RM

EMPLOYMENT TRIBUNALS

Claimant: **Mrs F Jungeling**

Respondent: **Academies Enterprise Trust**

Heard at: **East London Hearing Centre**

On: **20 February 2017**

Before: **Employment Judge Foxwell**

Members: **Mr G Tomey**
Mr ML Wood

Representation

Claimant: Mr K Ali (Counsel)
Respondent: Mr D Faulkner (Solicitor)

JUDGMENT ON REMEDY

The unanimous judgment of the Tribunal is that:-

1. **The Respondent shall pay the Claimant a basic award for unfair dismissal, compensation for unlawful discrimination, statutory interest and an uplift under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 of £34,029.65 for the reasons and as calculated below.**

2. **The Respondent shall pay to the Claimant costs of £1,200.**

3. **The recoupment provisions do not apply.**

REASONS

Introduction

1 This hearing was listed to determine remedy in light of the Tribunal's judgment on liability sent to the parties on 16 December 2016. The hearing had originally been listed

on 3 February 2017 and the parties attended that day. Unfortunately, the Judge was unavailable for personal reasons and the Regional Employment Judge had allocated a different Judge and the same Members to hear the case. The parties had not been notified of this change in advance. The Respondent objected and requested a postponement which was granted on the basis that this hearing could be re-listed before the Tribunal as it was originally constituted within a short while. It is in this context that the hearing was reconvened before the original Tribunal on 8 February 2017.

The hearing and the evidence

2 The Claimant gave evidence-in-chief for the remedy hearing contained in two written statements both dated 8 February 2017; the longer statement deals with most of the Claimant's evidence whereas the shorter one focusses on her claim for loss of a university bursary. Mr Faulkner was able to cross-examine her on these and other matters. The Respondent elected to call no witnesses but had produced documents relevant to remedy which were contained in an agreed bundle, which we considered.

3 Both advocates had the opportunity to make closing submission and they each presented written submissions, which we read, supplementing these orally. We shall deal with the parties' cases below.

4 We asked the advocates to agree the arithmetic of their respect positions which they achieved during the course of the day. In doing so Mr Ali accepted that there had been mathematical errors and some double accounting in the schedule of loss produced by the Claimant.

5 The following matters and figures were agreed or agreed arithmetically:

5.1 Based on the Claimant working a five-day week (which is her case), it is agreed that her weekly pay with the Respondent was £270.57 gross and £223.35 net. It is also agreed that a further reduction of 15% is necessary to these figures to reflect the fact that the Claimant planned to work four days a week from September 2015 to allow her to attend university. This reduction results in a loss of earnings of £189.85 net per week on this basis.

5.2 The Claimant's gross weekly pay based on the Respondent's case is £142.49; this reflects guaranteed hours (3 days) only. The Respondent acknowledges that the Claimant is unlikely to have paid income tax at this level and therefore concedes that this gross figure may also be treated as net.

5.3 It is agreed that the Claimant has lost pension benefits at the rate of £28.29 per week to the date of this hearing but that there is no future loss under this head.

5.4 The value of lost health insurance cover is agreed at £1,134 to the date of this hearing and £567 in respect of future loss.

5.5 Subject to proof of causation, it is agreed that the net value of the Claimant's claim for loss of earnings from a Thursday after-school and youth club is £2,198.63 to the date of hearing and from the Discovery Holiday Club is £851.93. Based on these figures we calculate future loss over 26 weeks as £1,525.28.

5.6 Claims for general expenses and loss of statutory rights incurred up to the date of this hearing are agreed in the sums of £50 and £350 respectively. Future expenses have been agreed at £100.

5.7 The value of a university bursary is agreed at £2,000 subject to causation.

5.8 It is agreed that 61 weeks passed between the date of dismissal and the remedy hearing and that future losses should be calculated over 26 weeks.

5.9 There is no dispute that the Claimant was aged 50 at the date of dismissal (date of birth 17 April 1965) and had 9 full years' service.

6 The points of dispute between the parties are as follows:

6.1 Should the multiplicand for weekly loss of earnings be based on the Claimant's guaranteed hours, three days a week, or reflect the fact that she regularly worked five days a week? This issue also affects the calculation of the basic award for unfair dismissal.

6.2 Should the Claimant's claims include loss of earnings from the after-school and holiday clubs (these are only claimed from the date of dismissal)?

6.3 Has the Claimant taken reasonable steps to mitigate her losses?

6.4 Is loss of the university bursary recoverable?

6.5 What is the correct level of compensation for injury to feelings and is an award or separate award for aggravated damages appropriate?

6.6 What credit should the Claimant give for current earnings against her claims for past and future loss of earnings?

6.7 Should interest be awarded on past loss?

6.8 Should future loss be discounted for accelerated receipt?

6.9 What uplift should be applied under Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 to the compensation awarded (what we shall call *"the ACAS uplift"*) for the Respondent's failure to comply with the relevant ACAS Codes of Practice?

7 We have reminded ourselves that we must reduce parts of our calculation of the Claimant's losses by 10% to take account of our assessment of the chance that she would have resigned even if the Respondent had not behaved unlawfully ("the *Polkey* reduction").

8 We have also reminded ourselves that the purpose of compensation is compensatory and not punitive and that compensation for injury to feelings must bear some relationship to the level and nature of the unlawful treatment to which the Claimant was subjected, notwithstanding the wider principle that a tortfeasor must take its victim as it finds her.

The parties' cases and the Tribunal's findings

9 Before we turn to our findings on the specific issues we should state that, in general terms, we found the Claimant's evidence to be both credible and reliable.

The multiplicand for loss of earnings

10 The Claimant's evidence, which we accept, is that she had two contracts of employment with the Respondent. The principal one was a permanent contract under which she was engaged to work three days a week. She had been employed under this for about nine years. Her second contract provided for her to work on a supply basis as required; it was not clear when she entered into this but our impression was that it was some years before her dismissal. Her rate of pay under this second contract was different to that for her permanent hours; we understand it was higher but we did not receive specific evidence on the rates.

11 The Claimant told us that in practical terms she worked two days a week on a supply basis every week bringing her hours to full-time and that she and Mr Jackson Owens agreed to this arrangement at the beginning of each academic year. Under cross-examination the Claimant accepted that she had not referred to this in the witness statements she had prepared for the remedy hearing but nevertheless we accept her account. We note, however, that at paragraph 4 of her longer statement dated 8 February 2017 the Claimant said that she intended to work three days a week from September 2015; this was because she hoped to attend university on a part-time basis. At paragraph 9 of the same statement she refers to only being allowed one day off each week to attend university by her current employer. We think that this has led to some confusion in the evidence. In our judgment the Claimant's loss of earnings must be calculated on the basis that she would have worked three days a week from September 2015 as explained at paragraph 4 of her statement.

12 It follows that we find that the multiplicand for past and future loss of earnings should be based on pay for three days a week which is agreed in the net sum of £142.49.

13 We turn then to the basic award for unfair dismissal which is contingent on the statutory concept of a week's pay. The Respondent's case is that this should reflect basic hours only and not work under the supply contract. We agree with this submission on the facts of this case for the following reasons. Firstly, we find that the Claimant worked under two contracts: the principal contract had normal working hours of three days a week but

the second supply contract did not have normal working hours but was for a contract for the Claimant to work as required. In practice she had been required to work on a supply basis two days a week bringing her working week up to five days. Nevertheless, in our judgment the second contract was one under which remuneration varied according to the time of work. In these circumstances we are required to take an average of the hours worked under the supply contract in the 12 weeks before the calculation date which in this case is the date of dismissal, 9 December 2015 (see Section 222 of Employment Rights Act 1996). The Claimant has not established on the evidence that she earned anything under the supply contract in this period; indeed, one of her complaints has been that she only received three days' pay each week after she went off sick in October 2015. In these circumstances we find that the multiplicand for the basic award for unfair dismissal is based on the principal contract only at the rate of £142.49 per week.

The Clubs

14 The Respondent's case is that no compensation is payable for loss of earnings arising from the Claimant working in after-school and holiday clubs associated with the School. It contends that the opportunity to do this work was at the discretion of the club organisers and that evidence received at the liability hearing shows that the organiser of the holiday club had chosen not to ask the Claimant to work shifts over the summer of 2015 for reasons unconnected with the unlawful treatment established in this case (see paragraph 90 of our Reasons for the liability judgment). There is no evidence to suggest that the Claimant's work at the Thursday after-school club reduced.

15 We find on the balance of probabilities that, had the Claimant remained employed, she would have continued to work in the Thursday after-school clubs (which included a youth club) and in the holiday club. We find that these opportunities ended simply because her connection with the School came to an end and that, therefore, they are a consequence of her dismissal. In reaching this conclusion we have borne in mind our finding in respect of bookings for the holiday club in summer 2015 but we accept the Claimant's evidence that her replacement, a relative of the organiser, proved unreliable such that the Claimant was called in to cover frequently during 2015, often at short notice. The Claimant has been helping with such clubs for four or five years before her dismissal and in these circumstances there is every reason to believe that this would have continued but for her dismissal. Accordingly, we find that loss of earnings arising from the work in the clubs is recoverable on a past and future basis.

Failure to mitigate

16 The Claimant found alternative work, albeit on an agency basis, as a Support Worker for people with learning disabilities which started on 7 January 2016, so within a matter of weeks of her dismissal. She has since accepted a permanent contract with her new employer. The Respondent has nevertheless argued that the Claimant could have found more lucrative work and more quickly than she did. The Respondent produced examples of jobs which it said she could have applied for. When these were put to the Claimant in cross-examination she explained that these jobs were generally of a lower status and not as well remunerated as her current post. We accept her evidence. She also said that she required employment which would enable her to continue her studies at university and she was concerned too that she was unlikely to get a good reference from the Respondent because of the events which led to her dismissal. These were factors

which influenced her decision to take a permanent contract with her new employer

17 On closer examination of the comparators the Respondent put to the Claimant it became clear to us that they were no more favourable than the Claimant's present post and in a number of cases were inferior in terms of status or location. We find, therefore, that the Respondent has not established that the Claimant failed to take reasonable steps to mitigate her loss. We go further than that, we are sure that the Claimant did take reasonable steps.

The university bursary

18 The Claimant's evidence, which we accept, is that she was prevented from completing assessments necessary to qualify for university entry because she was moved from the College to the School Campus before the end of the 2015 summer term. She told us that she had to make special arrangements during the school holidays to secure her place on the course. We noted that one of the matters she raised at the time of the disciplinary process was its likely effect on her plan to attend university, a plan which was well known to her managers having been agreed with them.

19 The Claimant's evidence was that she qualified for, and would have received a bursary of £2,000 provided she met the entry requirements for university by the cut off date of 31 July 2015. Furthermore, she told us that she would have met this requirement had she remained on the College Campus where she could undertake the necessary assessments working with older children. The Respondent's treatment of her in moving her to the School Campus meant that she missed the 31 July deadline because she could no longer undertake the assessments by this date. We accept this evidence. We find that the Claimant lost the university bursary because of the Respondent's unlawful discrimination.

20 As this loss predates dismissal and is independent of it (although we are sure it contributed to her decision to resign) it is not subject to the 10% *Polkey* reduction which applies to other aspects of our awards.

Compensation for injury to feelings/aggravated damages

21 The Respondent argued that compensation for injury to feelings should be modest (£1,500) as the treatment the Claimant was subjected to was well-intentioned, not heavy handed and, at worst, simply clumsy. In contrast the Claimant argued that she was affected profoundly by her treatment which exacerbated her health conditions.

22 We note that the Claimant chose to resign because of her treatment after nine years' service. We agree with Mr Ali that the Claimant's treatment falls within the middle of the *Vento* bands as up-dated by subsequent decisions.

23 In our judgment, the Claimant's treatment was not a one-off but involved a number of stages including a humiliating transfer from one Campus to another. Ms Bellard adopted a high-handed approach in the disciplinary process by providing an outcome before hearing any explanation from the Claimant and in the terms of her response to the Claimant's letter of appeal to the governors. We accept the Claimant's evidence that this

treatment exacerbated her psychological condition, although no specific medical evidence of the degree of this has been provided.

24 Taking all of these factors into account we assess compensation under this head at £16,000. This includes an element of aggravated damages for high-handed conduct which, had we assessed it separately, would have been valued at £2,000.

25 This head of compensation results from the Respondent's unlawful discrimination alone and is not the subject of a *Polkey* reduction.

Actual earnings to the date of the remedy hearing and future actual earnings

26 The Claimant's schedule of loss gives a figure of £8,119.95 for net loss of earnings to the remedy hearing but the corresponding footnote says that the actual total is £8,407.16 based on one year's worth of payslips. This is also the figure in the counter-schedule of loss and we therefore adopt it in respect of past loss. We accept that it covers the period to the remedy hearing because the Claimant had to work a month in hand.

27 We also find that this figure is the most reliable indication of the Claimant's likely future earnings over the next 26 weeks. We have therefore taken half of it, £4,203.58, as the Claimant's likely earnings in the period of future loss.

Interest and a discount for accelerated receipt

28 We see no reason not to award interest at the prescribed rate (8%) under the Employment Tribunals (Interest on Awards and Discrimination Cases) Regulations 1996. This applies to all of our awards apart from the basic award for unfair dismissal as we have chosen to compensate the Claimant under the Equality Act 2010 rather than the Employment Rights Act 1996. For ease of calculation we have awarded interest at half rate over the period of past loss with the exception of compensation for injury to feelings and the loss of the university bursary. Again for ease of calculation we have awarded full rate on both of these losses from the date of dismissal. The parties may, if they choose, submit more exact calculations provided that they are agreed and the workings fully-explained.

29 We decline to discount future loss for accelerated receipt as requested by the Respondent as any such reduction would be *de minimis*.

The ACAS uplift

30 The Respondent accepts that an ACAS uplift is likely but argues that this should be no more than 15%. The Claimant asks for the maximum of 25%. The Respondent's case is based on an assertion that the Respondent omissions were minor and well-intentioned. We do not agree with this part of the Respondent's submissions but do agree with Mr Faulkner when he says that the highest uplifts should be reserved for the most serious cases and that this one does not quite meet that level. Nevertheless, in our judgment the Claimant was made subject to a final written warning without any opportunity to put her case and with no express right of appeal. Aspects of the process were dealt with in a high handed manner as explained above and in our decision on liability. Bearing

these factors in mind we find that the correct level of the ACAS uplift in this case is 20%. By operation of law this does not apply to the basic award for unfair dismissal.

Costs

31 The Claimant has paid issue and hearing fees amounting to £1,200. We order the Respondent to pay this to her by way of costs. This amount is not subject to interest or the uplift referred to above nor is it subject to the *Polkey* reduction.

The Arithmetic

32 In light of the findings set out above we calculate compensation as follows:

Basic award for unfair dismissal

32.1	*9 x 1.5 x £142.49*	= £ 1,923.62
32.2	*Less 10%, £192.36*	= **£ 1,731.26**

Past losses:

32.3	*Earnings: 61 x £142.49*	= £ 8,691.89
32.4	*Pension: 61 x £28.29*	= £ 1,725.69
32.5	*Health insurance:*	= £ 1,134.00
32.6	*After-school clubs:*	= £ 2,198.63
32.7	*Discovery holiday club:*	= £ 851.93
32.8	*Expenses:*	= £ 50.00
32.9	*Loss of statutory rights:*	= £ 350.00
32.10	Sub-total:	= £15,002.14
32.11	*Less 10%, £1,500.21*	= £13,501.93
32.12	*Bursary:*	= £ 2,000.00
32.13	Sub-total:	= £15,501.93

Less:

32.14	*Actual earnings to date:*	= £ 8,407.16

32.15 *Actual pension to date:* = £ 897.89

32.16 Total of past losses: **= £ 6,196.88**

Future loss

32.17 *Loss of earnings: 26 x £142.49* = £ 3,704.74

32.18 *Health insurance:* = £ 567.00

32.19 *Loss of income from clubs* = £ 1,525.28

32.20 *Expenses:* = £ 100.00

32.21 Sub-total = £ 5,897.02

Less:

32.22 *10% Polkey reduction* = £ 589.70

32.23 *Actual earnings* = £ 4,203.58

32.24 Total future loss: **= £ 1,103.74**

33 ***Interest*** We have assessed compensation for injury to feelings and aggravated damages ("general damages") at £16,000. Interest runs on this and on our award for the loss of a bursary, £2,000 (which is not subject to a *Polkey* reduction), from the date of dismissal (this results in a slight credit for the Respondent which we judge to be *de minimis*):

Calculation: (£18,000 x 8%)/52 x 61 **= £1,689.23**

34 We have assessed interest on past loss at half-rate, 4%, for ease of calculation. We have excluded the basic award and the university bursary from this:

Calculation: ((£6,196.88 - £2,000) x 4%)/52 x 61 = £196.93

35 ***The ACAS uplift:*** We have taken the following awards into account in calculating the ACAS uplift:

35.1 Past loss: = £ 7,928.13

35.2 Future loss: = £ 1,103.74

35.3 General damages = £16,000.00

35.4 Interest = £ 1,886.16

35.5 Total: **= £26,918.03**

Calculation: £26,918.03 x 20% **= £5,383.61**

36 ***Grossing up*** The total of our awards, including the basic award and the ACAS uplift, is £34,032.90. This takes the Claimant above the tax free limit of £30,000 and, therefore, £4,032.90 of this award will be subject to tax and National Insurance as part of the Claimant's current income. To address this, we make an additional award of £1,728 based on an estimated statutory deductions rate of 30%; we have had to estimate as the parties did not provide or agree figures on this.

Summary of awards

37 For the reasons given above we make the following awards:

37.1 Basic award: = £ 1,731.26

37.2 Past loss: = £ 6,196.88

37.3 Future loss: = £ 1,103.74

37.4 General damages = £16,000.00

37.5 Interest = £ 1,886.16

37.6 ACAS uplift = £ 5,383.61

37.7 Grossing up = £ 1,728.00

Grand total: = **£34,029.65**

38 In addition, we Order the Respondent to pay the Claimant costs of £1,200.

Recoupment

39 The Claimant did not receive State benefits in the prescribed period so the recoupment provisions do not apply. In any event we have chosen to award compensation under the Equality Act 2010 rather than the Employment Rights Act 1996 with the exception of the basic award from unfair dismissal.

Employment Judge Foxwell

8 March 2017