EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100267/2018

Held in Glasgow on 1, 2 and 12 November 2018

Employment Judge: W A Meiklejohn

Ms Ajoke Toriola	**Claimant** **Represented by:** **Mr M Ross - Solicitor**
HM Revenue and Customs	**Respondent** **Represented by:** **Dr A Gibson - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the Claimant was unfairly dismissed by the Respondent and that the Respondent is ordered to pay to the Claimant the sum of FOUR HUNDRED AND SIXTY SEVEN POUNDS AND EIGHTY THREE PENCE (£467.83).

REASONS

1. This case came before me for a Final Hearing on both liability and remedy in Glasgow on 1, 2 and 12 November 2018. Mr Ross appeared for the Claimant and Dr Gibson appeared for the Respondent.

2. The Claimant alleged that she had been unfairly dismissed by the Respondent. The Respondent admitted dismissal but denied unfairness. The Respondent's position was that the Claimant had been fairly dismissed for gross misconduct.

Evidence and Findings in Fact

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3. For the Respondent I heard evidence from Ms K Rowlands, Internal Governance Officer, Mr D Barclay, Senior Team Leader and Ms H Watson, Deputy Senior Operational Head. I also heard evidence from the Claimant. There was a joint bundle of productions to which I will refer by page number.

4. Ms Rowlands worked within the Respondent's Internal Governance Civil Investigation Unit (based in Salford) and was the investigating officer in this case. Mr Barclay worked within the Respondent's Debt Collection centre in East Kilbride and was the decision maker in respect of the Claimant's dismissal. Ms Watson worked in Debt Management, also based in East Kilbride, and was the appeal officer. The Claimant was employed as an Administrative Officer in Debt Management and Banking, based in East Kilbride.

5. The Claimant's employment began on 18 May 2015 and ended when she was dismissed without notice on 1 September 2017. At the time of her dismissal the Claimant's weekly pay was £317.84 gross and £209.14 net. The Claimant's role within the Debt Management Collections Team involved putting in place payment plans for customers (principally relating to Value Added Tax) and she was aware of the importance to the Respondent in having such plans in place quickly.

6. In November 2016 the Respondent and her partner (Mr B Jikiemi) received a letter from the Respondent's Tax Credit Office ("TCO") confirming that there had been an overpayment of tax credits in respect of the year ending 5 April 2015. The amount in respect of which recovery was sought from them was £3595.00. The overpayment arose because the childcare provider engaged by the Claimant and Mr Jikiemi was registered with Ofsted but not with Social Care and Social Work Improvement Scotland (SCSWIS – previously known as Scottish Care Commission). This had not been picked up by the TCO nor by Concentrix, a contractor to the Respondent, when the claim for tax credits had been processed.

7. The Claimant contacted the TCO about this matter on 6 December 2016. She did not consider that the explanation she received was satisfactory. She was

offered a telephone number to make a Time to Pay ("TTP") arrangement but declined this as she wanted to get to the bottom of the alleged overpayment. She was advised of her right to appeal and exercised this by submitting an appeal online on 14 December 2016.

8. In February 2017 the Claimant became aware that her father in Nigeria had been diagnosed with prostate cancer and that his condition was terminal. She remitted funds to help pay for her father's medical expenses. She was also preparing to move house. She felt "mentally really low" and "extremely stressed". Her sleep pattern was affected. She suffered from migraines, the medication for which made her drowsy. The Claimant's line manager (Ms E Lawrie) was aware of these issues.

9. On 6 March 2017 the TCO contacted the Claimant by telephone about her appeal. The Claimant was told that her appeal had been granted and that the amount of the overpayment had been reduced.

10. The bundle of documents contained a number of references to this telephone call –

    a. In a document prepared by Ms V Keeble of the TCO (page 44) it was recorded that the Claimant said she "couldn't speak but was aware of overpayment and knew she needed to sort something out".

    b. In the note of a meeting between the Claimant and Ms Lawrie on 3 May 2017 (page 86) it was recorded that "Ajoke received a phone call about the overpayment but advised it wasn't a good time to discuss at the moment. During this call Ajoke was advised that a letter would be sent out to her".

    c. In her investigation report (pages 31-114, at page 37) Ms Rowland recorded that "On 6 March 2017 Mrs Keeble contacted Ms Toriola to discuss the overpayment, Ms Toriola stated she was aware of the overpayment and would make an arrangement to pay. Mrs Keeble

advised Ms Toriola that a review letter would be issued, this was sent on 9 March 2017".

d. In his Decision – manager's deliberations document (pages 144-147, at page 145) Mr Barclay recorded "The facts of the case are that Ajoke was aware of an overpayment since November 2016. On appeal this was reduced and on 06/03/17 she was contacted by TCO to discuss repayment. During this call she advised she would make arrangements to repay and TCO sent review letter on 09/03/17 confirming amount and when payment to be made by".

e. In her appeal manager's deliberation template (pages 170-176, at page 172) Ms Watson recorded "Ajoke had appealed the overpayment amount and on 06/03/2017 she was contacted by DMGT to discuss the repayment. She agreed to repay but requested a letter".

11. The Claimant's position in her evidence to the Tribunal was that she had not been in the office when she received the call on 6 March 2017, that she might have had her children with her, that she might have been driving home at the time (although this would normally have been recorded by the Respondent and this had not happened), that it had not been a long conversation, that she had been told that the amount of the overpayment had been reduced but was not sure if the exact amount was mentioned and that she could not recall being told that 23 March 2017 was the deadline for repayment. It was evident that the purpose of the phonecall had been to advise the Claimant of the outcome of her appeal and I considered it to be more likely than not that the reduced amount of the overpayment was mentioned. However, given that none of the references to this phonecall in the bundle of documents mentioned a specific repayment date, I considered it to be more likely than not that the date of 23 March 2017 was not mentioned during the call (which was the Claimant's position at her meeting with Mr Barclay on 23 August 2017 – see paragraph 13 below).

12. Ms Keeble wrote to the Claimant of 9 March 2017 (pages 90-91) advising that the amount of the overpayment was now £2977.34 and stating "You must pay in full now or phone me by 23 March 2017 on the number above to discuss payment". The letter also contained a reference to the Respondent's conduct guidance HR22009 relating to private financial conduct (page 57) reminding the Claimant that she –

"….must avoid any conduct or behaviour in your private activities and financial transactions which would:

- reflect poorly on you as an employee of HMRC
- bring HMRC into disrepute
- give grounds for suspecting dishonesty or abuse of trust"

13. The information provided by the Claimant to the Respondent about this letter was not consistent –

a. In the note of her meeting with Ms Lawrie on 3 May 2017 (page 86) it was recorded that "Ajoke received a letter dated 9.3.17 advising her that the amount now due is £2977.34. The letter advised that payment must be made in full or an arrangement in place by 23.3.17".

b. In the transcript of the tape recorded interview between Ms Rowlands and the Claimant on 6 June 2017 (pages 96-111, at page 105) the Claimant is recorded as saying "Whatever letter was sent out in February, March even my bank statement important stuff I've just stopped opening letters…." and "So I didn't really want to put pressure on myself opening letters and but the only contact I got from, from, from that Department was on the 1st of oh sorry the 6th of March and that was the conversation".

c. In the note of the meeting between Mr Barclay and the Claimant on 23 August 2017 (pages 136-139, at page 137) it was recorded that "She said she wasn't told over the phone that the debt had to be paid by the 23/03/2017, it may have been in the letter she received but she didn't read fully she only looked at the amount as she was in shock".

d. In the note of the appeal meeting between Ms Watson and the Claimant on 2 October 2017 (pages 157-168, at page 159) the Claimant was recorded as saying three times in answer to questions about the letter of 9 March 2017 "I cannot guarantee I received the letter".

14. The Claimant moved house on 17 March 2017. The letter of 9 March 2017 was sent to her old address and I was satisfied that she received it. There was no suggestion when the Claimant spoke with Ms Lawrie on 3 May 2017 that she had not done so. In her evidence to the Tribunal the Claimant's position was the same as she had taken at her meeting with Mr Barclay, namely that she had received the letter, opened it but not read it fully. It was difficult to understand – and unhelpful to the Claimant's credibility – that she had not taken the same position at the investigation meeting with Ms Rowlands and at the appeal meeting with Ms Watson. However, although not without considerable hesitation, I accepted the Claimant's evidence that she had received the letter of 9 March 2017 but had not read it fully so that, while she aware of the reduced overpayment amount, she was not aware of the deadline of 23 March 2017 for making payment or putting a TTP arrangement in place.

15. Ms Keeble telephoned the Claimant on 23 March 2017 about the overpayment. The Claimant told Ms Keeble that she was having a "hard time". Ms Keeble extended the deadline for the Claimant making contact to set up a TTP arrangement to 28 March 2017. This was confirmed by the document called IG Referral Check List Tax Credits (page 89) which bore to have been prepared by Ms Keeble and formed part of Ms Rowlands' report,

and also by the note of the Claimant's meeting with Ms Lawrie on 3 May 2017 (page 86) which records the Claimant as telling Ms Keeble that "it wasn't a good time". In her interview with Ms Rowlands on 6 June 2017 the Claimant is recorded (at page 108) as saying that she "said to the lady to give me a call back no later than the Tuesday" which I understood to mean Tuesday 28 March 2017. The Claimant is also recorded as saying "I said listen give me a call back by Tuesday I'll get all my bank information ready then I can go ahead and she was like no I'm not going to call you back you've got to call us back and I said fair enough whatever you need to see put it in the post and I'll deal with it".

16. The Claimant's father passed away in the early hours of 24 March 2017. The Claimant did not attend work on that date. She travelled to Nigeria on 26 March 2017. Her partner advised the Respondent on 27 March 2017 that the Claimant would not be returning to the UK for two weeks.

17. Ms Keeble wrote to the Claimant on 30 March 2017 (page 92). This letter reminded the Claimant that she might be in breach of HMRC Conduct guidance (HR22009) relating to her private financial conduct. It also informed the Claimant that if she did not pay the full amount or contact the Respondent to discuss payment within seven days her case would be referred to Internal Governance. The Claimant received this letter upon her return to the UK on 15 April 2017.

18. On 13 April 2017 Ms Keeble attempted to contact the Claimant but was unable to do so.

19. The Claimant's first day back at work was 19 April 2017. On this date she attempted during her lunch break to contact the TCO with a view to setting up a TTP arrangement. Unfortunately she had to wait twenty minutes for her call to be answered and this left insufficient time to set up a TPP arrangement before the end of her break.

20. The Claimant called the TCO again on 25 April 2017 and set up a TPP arrangement. This required the Claimant to repay over 10 years at the rate of £24.81 per month. During this call the Claimant was advised that her case had been passed to Internal Governance on 19 April 2017.

21. The Claimant met with Ms Lawrie on 3 May 2017. According to the note of this meeting (page 86) the Claimant was told by Ms Lawrie that the meeting was informal and was "to make her aware of the situation". The Claimant confirmed that she was aware that Internal Governance were dealing with her case.

22. Mr Barclay, having been appointed as decision maker, wrote to the Claimant on 11 May 2017 to advise that Mr S Mafu of Internal Governance Civil Investigations had been appointed to "investigate concerns that you may have failed to manage your private dealings with HMRC properly and on time, including failing to engage with Debt Management PD collections concerning your tax credit overpayment in a timely manner, which is contrary to HMRG guidance". Mr Mafu was replaced by Ms Rowlands because he suffered a bereavement in respect of which Ms Rowlands said that the Respondent had provided "as much sympathy and support as they could offer".

23. Ms Rowlands conducted her investigation which included a tape recorded interview with the Claimant on 6 June 2017. Mr L Elliot of Internal Governance also participated in this interview. Ms Rowlands produced a comprehensive report (pages 31-114) which included the recommendation of Ms M Burns dated 23 June 2017 (at pages 41-43) that the Claimant did have a case to answer. Ms Burns provided a suggested form of wording for the allegation of misconduct by the Claimant. Ms Rowlands explained that, while she undertook the investigation, it was not her function to make the recommendation.

24. Mr Barclay wrote to the Claimant on 16 August 2017 (pages 134-135) inviting her to a discipline decision meeting to be held on 23 August 2017. His letter set out the allegation against the Claimant in these terms –

"The formal meeting will consider the allegation that you after appealing a notification in November 2016 of an overpayment of Tax Credits of £3595, you were contacted on 6th March 2017 by the Tax Credit office and informed of an overpayment of Tax Credits totalling £2977.34 and that it must be paid or a payment plan arranged by 23rd March 2017, you requested a letter which was issued to you on 9th March 2017. On 23rd March 2017 the Tax Credit Office contacted you again by telephone and extended the deadline to pay or make a payment plan to the 28th March 2017. However, you failed to do so, which is contrary to HMRC's Conduct policy HR 22009 Conduct; private and managing your financial affairs."

This was a slightly expanded version of the wording suggested by Ms Burns. Mr Barclay's letter advised the Claimant that the outcome might be a "2 year final written warning or your dismissal without notice."

25. The discipline decision meeting took place on 23 August 2017. The Claimant had been advised of her right to be accompanied but chose to proceed without a companion. Pages 136-139 were the notes of the meeting and I was satisfied that these provided an accurate record. Mr Barclay asked the Claimant if she admitted the allegation. The Claimant's response was recorded in these terms –

"Ajoke replies she partially admits. Even though it was brought to her attention she had a lot going on at the time and didn't receive letter until she returned from attending her father's funeral in Nigeria. When she called it was already passed to IG. She didn't agree the amount and she disputed this and got the amount reduced. She advised that she didn't refuse to pay the debt but had too much going on to discuss over the phone."

26. Mr Barclay wrote to the Claimant on 1 September 2017 (pages 142-143) including the following paragraphs –

"During the meeting and you claimed that you admitted you knew you had an overpayment but that you were unaware of the date it was due to be paid. You advised that you did not deal with the overpayment as you were under a lot of stress in March 2017 due to your father's ill-health and death as well as moving house.

I have carefully considered all the circumstances including the results of the investigation and your representations and found the allegation against you to be proven.

After considering all the relevant factors, it has been decided that your employment with HMRC should be terminated. This will take effect immediately, without notice and without pay in lieu of notice. Therefore your last day of service is 01/09/2017."

27. Mr Barclay's letter also advised the Claimant that details of her dismissal would be forwarded to the Cabinet Office for inclusion on the database of civil servants dismissed for internal fraud (the Internal Fraud Hub), explaining that internal fraud meant –

- Dishonest or fraudulent conduct, in the course of employment in the Civil Service, with a view to gain for the employee or another person; and

- For employees of HMRC, this includes dishonest or fraudulent conduct relating to tax, duties, contributions or payments administered by HMRC, even if not connected with employment.

The effect of this was that the Claimant was banned from employment with the Civil Service for a period of five years.

28. Mr Barclay prepared a document recording his deliberations in reaching his decision (pages 144-147). In this he included the following (at page 146) –

"I have considered the penalties available to me taking into account the following:

As an employee of Debt Management it would be reasonable to expect a higher standard than other HMRC employees.

As an employee of Debt Management you would know the process to set up a payment plan.

You are a second time offender in respect of a tax credit overpayment.

You have failed to take responsibility for the overpayment.

HMRC cannot be confident that you will not do this again."

29. Mr Barclay's description of the Claimant as a "second time offender" related to the fact that she had, prior to her employment with the Respondent commencing, received an overpayment of Tax Credits which she had repaid in a timely manner. The Claimant had disclosed this to Ms Rowlands and had provided a copy of a letter dated 5 March 2014 (page 114) confirming the payment plan she had made in respect of this overpayment.

30. The Claimant exercised her right of appeal against her dismissal in terms of her letter to Ms Watson dated 6 September 2017 (pages 148-150). The appeal meeting took place on 2 October 2017. On this occasion the Claimant was accompanied by Ms F Moduro. Pages 157-168 were the notes of the appeal meeting and again I was satisfied that these provided an accurate record. By her letter to the Claimant dated 16 October 2017 (page 169) Ms Watson confirmed that the appeal was not upheld.

31. As Mr Barclay had done, Ms Watson prepared a document recording her deliberations in relation to the Claimant's appeal (pages 170-176). In this Ms Watson described her role as appeal manager in these terms –

"As Appeal manager my role is to review the decision made in relation to the use of evidence, any new evidence, procedures, consistency and the reasonable (sic) of the decision."

32. In the course of the appeal meeting on 2 October 2017 and in response to the Claimant asserting that there had been no dishonesty or fraud, the notes record (at page 164) Ms Watson as saying –

"That is not for me to say. Douglas Barclay is the decision maker, he makes the decision. My role as appeals manager is to check whether processes have been followed correctly and to ensure all relevant information has been considered. If I find that the decision has been made properly considering all relevant information I don't have the power to change it even if I disagree."

33. In the document recording her deliberations (pages 170-176, at page 174) Ms Watson dealt with Mr Barclay's reference to the Claimant as a "second time offender". After referring to the Claimant having produced the letter dated 5 March 2014 (page 114) Ms Watson continued –

"This together with the current overpayment confirms two TC overpayments. The terminology used 'offender' could be classed as insensitive but there has definitely been 2 overpayments. This has no direct impact on the decision."

34. Ms Watson believed that Mr Barclay had followed the Respondent's procedures correctly. She believed that the evidence had been properly considered. She identified the inconsistencies in the Claimant's accounts, given at different times, about her receipt of the letter of 9 March 2017 and her knowledge of its contents. She found that the evidence about the Claimant's state of mind at the time did not excuse her from dealing with the overpayment. She was sceptical about what the Claimant had said about her efforts to contact Debt Management upon her return to the UK in April 2017.

35. Ms Watson's decision was that the Claimant's appeal was not upheld and that Mr Barclay's decision should stand. She advised the Claimant of this in her letter of 16 October 2017 (page 169).

36. It was a matter of agreement between the parties that the Claimant's earnings post-dismissal exceeded the net earnings she would have received had her employment with the Respondent continued.

37. The Claimant's preferred remedy was re-engagement. Both Mr Barclay and Ms Watson said that they would not want the Claimant to return to the Respondent's employment as the necessary bond of trust no longer existed.

Submissions for the Respondent

38. Dr Gibson helpfully provided a detailed written submission and as this is available in the case file I will deal with it by way of brief summary. Dr Gibson invited me to find (a) that the Respondent had shown a potentially fair reason for dismissal, relating to the Claimant's conduct, (b) that the decision makers, Mr Barclay and Ms Watson, genuinely believed that the Claimant was guilty of the allegations against her, (c) that this belief was based on reasonable grounds, (d) that the Respondent conducted a reasonable investigation and (e) that the Respondent's dismissal of the Claimant was procedurally fair.

39. Dr Gibson argued that re-instatement and re-engagement were not reasonably practicable given the Respondent's loss of trust in the Claimant. He also argued that any award of compensation to the Claimant should be reduced by 80% to reflect her contributory conduct.

Submissions for the Claimant

40. Mr Ross sensibly acknowledged that the Respondent's investigation had been procedurally fair. Unfairness, he submitted, arose only at the stage of Mr Barclay's decision to dismiss the Claimant. Mr Barclay had expressed regret about his reference to the Claimant as a "second time offender" and this had clearly caused Ms Watson considerable disquiet. Mr Ross submitted that Mr Barclay had also fallen into error when he had held the Claimant to a

higher standard than other HMRC employees. These elements undermined Mr Barclay's decision.

41. Mr Ross submitted that the Respondent had failed fully and properly to consider the matters raised by the Claimant in mitigation. There were considerable stresses on the Claimant which impacted her decision making process. In answer to Dr Gibson's criticism of the time taken by the Claimant to put a TTP arrangement in place Mr Ross submitted that she had tried to resolve the matter which showed her commitment to engagement with the Respondent's processes.

42. Mr Ross argued that, given the Respondent's size as an organisation, it should be possible for them to re-engage her elsewhere than her former role. Although the Claimant's new job paid more than her job with the Respondent, re-engagement remained her preferred remedy. Mr Ross disagreed with Dr Gibson's argument on contributory conduct.

Applicable law

43. Section 98 of the Employment Rights Act 1996 ("ERA") provides as follows –

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

….(b) relates to the conduct of the employee….

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

44. Sections 113-117 ERA deal with orders for re-instatement and re-engagement. Sections 118-124 ERA deal with awards of compensation. Contributory conduct is dealt with as follows –

(a) in relation to the basic award in section 122(2) ERA –

"Where the tribunal considers that any conduct of the complainant before the dismissal….was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

(b) In relation to the compensatory award in section 123(6) ERA –

"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

Discussion and Disposal

45. It will be apparent to the parties that I have not recorded every aspect of the evidence presented at the Hearing. That is not the function of the Tribunal. I have focussed on those parts of the evidence most relevant to the fairness or otherwise Respondent's decision to dismiss the Claimant. Matters such as the Claimant's timekeeping and the reasons she gave for lateness in

December 2016 and early in 2017 did not in my view impact in a material way on that decision.

46. I reminded myself of what Arnold J said in **British Home Stores v Burchell 1978 IRLR 379 –**

"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further."

47. I also reminded myself of what Browne-Wilkinson J (as he then was) said in **Iceland Frozen Foods Limited v Jones 1983 ICR 17** –

"(1) the starting point should always be the words of section 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 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 fair; if the dismissal falls outside the band it is unfair."

48. There was considerable force in Dr Gibson's submissions. The Respondent's decision makers believed the Claimant was guilty of the misconduct as alleged - see paragraph 24 above. There were grounds for that belief – the Claimant in her role was familiar with the importance to the Respondent of having payment plans put in place as quickly as possible, yet more than seven weeks had passed between the Claimant being told of the outcome of her appeal and her putting a TTP arrangement in place. Mr Ross was right not to challenge the fairness of the Respondent's investigation which was thorough.

49. However, there were three elements of the Respondent's disciplinary process which troubled me. Firstly, there was Mr Barclay's statement that it would be reasonable to expect a higher standard of the Claimant as a Debt Management employee than other employees of the Respondent. Dr Gibson argued that this was simply a matter of common sense – the Claimant's role involved putting payment plans in place. She knew what was required. She had made a TTP arrangement before she became an employee of the Respondent. She had delayed more than seven weeks in doing the same in relation to the overpayment of tax credits after being told the outcome of her appeal.

50. However, the Claimant was entitled to expect that she would be dealt with in accordance with the Respondent's policies. These made no distinction

between employees engaged in Debt Management and others. There was no basis within these policies for Mr Barclay to expect a higher standard from the Claimant.

51. Secondly, Mr Barclay's description of the Claimant as a "second time offender" was unfortunate. It implied that the Claimant had done something wrong by having to make a previous repayment of tax credits which had been overpaid. I understood that the operation of the tax credit system required recipients to notify the TCO within 30 days of changes in circumstances which might affect entitlement to tax credits. This meant that any adjustment to the recipient's entitlement would necessarily have to be implemented retrospectively and if the change reduced the entitlement an overpayment would inevitably arise. To describe the recipient of that overpayment as an "offender" in the context of deciding the appropriate sanction, as Mr Barclay had done, was by a considerable margin outwith the band of reasonable responses.

52. Thirdly, there was Ms Watson's description of her role as appeal officer – see paragraph 32 above. It seemed to me that it was an essential element of being an appeal officer that if the appeal officer disagreed with the decision against which the appeal was taken then he/she should be able to reverse that decision. To restrict the appeal officer to checking that "processes have been followed correctly" and that" all relevant information has been considered" fell short of giving the Claimant a proper right of appeal.

53. The ACAS Guide: Discipline and Grievances at Work (2017) states at paragraph 4.17 that at an appeal meeting the employer should –

"change a previous decision if it becomes apparent that it was not soundly based – such action does not undermine authority but rather makes clear the independent nature of the appeal."

Applying that to the present case – if the appeal officer believed that the decision to dismiss was not sound because insufficient weight had been

attached to the employee's mitigation, he/she would according to Ms Watson be unable to change the decision if processes had been followed correctly and all relevant information had been considered. That fetters the discretion of the appeal officer and negates the independent nature of the appeal.

54. Mr Barclay had notified the Claimant of two possible outcomes of the disciplinary process – see paragraph 24 above. To choose summary dismissal as the appropriate outcome based, to any extent, on the characterisation of the Claimant as a "second time offender" took Mr Barclay's decision outside the band of reasonable responses. It necessarily followed that the Claimant's dismissal was unfair.

Remedy

55. The Claimant wanted to return to the Respondent's employment. The Respondent argued that re-instatement or re-engagement would not be appropriate in view of their loss of trust in the Claimant. In view of what I say below about contributory conduct on the part of the Claimant, I did not consider that re-instatement or re-engagement would be an appropriate remedy.

56. At the effective date of termination of her employment with the Respondent, the Claimant had completed 2 years' service. Based on her age at that time (33) and her gross weekly pay (£317.84) the basic award was £635.66.

57. It was common ground between the parties that the Claimant had earned more in the period between the termination of her employment on 1 September 2017 and the date of the Hearing than she would have earned had she remained in the Respondent's employment. As her current earnings continued to exceed what she had been earning with the Respondent, there was also no future loss.

58. Because of her dismissal the Claimant had lost the benefit of statutory employment protection rights. The value placed upon these by the Claimant was £500. The Respondent contended for the lower figure of £300. I

considered that the Respondent's figure was more appropriate and in line with what was normally awarded under this head of loss. Adding this to the basic award produced a total of £935.66.

59. I then considered whether the Claimant had by reason of her conduct contributed to her dismissal. I reminded myself of the terms of sections 122(2) and 123(6) ERA – see paragraph 44 above. Notwithstanding the different criteria against which the conduct of the Claimant had to be assessed under these provisions I took the view that, if there had been conduct which made it appropriate to reduce the basic and compensatory awards, the same percentage reduction should apply.

60. I was satisfied that the Claimant had contributed to her dismissal by failing to put a TTP arrangement in place as promptly as she should have done. I did not agree with Ms Watson's assertion that she should have done so when she first became aware of the tax credit overpayment in November 2016. It could not in my view be said that the Claimant had acted unreasonably by waiting to learn the outcome of her appeal.

61. While I accepted the Claimant's evidence that she had not been told of the deadline for making a TPP arrangement in the course of the telephone call on 6 March 2017, I was less impressed with her explanation that she had received the letter of 9 March 2017 but had not read it fully. She knew that there had been a substantial overpayment of tax credits the amount of which, after her appeal, was confirmed by this letter. She knew that she would have to make a TPP arrangement. Her conduct in failing to do so between 9 and 23 March 2017 contributed to her dismissal.

62. The Claimant's failure to make a TPP arrangement between the telephone call with Ms Keeble on 23 March 2017 when the deadline was extended to 28 March 2017 and her return to work on 19 April 2017 could not in my view be properly regarded as contributory conduct. She learned of her father's death on 24 March 2017 and travelled to Nigeria on 26 March 2017. She did not receive the letter of 30 March 2017 until she returned from Nigeria. It was consistent with allowing a bereaved employee as much sympathy and support

as could be offered (see paragraph 22 above) to await the Claimant's return to work before expecting her to put a TPP arrangement in place.

63. When the Claimant returned to work on 19 April 2017 she attempted to make a TPP arrangement on that date. It was not the Claimant's fault that it took the Respondent so long to answer her call that she had insufficient break time left to make the TPP arrangement on that date. However, the Claimant offered no explanation as to why she then waited until 25 April 2017 to make the follow up call in the course of which her TPP arrangement was put in place. This was also conduct which contributed to her dismissal.

64. Looking at matters in the round, I decided that the Claimant's conduct as described in paragraphs 61 and 63 above could reasonably be said to have contributed to her dismissal to the extent of 50%.

65. Applying that level of contribution to the aggregate of the basic and compensatory awards resulted in a figure of £467.83 and I decided that this was the appropriate amount of compensation which the Respondent should be ordered to pay to the Claimant. I should add that I could find nothing in the language of section 123(6) which required the element of the compensatory award which related to loss of statutory employment protection rights to be excluded from the reduction by reason of contributory conduct.

66. It is not in my power to order that the consequence of the Claimant's dismissal recorded in paragraph 27 above (her inclusion on the Internal Fraud Hub and consequent exclusion from Civil Service employment for a period of five years) should be revisited but it would be logical and equitable that this should follow upon the finding of unfair dismissal.

Employment Judge: WA Meiklejohn
Date of Judgment: 23 November 2018
Entered in register: 03 December 2018
and copied to parties