence with the claimant. She would certainly have included the key

allegation that the claimant wanted SD to organise a customer party at the shop because she wanted to collect the customers' numbers and then contact them and sell to them cheaply, undercutting the respondent.

63. However, no information whatsoever was provided to the claimant about these allegations in the call of 24 Jan, the letter of 24 Jan, the meeting of 26 Jan, the dismissal letter of 6 Feb or the appeal outcome of 1 Mar 2018. It was not even mentioned in the representative's email of 31 Jul 2018 or the grounds of resistance.

64. The respondent suggested that it did not raise KM's evidence with the claimant because of the sensitivity of the claimant and KM being friends. We find this explanation lacking in credibility given KM's evidence that she told SD from the start that she was not bothered if the claimant found out the details.

65. We conclude from the absence of the Second Allegation in any of these conversations and correspondence that the Second Allegation was not detailed by KM to SD. We reject entirely the evidence given by KM about her supposed conversations with the claimant and the evidence given by SD about what KM supposedly told her. We find that the only information which the respondent had in its mind at the time of dismissing the claimant and conducting the dismissal process was that set out by SD to the claimant in the letter of 24 Jan 2018, namely that customers had been coming into the shop and saying that the claimant was planning to leave their employ to commence trading herself, retailing clothes.

66. We find that the claimant did not commit the First Allegation or the Second Allegation. The only thing which the claimant did was to have a generalised wish to start her own clothes shop at some time.

<u>Unfair dismissal</u>

67. Of course, in an unfair dismissal case, the fact that the employee did not in fact commit the conduct for which he or she is dismissed will not decide the claim. The decisive issue is as set out in *Burchell*:

    67.1. Whether the employer believed the employee guilty of misconduct;

    67.2. Whether the employer had in mind reasonable grounds upon which to sustain that belief; and

    67.3. Whether, at the stage at which that belief was formed on those grounds, the employer had carried out as much investigation as was reasonable in the circumstances.

68. The respondent did believe the First Allegation as it recorded in its letter of 24 Jan 2018 to the claimant. Such a belief, however, could not be a belief amounting to one of misconduct. This is because we have already concluded that the respondent has not proved the First Allegation to constitute a breach of contract.

69. We find that the respondent did not believe the Second Allegation on the basis that it made no reference to it until in its witness statements; we have found that KM did not in fact report the Second Allegation to SD.

70. Therefore, the respondent's case falls at the first part of the Burchell test. For this reason alone, the dismissal is unfair.

71. Turning to the particular procedural complaints made by the claimant

71.1. There was no warning of possible dismissal: we do not find this complaint valid; if there had been a breach of the implied duty of fidelity, no warning would be required. It would clearly constitute a gross misconduct.

71.2. There was no investigation: The only "investigation" of which we have any evidence which we accept is that SD heard a report from JS that "on several days, different women came in the shop and queried whether [the claimant]'s absence was because she had left and started her own business we agree that there was no investigation". Hearing such a report does not really amount to something which could be described as an investigation. SD subsequently took no steps to investigate the report. We conclude that there was no investigation.

71.3. There was no disciplinary hearing: This was conceded; the meeting which was held with the claimant was merely investigatory.

71.4. No explanation of or evidence for the basis of the dismissal decision was provided to the claimant: Because it effectively did not investigate, there was little explanation or evidence which the respondent could give. This is not to let the respondent off the hook of its obligation to provide proper explanations or evidence in the disciplinary process, which it failed to do.

71.5. There was no independent appeal manager. This was not contested. No argument was run before the Tribunal that the respondent was too small to have an independent appeal manager.

71.6. There was no appeal meeting. This was not contested.

71.7. The claimant was not told of her right to be accompanied in meetings. We do not find this a valid complaint as the absence of any disciplinary or appeal meeting meant that there was no meeting where the claimant would have had the right to be accompanied. There is also no obligation to inform an employee of the right to be accompanied, but merely to allow a reasonable request.

72. The dismissal was therefore procedurally unfair for lack of investigation, lack of disciplinary hearing, lack of explanation or evidence for the basis of the dismissal decision, lack of disciplinary hearing, lack of independent appeal manager and lack of appeal meeting.

73. In conclusion, we find the dismissal unfair.

Remedy

74. As we have found that the claimant did not commit a misconduct, there is no place for the application of the concept of a reduction in award for contribution. Nor can we find that, if a proper procedure had been followed, there would have been a dismissal (*Polkey)* because we cannot see that any grounds for dismissal would have been found. This is the case because we reject KM's evidence.

75. The parties agreed that the claimant's annual gross wage was £18,720, equating to £16,009.28 net, resulting in monthly figures of £1560 and £1334.11 respectively and £360 and £307.87 weekly respectively.

76. The claimant had two complete years of service. Her age at termination of employment was 58.

77. As agreed by the parties, the basic award is £1,080.00.

78. On the claimant's updated schedule of loss, as at 18 Jan 2019, the claimant calculated 50 weeks loss of earnings from 24 Jan 2018 to 9 Jan 2019 as being net £4002.31. During the same period, the claimant says she had earnings from DWP carers allowance (£1953), temporary work for Revolve (£459.99) and employment with Revolve (£1,968), amounting to £4380.99, meaning that she earned more for that period than if she had been working for the respondent, in the sum of £378.68.

79. The claimant claims future losses for 39 weeks of £12,006.39 net and sets off that her projected income at Revolve of £8,856.12, leaving a deficit of £3150.81.

80. In the Hearing, it was the claimant's evidence that she would have stopped working for the respondent when she started to care for her father-in-law at home from 12 Feb 2018. She said that Revolve approached her and asked her to come back to work for them after her father-in-law went into a home and she stopped caring for him, in September 2018. Revolve moved the boutique to a different town to make it more convenient for the claimant. She started working for Revolve in November 2018.

81. We do not consider it equitable to award the claimant any further compensation for loss of earnings. She would have left the respondent on or about 12 Feb 2018 in order to care for her father-in-law. We consider that the most likely thing that would then have happened would have been that she returned to work for Revolve when they approached her, as in fact happened in practice.

82. Therefore, there is no loss of earnings to award.

83. The claimant claims £500 for loss of statutory rights. The respondent did not object to this figure and we will make that award.

84. The claimant claims a 25% uplift to the compensatory award for failure to follow the ACAS Code on Discipline and Grievances at Work. We consider that this maximum uplift is warranted given that the respondent failed to comply with any of the requirements of the Code which we have listed above (para 55).

85. The claimant claims 4 weeks pay for failure to provide her with a statement of employment particulars. The employment particulars which the respondent provided to the claimant in writing were very limited being only the title of the job, incomplete information about hours of work (as it was not explained how the number of days per week would be decided), the rate of remuneration and intervals of remuneration. Given the great deal further information required by s1 and s3 Employment Rights Act 1996, we consider it reasonable to increase the unfair dismissal award by the higher amount of 4 weeks pay.

86. We calculate the claimant's compensation for unfair dismissal as follows:

    86.1. Basic award: **£1080.00**

    86.2. Compensatory award:

        86.2.1. Loss of statutory rights: £500

        86.2.2. Increased by 4 weeks pay for failure to provide employment particulars: 4 x £360 = £1440

86.2.3. Subtotal: £1940

86.2.4. Increased by 25% (£485): **£2425.00**

Employment Judge Kelly
8 February 2019