



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4103946/2018

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Held in Glasgow on 8 August 2018

Employment Judge: Lucy Wiseman
Members: Ian Poad
Martha McAllister

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Ms Heather McColville

Claimant
Represented by:
Mr E Mowat -
Solicitor

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Z A Care Ltd

Respondent
Represented by:
Mr D Roberts -
HR Consultant

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal decided:

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i. the claimant was unfairly dismissed by the respondent in terms of section 98 Employment Rights Act. The respondent shall pay to the claimant a monetary award of £2914. The prescribed element is £980 and relates to the period from 20 December 2017 to the 2 March 2018. The monetary award exceeds the prescribed element by £1934; and

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ii. the complaint of breach of contract in respect of the payment of notice was well founded, and the respondent shall pay to the claimant the sum of £1470.

E.T. Z4 (WR)

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 11 April 2018 alleging she had been unfairly dismissed for reasons connected to pregnancy and maternity and that she had not been paid notice pay.

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2. The respondent entered a response denying the claimant had been dismissed and asserting the claimant had failed to make contact with the respondent and had resigned from her employment.

3. The issues for the tribunal to determine are:

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- was the claimant dismissed by the respondent;
- if so, what was the reason for the dismissal;
- was the claimant dismissed for a prescribed reason (pregnancy, childbirth or maternity) in terms of section 99(3) Employment Rights Act;
- was the claimant discriminated against because of the protected characteristic of pregnancy and maternity in terms of section 18(4) Equality Act and
- was the claimant entitled to a payment of notice.

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4. We heard evidence from the claimant and Mr John Robb, Manager of the care home. We were also referred to a jointly produced file of documents.

5. We, on the basis of the evidence before us, made the following material findings of fact.

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Findings of fact

6. The respondent owned and operated a Nursing Home for the elderly.

7. The claimant was employed by the respondent as a Care Worker from the 5 February 2011 until the termination of her employment on the 18 December 2017.

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8. The claimant worked 30 hours per week and regular overtime. She earned £269 gross per week, giving a net weekly take home pay of £245. The claimant was paid on a monthly basis and pay slips were produced at pages 46 – 48.
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9. The claimant became pregnant in 2016 and advised Mr John Robb, Manager, of this. The claimant wrote to Mr Robb on the 17 January 2017 (page 35) to inform him she wished to start her maternity leave on the 3 March 2017 and would take 9 months maternity leave before returning to work in December
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- 2017.
10. The claimant's baby was born on the 20 April 2017.
11. The claimant, in her capacity as a Care Worker, required to be registered with the Scottish Social Services Council (SSSC). The claimant was required to
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- apply for registration prior to commencing employment with the respondent, and thereafter to renew her registration every five years. The process of renewal involved completing an online application and paying a renewal fee. The application is sent to the employer for endorsement.
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12. A document produced from the SSSC website (page 56) noted that employees on maternity leave are usually still under contract with their employer, and therefore need to maintain their registration so they can return to work at the end of their maternity leave. If registration is allowed to lapse,
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- the employee would not be able to return to work until they are registered again (a process which may take up to 60 days to complete).
13. The claimant's registration with the SSSC lapsed whilst she was on maternity leave. Mr Robb, Manager, noted this whilst carrying out an ad-hoc check on
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- employees' registrations.
14. Mr Robb wrote to the claimant on the 15 August 2017 (page 36) noting he had been made aware the claimant had failed to maintain a current registration and that she would be unable to fulfil her role until it had been

obtained. Mr Robb asked the claimant to register immediately and inform him once this had been done.

5 15. The claimant phoned Mr Robb to confirm she had received his letter and would “get on top of it” as soon as she could.

16. The claimant had a new baby and found the issue of registration “went out of” her mind.

10 17. Mr Robb wrote to the claimant again on the 5 September 2017 (page 37) reiterating that even though the claimant was not currently at work, her registration still had to be valid. He asked her not to delay in renewing her registration and to inform him once this had been done.

15 18. The letter was sent by first class post and recorded delivery. Mr Robb received notice that the recorded delivery letter had been returned. The claimant did not receive the letter of the 5 September.

19. The claimant contacted the SSSC on the 20 September and started the online
20 process of applying for registration. This process was not completed.

20. The claimant subsequently contacted the SSSC on the 15 December and completed an application for registration. This application was sent by email, by the SSSC (page 38,) to Mr Robb for endorsement.

25 21. The claimant telephoned Mr Robb on the afternoon of the 18 December to ask if he had received the email from the SSSC regarding her registration. Mr Robb confirmed he had received it. Mr Robb went on to say he had been unable to contact the claimant by phone, and that the letter dated the 5
30 September had been returned. The claimant asked Mr Robb if she still had a job. Mr Robb ignored the question and again made reference to the SSSC and not being able to contact the claimant. The claimant asked again if she was still employed, and Mr Robb said “No”. The claimant understood she had been dismissed and hung up.

22. Mr Robb, during the phone call, referred to a letter having been sent out to the claimant that morning (page 39). The letter informed the claimant that he was unable to verify and confirm her re-registration because she had given him the impression in August that she was going to attend to the registration, but had not done so; the September letter had been returned and he had been unable to contact her by telephone. The letter concluded by stating it was “imperative” that the claimant contact him within 72 hours of receipt of the letter so they could discuss any potential way forward. Further, in the absence of any contact, he would have no choice but to assume the claimant had terminated her employment of her own volition and that she did not intend to return.
23. The claimant received the letter on the 20 December. She was confused and did not know what to think. The claimant did not contact Mr Robb because he had already said she was no longer employed with the respondent.
24. The claimant sent an email to the Administrator (Zeenat) on the 28 December (page 40) stating that on the 18 December Mr Robb had terminated her employment by phone. She noted she was still waiting to receive confirmation of this by post.
25. This email was copied to Mr Robb and a response was sent (page 41) stating that Mr Robb had advised that a letter was posted to the claimant on the 20 December and had been signed for.
26. The claimant sent a further email on the 31 December (page 42) saying she had received the letter dated 18 December, but this was not the letter which confirmed her termination of employment. The claimant also asked for her P45.
27. The claimant received her P45 (page 59). The claimant sent an email to the respondent (page 43) querying why the P45 referred to her employment terminating on the 23 December. The claimant did not receive a response to this email.

28. The claimant obtained alternative employment at the start of March 2018 with Leisure Employment Services as a cleaner. The claimant earned a total sum of £689.13 over a six week period. The claimant resigned from this employment due to childcare difficulties when her parents went on holiday.

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29. The claimant did not apply for any other jobs after she left Leisure Employment Services. The claimant has been in receipt of Income Support and is now on Universal Credit.

10 30. The claimant has applied, and been accepted, for a course at Ayr College studying Business Administration. This course will commence on the 27 August. The College provides childcare.

Credibility and notes on the evidence

15 31. We found the claimant to be a credible and reliable witness. The claimant gave her evidence in a straightforward and honest manner. She accepted she had not applied to renew her registration promptly but put that down to having a new baby. We preferred the claimant's version of the telephone call on the 18 December.

20 32. Mr Robb invited the tribunal to find that on the 18 December, when the claimant telephoned to speak with him, she had asked about the endorsement of the registration and had also asked about her job. Mr Robb had responded that the claimant would lose her job if she did not respond to the letter he had sent. The claimant put the phone down.

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30 33. We preferred the claimant's version of events regarding the phone call on the 18 December. We could not accept Mr Robb's version for three principal reasons. Firstly, Mr Robb, throughout his evidence, told the tribunal that he had attached importance to speaking to the claimant to find out her intentions about returning to work. Mr Robb had an opportunity to speak with the claimant on the 18 December but did not address any of those issues: instead, according to his version of events, he told the claimant she would lose her job if she did not respond to the letter. We could not, in the absence of any

explanation from Mr Robb, understand the difference between talking to the claimant on the phone on the 18 December and talking to her if/when she responded to the letter.

5 34. Secondly, Mr Robb received a copy of the claimant's email of the 28 December (page 40). He knew from that email that the claimant believed he had terminated her employment by phone on the 18 December. Mr Robb took no action to address that matter or correct the claimant's alleged misunderstanding. The only action he took was to refer to the letter dated 18
10 December which had been sent to the claimant.

15 35. Thirdly, Mr Robb accepted he could have contacted the claimant by email (pay slips are emailed to employees each month). Mr Robb's preferred method of contact was in writing. We did not doubt this, but in circumstances where the recorded delivery letter dated 5 September had been returned, and where the claimant did not have a phone, Mr Robb's failure to try to make contact with the claimant by email appeared odd, and this was particularly so, given Mr Robb conducts other business by email.

Claimant's submissions

20 36. Mr Mowat invited the tribunal to accept the claimant's account of the phone call on the 18 December and to find the claimant was dismissed by Mr Robb. The claimant had, by the 18 December, taken active steps regarding a return to work by making an application for registration. Mr Mowat submitted the wording of the letter dated 18 December had been prepared to set up the
25 claimant's employment coming to an end: her phone call on the 18 December had been an inconvenience.

30 37. Mr Mowat submitted Mr Robb's account of events on the 18 December was not credible: he had not tried to contact the claimant by email; he had wanted the claimant to contact him urgently yet when she did, he took no steps to discuss matters. The claimant's action in hanging up was consistent with being told her job had ended. Furthermore, Mr Robb took no action to reply to or clarify the claimant's belief that she had been dismissed.

38. Mr Mowat submitted the claimant's attempts to return to work had not been allowed and therefore the dismissal had been for a reason connected with maternity leave and automatically unfair.

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39. Mr Mowat referred to the case of **Atkins v Coyle Personnel Plc 2008 IRLR 420** where the EAT held the words "connected with" means causally connected with rather than some vaguer, less stringent connection.

10 40. The dismissal was also unfair in terms of section 98 Employment Rights Act because the respondent had offered no reason for it, and had not followed any procedure.

15 41. The claimant had also been discriminated against in terms of section 18(4) Equality Act because she had exercised the right to maternity leave and been dismissed instead of being allowed to return. The dismissal was unfavourable treatment.

20 42. Mr Mowat also referred to the case of **Hair Division Ltd v MacMillan UKEATS/0033/12** where the EAT stated, with regard to cases of alleged sex discrimination where there was a dispute regarding the reason for dismissal, it was essential for the tribunal "to enquire why the employer acted as it did".

25 43. Mr Mowat invited the tribunal to make a clear finding of fact between dismissal and maternity leave because there was an intrinsic link between them in this case.

44. The complaint in respect of notice would also be successful if the tribunal found the claimant had been dismissed.

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45. Mr Mowat noted a schedule of loss had been provided. The calculation for loss of earnings had been calculated up to the 27 August 2018 when the claimant will start her college course. He noted the tribunal would have to consider the issue of mitigation of loss and he invited the tribunal to bear in mind the fact the claimant was a single parent with a new baby.

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46. The schedule of loss included an award for injury to feelings of £8000 which was at the high end of the lower band. Mr Mowat referred the tribunal to the case of **Voith Turbo Ltd v Stowe 2005 IRLR 228** as a helpful authority.

5 **Respondent's submissions**

47. Mr Roberts submitted the claim brought by the claimant was flawed because the claimant had not been dismissed. The claim was based on the reliability of a 3/4 second comment in a phone call on the 18 December, which sought to ignore the documents which had been produced in this case.

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48. The respondent had been supportive of the claimant and encouraged her to renew her registration, but she would not engage with Mr Robb. It was submitted that the claimant's failure to engage and co-operate placed Mr Robb in an impossible position.

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49. The claimant had not been dismissed and accordingly all claims must fail.

50. The claimant had, it was submitted, sought to rewrite the SSSC requirements. She appeared to have started an application in September and ended it in December.

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Discussion and Decision

51. The claimant brings the following claims:-

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- ordinary unfair dismissal (in terms of section 98 Employment Rights Act);
- automatically unfair dismissal (it being said the reason for dismissal was related to pregnancy or maternity in terms of section 99 Employment Rights Act);
- pregnancy/maternity discrimination (in terms of section 18(4) Equality Act);
- dismissal connected with maternity leave (in terms of regulation 20(3)(b) Maternity and Parental Leave Regulations 1999 and

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- breach of contract in respect of the payment of notice.

52. The first issue for this tribunal to determine is the disputed issue of whether the claimant was dismissed by the respondent. The claimant's position is that she was dismissed by Mr Robb during the telephone call on the 18 December. The respondent's position is that the claimant did not respond to the letter sent on the 18 December and accordingly resigned.

53. We noted there was little dispute regarding the background facts leading up to the 18 December. The key facts were:-

- the claimant informed Mr Robb she would commence maternity leave on the 3 March 2017, and that she intended to return to work in December 2017;
- Mr Robb wrote to the claimant on the 15 August to note her registration had not been renewed and urging her to attend to this immediately;
- the claimant telephoned Mr Robb in response to this;
- Mr Robb wrote again on the 5 September but the claimant did not receive this letter;
- the claimant started to do the renewal on the 20 September but did not complete it;
- the claimant made an application to the SSSC on the 15 December and this was sent to Mr Robb the same day to endorse;
- Mr Robb did not endorse the application and
- he drafted a letter to the claimant dated 18 December and sent that morning.

54. Mr Robb, we concluded, was frustrated with the claimant's lack of contact. He received the application for registration on the 15 December, but he had not had any contact with the claimant since August, and did not know when she planned to return to work. Mr Robb accepted it was evident from the fact of the application for registration having been made that the claimant would be

returning to work, but he told the tribunal that he wanted the claimant to contact him before he would endorse the application.

55. We acknowledged the letters sent by Mr Robb on the 15 August and 5
5 September were reasonable and encouraged the claimant to make the application for registration. We also acknowledged that it was reasonable for Mr Robb to adopt the position that he would not endorse the application for registration until the claimant had made contact with him to discuss arrangements for her return to work.
- 10 56. The issue with Mr Robb's credibility was that when the claimant did phone him on the 18 December to enquire about him endorsing the application for registration and to enquire about her job, he did not engage in the very discussion he wished to have with the claimant. Mr Robb had an opportunity
15 to talk to the claimant about when she would return to work, why she had not made the application sooner and the fact there might be a delay in processing the application, but he failed totally to take that opportunity. He instead, when asked by the claimant if she still had a job, said "no". We accepted Mr Mowat's submission that the fact the claimant hung up was consistent with her version
20 of events.
57. Mr Robb received a copy of the claimant's email of the 28 December and he knew from this email that the claimant believed he had terminated her employment during the phone call on the 18 December. Mr Robb took no
25 action to deny this or clarify the situation. Mr Robb was questioned about this during the Hearing and it appeared he had simply been content to rely on the letter of the 18 December notwithstanding the phone call on the 18 December.
58. We preferred the claimant's version of events regarding the phone call on the
30 18 December to that of Mr Robb. We could not accept Mr Robb's evidence because (a) he had an opportunity to speak with the claimant on the 18 December but he did not take it and (b) he took no action to deny dismissal or clarify for the claimant that she had not been dismissed.

59. Mr Mowat suggested the letter of the 18 December had prepared the ground to treat the claimant as having left, and that the phone call on the 18 December had been an inconvenience and that explained why Mr Robb had not engaged in discussion. Mr Robb denied this suggestion, but we considered it accurately described what had happened and why.

60. We, having had regard to all of the points set out above, concluded the claimant was dismissed by Mr Robb on the 18 December 2017 when, in response to her question about still having a job, Mr Robb replied “no”. This was a clear and unambiguous response which the claimant was entitled to accept.

61. We next turned to consider the reason for the dismissal. The claimant argued the reason for dismissal was related to, or connected with, pregnancy and/or maternity. We were referred to the case of **Atkins v Coyle Personnel plc** (above) which involved an employee off on paternity leave who sent an angry email to his boss following being woken up after only three hours sleep. There was subsequently a heated conversation which culminated in the employee being dismissed. The tribunal found the employee had been dismissed during the currency of his paternity leave, but there was no evidence to suggest that the reason for the dismissal was connected with the fact that he had taken paternity leave. The EAT upheld the tribunal’s decision and observed the term “connected with” means causally connected with rather than some vaguer, less stringent connection. It was said “The legislation must be given a wide purposive interpretation and the application of the test must, as on any causation issue, be approached in a pragmatic common-sense fashion on the facts of the individual case.

62. We also had regard to the case of **O’Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School 1997 ICR 33** where the EAT said, with regard to the issue of causation, that the critical question was whether the dismissal was on the grounds of the claimant’s pregnancy, or on some other ground.

63. Mr Mowat invited the tribunal to accept the claimant had taken a period of maternity leave and had wanted to return to work. She had been prevented from doing so and the dismissal and the maternity leave were intrinsically linked. There was no dispute in this case regarding the fact the claimant had been on a period of maternity leave and had informed her employer of her intention to return in December 2017.
64. The issues between Mr Robb and the claimant related to the fact she had not renewed her registration and the fact the claimant had not contacted Mr Robb after her phone call in August. We acknowledged that Mr Robb was in the position of having been told the claimant intended to return to work in December 2017, but he had had no contact from her to confirm this or discuss a date for return and he knew her application for registration had not been made. These matters did not “relate to” and were not “connected with” the fact of the claimant’s pregnancy or maternity leave. We were satisfied there was no causal connection between these matters.
65. We did not consider the fact the claimant was on maternity leave was of itself a sufficient causal connection between the maternity leave and dismissal. The claimant did not suggest she had let her registration lapse because of her pregnancy or maternity leave. Mr Robb asked her to make her application for registration and she told him she would do so.
66. We were entirely satisfied the dismissal of the claimant on the 18 December was caused by Mr Robb’s frustration and anger that the claimant had not contacted him earlier to discuss her return to work and explain why she had not acted earlier to make the application for registration. The dismissal was not related to or connected with the claimant’s pregnancy or maternity leave.
67. We decided, for these reasons, to dismiss the complaints under section 99 Employment Rights Act and regulation 20 Maternity and Parental Leave Regulations.

68. The claimant also argued that she had been discriminated against in terms of section 18(4) Equality Act, which provides that a person discriminates against a woman if, in the protected period in relation to a pregnancy of hers, the person treats the woman unfavourably ... because she has exercised the right to ordinary or additional maternity leave.

69. We decided, for the reasons set out above, to dismiss this complaint because there was no evidence to suggest the claimant had been treated unfavourably (that is, dismissed) because she had exercised the right to ordinary or additional maternity leave. The claimant was dismissed because Mr Robb was angry and frustrated by her lack of contact and her failure to explain why she had not made an application for registration earlier.

70. The claimant also brought a complaint of ordinary unfair dismissal. Section 98 Employment Rights Act sets out how a tribunal should approach the question of whether a dismissal is fair. There are two stages and the first stage is for the employer to show the reason for dismissal, and that it is one of the five potentially fair reasons set out in section 98(1) or (2). The respondent's position was that the claimant was not dismissed. The respondent did not advance an alternative position should the tribunal find the claimant was dismissed. In those circumstances, the respondent has not shown the reason for the dismissal of the claimant. The dismissal is unfair.

71. The claimant also brought a complaint regarding the failure to pay her notice. We have found the claimant was dismissed. The claimant was not paid notice of termination of employment. The claimant is entitled to payment of 6 weeks net pay in respect of notice of termination of employment.

Compensation

72. The claimant is entitled to an award of compensation in respect of the unfair dismissal. There were two issues for the tribunal to consider prior to calculating compensation. The first issue related to mitigation of loss (section 123(4) Employment Rights Act). The claimant took steps to mitigate her losses and accepted alternative employment with Leisure Services Ltd for a

6 week period. The claimant told the tribunal that thereafter she had not applied for any other jobs.

5 73. The claimant was not questioned about the type of work she could do or the availability of jobs. We accordingly had no evidence (or submissions) regarding the issue of mitigation. We decided, having had regard to these points, not to make any reduction to compensation.

10 74. We next considered the issue of contributory conduct. Section 123(6) Employment Rights Act provides that where a tribunal finds the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding. We concluded (above) that Mr Robb dismissed the claimant during the phone call on the 18 December, and
15 that this resulted from his frustration with the claimant because of her lack of contact and not making the application for registration earlier.

20 75. We noted there was no suggestion the claimant was under any duty to keep in contact with Mr Robb during her maternity leave. The claimant commenced maternity leave in March and had her baby in April. The claimant telephoned Mr Robb in response to his letter of the 15 August. We considered the issues in this case started after August, when Mr Robb noted the claimant had not applied for registration and when the letter of the 5 September was returned.

25 76. Mr Robb had no contact with the claimant from August until he received the application from the SSSC on the 15 December to endorse.

30 77. The letter of the 18 December to the claimant (page 39) lists the reasons why Mr Robb was unable to endorse the claimant's application for registration. The reasons were:-

- i. he had written to her in August 2017 urging her to immediately renew her SSSC registration. He pointed out that it was a condition of her employment to maintain her registration

throughout her maternity leave. (Mr Robb accepted in cross examination that in fact there was no reference to registration in the Statement of Terms and Conditions of Employment);

- 5 ii. the claimant had given him the impression in August that she would renew her registration immediately;
- iii. the letter of 5 September had been returned marked undeliverable and Mr Robb could not make contact with the claimant (the telephone number had been disconnected);
- 10 iv. the claimant had originally informed him of her intention to return to work in December, but the lack of communication from her and the fact her registration had expired made this impossible and
- v. he had no choice but to attempt to contact her again by letter.

15 78. We considered the terms of the letter make clear Mr Robb's frustration with the lack of contact by the claimant and her failure to act earlier to renew her registration. We asked ourselves whether the claimant's conduct was blameworthy and whether it had caused or contributed to the dismissal.

20 79. We concluded the conduct was blameworthy because she had intimated to Mr Robb that she intended to return to work in December, but she had let her registration lapse. The claimant would not be able to return to work until she had registered again, and there appeared to be no dispute regarding the fact this process could take up to 60 days. Accordingly, by doing this on the 15
25 December, the claimant could not have returned to work in December and perhaps would not have returned to work until January.

80. The claimant clearly understood she needed to apply for registration again because she started that process on the 20 September, but did not complete
30 it.

81. We have stated above the claimant was not under any duty to keep in contact with Mr Robb. Mr Robb was frustrated with the lack of contact, however this

did not sit comfortably with the fact Mr Robb could have contacted the claimant through email.

5 82. We concluded, having had regard to the above points, that the claimant did, by her inactions, contribute to her dismissal. We decided it would be just and equitable to reduce the compensatory award by 20%.

10 83. A tribunal may also reduce the basic award for contributory conduct (section 122(2) Employment Rights Act). We decided not to reduce the basic award because a reduction has already been made because of the claimant's conduct, and there were no other reasons making it just and equitable to reduce the basic award.

15 84. We next turned to calculate the award of compensation.

85. The claimant is entitled to a basic award of £1614 (being 6 weeks x a week's gross pay of £269).

20 86. The claimant is entitled to a compensatory award. The claimant obtained alternative employment at the beginning of March, for a period of 6 weeks. The claimant left this employment because of childcare issues. We decided the fact the claimant left this employment broke the chain of causation, and accordingly we decided to limit the calculation of compensation to the period from the 18 December to 2 March 2018.

25 87. The claimant has lost earnings in the period from 18 December to 2 March. This is a period of 11 weeks. We must deduct 6 weeks from this for the period of notice which is dealt with below. We accordingly calculate the claimant has lost earnings of £1225 (being 5 weeks x £245 net per week).

30 88. We made an award to the claimant of £400 in respect of the loss of statutory employment rights.

35 89. We decided a reduction of 20% had to be made to the compensatory award, and we calculate this to be £1300 (being £1225 + £400 = £1625).

90. The claimant is awarded a basic award of £1614 and a compensatory award of £1300.

5 91. The claimant's complaint of breach of contract in respect of the payment of notice is well founded. The claimant is entitled to a payment in respect of notice in the sum of £1470 (being 6 weeks x £245 net per week).

10 92. The claimant was in receipt of Income Support from the 20 December 2017, and then transferred to Universal Credit as a continuous claim from 12 July 2018. The Recoupment Regulations will apply and the effect of these Regulations is explained in the attached Notice.

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20 Employment Judge: L Wiseman
Date of Judgment: 23 August 2018
Entered in register: 29 August 2018
and copied to parties

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