6065/76

Case No: 1810462/2010

EMPLOYMENT TRIBUNALS

Claimant:	**Mrs EA Whitham**		
Respondent:	**Club 24 Limited t/a Ventura**		
Heard at:	**Leeds**	**On:**	**24 May 2011**
Before:	**Employment Judge Colin Grazin**		
Members:	**Mr DC Dowse** **Mr G Corbett**		

Representation

Claimant:	Mr O Cashman, Solicitor
Respondent:	Mrs Russell, Solicitor

JUDGMENT

1. The Claimant's complaint that she was unfairly dismissed by the Respondent **SUCCEEDS**.

2. The Respondent do pay to the Claimant a Basic Award in the sum of £1,800.00.

3. The Respondent do pay to the Claimant a Compensatory Award in the sum of £12,740.00.

4. The provisions of the Employment Protection (Recoupment of Jobseekers' Allowance & Income Support) Regulations 1996 ('the Regulations') apply to this Award.

5. The following particulars are provided to the parties pursuant to the provisions of the Regulations:-

   5.1 Grand Total of Award - £14,540.00.

   5.2 Prescribed Element - £6,146.40.

5.3 The period of the Prescribed Element - 22 September 2010 to 24 May 2011.

5.4 Excess of Grand Total over Prescribed Element - £8,393.60.

6. The parties are referred to the Annex to this Award which sets out the respective rights and obligations of the parties pursuant to the Regulations. The amount of the Prescribed Element is payable to the Claimant by the Respondent immediately following service of a Recoupment Notice to be served upon the Respondent by the Department of Work & Pensions.

7. There is no award in respect of the claim for breach of contract.

REASONS

1. This is a complaint of unfair dismissal. The Claimant was employed by the Respondent as a Team Leader at the Respondent's premises at Leeds Valley Park at Stourton, Leeds, between 14 May 2007 and 23 September 2010, when she dismissed in the circumstances set out in detail below.

2. The particular work in which the Claimant was employed was as Team Leader for Skoda Customer Services. Skoda is part of the Volkswagen group. The Volkswagen group is an important client of the Respondent. The Claimant's team dealt with customer complaints and requests for contribution towards replacement parts outside warranty. Because the work involved technical input, representatives of Volkswagen/Skoda worked in the same premises, both on a permanent and part-time basis. Such was the involvement of Volkswagen (VW) that the Claimant's own Line Manager, Ian Walsh (an Operational Support Manager within the VW Unit) reported to one Steven Hough, Contact Centre Manager, but who was actually an employee of VW, rather than the Respondent. The Claimant herself was responsible for management of eight team members. Those were Service Advisors dealing with calls from the public.

3. The Claimant began her employment in May 2007. In 2009, after two years service, of which there is no evidence of any complaint, she was promoted to a Team Leader. She worked as Team Leader for Skoda Group from that date. The Claimant's evidence, which was not challenged, was that she an exemplary employee with a clean disciplinary record throughout this period. Only one minor matter was brought to our attention; namely an informal discussion with Mr Walsh in week commencing 6 September 2010. There had been a minor difference of opinion with a member of the Claimant's team, a Mr Singh. He had objected to the Claimant talking to her with her arms folded. It was not felt that the Claimant had done anything wrong, but, with a view to avoiding further difficulties, the Claimant was informally advised as to

her body language. We do not regard this as a material factor which the Respondent could properly take into account in deciding upon any future disciplinary penalty.

4. This dispute arises out of a matter which occurred entirely outside work; albeit both parties accept that it relates to the Claimant's employment. In common with many other members of the population, the Claimant subscribes to the Facebook social network site. She has a number of 'friends' (totaling around 50) and she has arranged the settings on her Facebook profile so that each of her friends can see whatever messages she posts upon the site on a daily basis. No other member of the public or other Facebook subscribers can see those matters.

5. On 14 September 2010, the Claimant, having apparently had a difficult day at work, posted a comment

> "I think I work in a nursery and I do not mean working with plants".

The first response was from one Angela Flynn, one of the Claimant's team members. Neither of the parties thought that Ms Flynn's comment was particularly relevant. Immediately afterwards, the Claimant posted a comment:-

> "Don't worry, takes a lot for the bastards to grind me down. LOL [laugh out loud]".

During subsequent disciplinary proceedings, it was accepted by the dismissing officer (but not by the appeal officer) that that comment did not relate to the Claimant's workplace, but to her personal circumstances. One Liz Graham, a former team member, but no longer a Ventura employee, responded

> "Ya, work with a lot of planks though!!! LOL".

The Claimant responded

> "2 true xx".

There were a number of other comments from other Ventura employees, two of whom were the Claimant's team members.

6. It is quite clear that the Claimant believed that she was doing nothing wrong, in that she was sending these messages to her friends outside working hours, albeit she accepts that, at least in part, they relate to her work. There is a specific reference to her work in the first such message.

7. Matters came to the attention of the Respondent's management because two of the Claimant's colleagues, both Managers, and both of whom are Facebook 'friends', saw the messages. Both of them reported the circumstances to Mr Walsh and, in due course, both confirmed their concern as to the nature of the messages in e-mails sent to him. The two informants were Victoria Penrose,

a Communications Executive, and Kate Masters, a Ventura Planning Manager. Mr Walsh eventually saw the comments on Facebook. He believed they were unacceptable and spoke to Mr Hough.

8. It is an unfortunate feature of this case that we know nothing directly of Mr Hough's views. We know that Mr Walsh told Mr Hough that he was to commence a disciplinary investigation, but we do not know whether Mr Hough expressed any view on behalf of VW as to whether this conduct did or did not have any adverse affect upon the relationship between the two companies. The only evidence we have on that issue is the hearsay evidence of Forrest Leishman, an Operations Support Manager for the Respondent, who dealt with the disciplinary hearing. He received information, from his Line Manager, that Mr Hough was concerned as to the future employment of the Claimant. Against that, the Claimant told us that Mr Hough had a good working relationship with her (and vice versa) and that she had no reason to believe that Mr Hough would take any serious view of these matters. Had the Respondent troubled to obtain a formal statement from Mr Hough, there would not have been this substantial element of doubt on an important issue.

9. In any event, having told Mr Hough of his intentions, Mr Walsh then completed his investigation. In practice, there was little to investigate. The Claimant never disputed that she had posted the comments. The Claimant was suspended. We mention that factor only because there was a subsequent allegation (withdrawn on appeal) that the Claimant had somehow violated the terms of her suspension by communicating the fact of it to third parties. It is clear, as the appeal officer, Sian Davies, properly accepted, that the Claimant was not in fact given any such instruction, so that it is hardly surprising that she told her colleagues that she was suspended from work. Even if she had been given such an instruction, there was no reason for the Claimant not to tell those parties, if only because of the transport arrangements between them. The fact that the Claimant was treated in that manner in respect of an entirely unjustified allegation is perhaps some evidence of the Respondent's approach to this whole issue.

10. The Respondent relied strongly upon the fact that the Claimant's profile within Facebook indicated that she was an employee of Skoda UK. Apart from that being inaccurate (the Claimant is, of course, actually employed by the Respondent), the Claimant properly made the point that that information on her homepage is not necessarily seen by a person looking at the latest posting that day. It is apparent, as indicated above, that Mr Walsh was seriously concerned that there could be a detrimental effect upon the relationship between the Respondent and VW, but his investigation did not extend to finding out whether that was actually the case. The entirety of the Respondent's case on this point was potential impact.

11. Once the matter was explained to her by Mr Walsh, the Claimant immediately accepted that her conduct was not perhaps the most appropriate in all of the circumstances. Mr Walsh, nonetheless, took the view that formal disciplinary proceedings were appropriate. Those covered not only the Facebook comments, but the alleged breach of the terms of the suspension.

12. Mr Walsh decided that no action was necessary in respect of the other employees who had posted responses to the Claimant's comment. His explanations on that issue deal with the different roles of these persons; their respective seniority; and the important factor that the Claimant had initiated this discussion on Facebook. We accept that Mr Walsh was entitled to draw those distinctions and that disciplinary action against other parties was not appropriate.

13. The disciplinary hearing was dealt with by Mr Leishman. He considered the various documents which Mr Walsh had prepared, including a detailed note of the investigation meetings on 15 and 16 September 2010 and, importantly, a letter of apology from the Claimant, which is extremely contrite. It can properly be described as 'grovelling'. The Claimant's explanation to Mr Leishman was that this was an off-the-cuff remark and that she now understood the impact of her comments retrospectively. She understood the seriousness of her actions and she was aware that these comments would be seen not only by Ventura employees, but potentially by VW employees, if they were 'friends'. We are quite unable to see why the Respondent treated that last issue as such an important factor. The Claimant was not in any manner complaining about VW as such, but about her working conditions and/or the persons with whom she was working.

14. Mr Leishman clearly concluded, on his own evidence, that, pursuant to alleged concerns on the part of Mr Hough, there was extreme embarrassment to the Respondent. The Claimant's comments, he concluded, put the Respondent's reputation at risk and could have been detrimental to the relationship with Volkswagen. In evidence to the Tribunal, he went further. There was a choice to be made between the relationship with VW and the continued employment of the Claimant. If there was any risk of losing the former, then the Claimant had to go. We have concluded that the Claimant was, in effect, a sacrificial lamb, in circumstances where there was no proper evidence whatsoever before Mr Leishman that VW and, in particular, Mr Hough, believed these matters to be as serious as Mr Leishman concluded. Whilst we cannot rule out the possibility, it would seem to us that it would be a very strange world in which a company the size of Volkswagen, working with a company the size of the Respondent, would terminate an important commercial agreement of that sort because of a number of relatively mild comments made by a relatively junior employee of the Respondent and which do not, in any manner, directly refer to VW in any event.

15. Mr Leishman took into account the contents of various policy documents issued by the Respondent. We were taken to a number of those. Within the Employee Handbook under the heading of 'Confidentiality', there appear three restrictions, which deal with disclosure of information to third parties. It does not seem to us that the Claimant's comments come within those three proscriptions at all. Under the heading 'E-mail and Internet Use' and after setting out restrictions on the use of such systems, there appears the following:-

> 'You should also remember that your obligation of confidentiality extends outside of the workplace and that posting information about

> your job on the internet (for example, on social networking sites such as Facebook and MySpace) may lead to disciplinary proceedings and/or dismissal'.

16. Whilst we accept that there is here a reference to the use of Facebook, it seems to us that the conduct which the Respondent seeks to prevent is a breach of confidence. This is not a case where the Claimant has used Facebook to provide confidential information to third parties or other employees. We do not accept that the type of information which the Claimant provided properly can be treated as a breach of confidence.

17. We were also asked to consider two other parts of the Respondent's documentation. The Claimant's contract provides that the 'disciplinary rules' are set out in the Employee Handbook, but the 'disciplinary procedure' does not form part of the contract of employment. We were unable to find any definition of either of those terms. That is material because Mrs Russell subsequently argued that paragraph 10.0 of the Disciplinary Policy (which may or may not form part of the disciplinary rules or disciplinary procedure) was non-contractual. She did, however, argue that paragraph 9.7 which deals with summary dismissal for gross misconduct, and paragraph 12 containing examples of disciplinary offences and headed 'Summary Dismissal Gross Misconduct' were contractual. We are quite unable to understand the basis for that argument. Either the whole of the Disciplinary Policy is non-contractual or the whole of it is contractual.

18. The point is important because of the position adopted by the Respondent as to whether it could or could not demote the Claimant. The relevant provision at paragraph 10.0 of the Disciplinary Policy, under the heading 'Alternative Sanction' reads:-

> 'The company may, at its discretion and depending on the individual circumstances of the case, consider imposing a further sanction in addition to a written warning (or as an alternative sanction to dismissal) which may result in a reduction in pay such as unpaid suspension **and demotion'** (our emphasis).

19. At first glance, therefore, it would appear that a dismissing officer and/or an appeal officer has the option of demoting an employee as an alternative to any dismissal. The Respondent's case on this Hearing was that that was not possible because the employment contract did not provide for it. We are quite unable to see how it can properly be argued that there is a contractual right to dismiss within paragraphs 9.7 and 12.0 of the Disciplinary Policy, but no contractual right to demote within paragraph 10.0 under the heading 'Alternative Sanctions'.

20. The letter convening the disciplinary hearing, which was provided to Mr Leishman, alleged gross misconduct 'relating to conduct and confidentiality'. It then set out the information provided by Ms Penrose and Ms Masters and the potential impact on the Respondent of such comments. Mr Leishman had the benefit of the investigation notes and might well have understood the nature of the alleged breach of confidence. The Claimant herself did not

understand the alleged breach of confidence and asked Mr Leishman to explain it. She was somewhat surprised that he could not do so and that he needed to consult with Mr Walsh to determine the nature of the alleged breach of confidentiality.

21. Notwithstanding Mr Leishman's unfortunate attempt to deny the point in evidence, it is clear from his own notes of the disciplinary hearing that he regarded the alleged breach of the terms of the suspension as the 'main issue'. He decided that the Claimant should be summarily dismissed. On this hearing, Mr Leishman was, of course, aware that his colleague, Ms Davies, had decided on the appeal that there was no merit in the alleged breach of suspension allegation. Unsurprisingly, he nonetheless maintained that dismissal was the appropriate sanction for the one offence of breach of confidence in relation to the Facebook entries.

22. The Claimant appealed pursuant to the Respondent's policy. Ms Davies heard the appeal. She properly and relatively quickly accepted the Claimant's argument that she had not been told that she was not to breach the terms of the suspension by communicating with third parties. There was simply no evidence upon which Mr Leishman could properly have reached that conclusion, as Ms Davies accepted.

23. Ms Davies had the benefit of HR advice. The Respondent produced, pursuant to its duty of disclosure, a record of call logs between the various Managers on the one hand and its HR staff on the other. Two entries are of particular importance in that regard. On 13 October 2010, in preparation for the appeal, Ms Davies spoke to one 'Catherine'. The note made by Catherine is somewhat lengthy, but we need only record Ms Davies' apparent view (from which she did not resile during this Hearing) that her view of the dismissed hearing and of comments made on 13 October was that:-

> 'They concentrated too much on the breach of suspension rather than the inappropriate messages left on Facebook. Message on Facebook wasn't too horrendous, a warning would have been possible rather than dismissal (message on Facebook reported to Unit by Kate Masters and Victoria Penrose). In disciplinary, she mentioned she is on anti-depressants, but this isn't explored [the Claimant] feels dismissal was pre-empted. Feels she has been dismissed to be made an example of. SD heard that client may have pushed for a dismissal'.

24. On 20 October 2010, the day prior to the appeal hearing, Ms Davies spoke to another HR employee, one Charlotte. Ms Davies had already identified the error in the suspension allegation. After a relatively lengthy discussion between Ms Davies and Charlotte as to factors which should properly be taken into account, (but which, surprisingly, includes direct reference to the client, VW) Ms Davies was properly advised to consider whether the same action would have taken if the issues as to suspension had not been discussed and the medical issues and relationship issues had been noted. Charlotte then:

> 'suggested that re the medical issues, were these causing her to act differently and therefore should we have looked at different options to dismissal; eg demotion/redeployment etc'.

25. Clearly, as at 20 October 2010, the Respondent's HR advice was that demotion was a possibility and something which the appeal officer, Ms Davies, could properly consider as an option upon the hearing of the appeal the following day.

26. On 21 October 2010, Ms Davies again spoke to Charlotte. The Claimant had asked for reinstatement and understood the need to be a good role model. Ms Davies needed to consider whether the comments noted on Facebook still warranted dismissal. Those were discussed. The note continues:-

> 'SD agreed that if we cannot demote within Ventura as the contract does not provide for this, then she cannot come back as a Team Leader and certainly not into VW. Therefore only option to uphold decision'.

27. Ms Davies' evidence was quite clear. She would have demoted the Claimant had she been told she had the power to do so. She was told that there was no contractual power within the contract with the Claimant and accordingly, since the Claimant could not remain as a Team Leader or, in her opinion, continue to work on the VW contract, dismissal was the only option. For that reason, and notwithstanding that the appeal was allowed as to the suspension allegation, the appeal was dismissed as to the sanction and the Claimant's dismissal stood.

28. It was suggested to Ms Davies and to Mrs Russell that, whether or not the demotion provision was contractual, there was no reason whatsoever why the Respondent could not put to the Claimant the alternative of demotion as against dismissal. The parties could then have agreed that change in the Claimant's status would operate, whether or not there had been a prior contractual arrangement to that effect. Mrs Russell suggested briefly that that might amount to a potential ground for claiming constructive dismissal, but it seems to us that the Respondent would have an argument that it had an entirely proper reason for taking the action it did. In any event, if the Claimant agreed demotion, as an alternative to dismissal, the possibility of any other claim would be minimal. Ms Davies was quite unable to explain how it was that demotion was an option in discussions with Charlotte on 20 October, but was not an option by 21 October.

29. Those are the relevant facts of this matter. At the commencement of the Hearing, it seemed to us that the only specific issue within the general Section 98(4) test of reasonableness was whether dismissal was within the band of reasonable responses as a reasonable sanction by reference to the Claimant's conduct. As the Hearing progressed, it became clear that there were other issues including, of course, the reasonableness of the investigation, (including, specifically, the failure to contact Mr Hough) and whether the Respondent properly understood its own disciplinary process and/or applied it fairly.

We deal with each of those matters in our conclusions below.

30. As to the relevant law, we read Mrs Russell's submission which included reference to the various cases dealing with alleged inconsistency of treatment and culminating in the decision in **Paul –v- East Surrey District Health Authority** [1995] IRLR 305. In the light of the decision in that and earlier cases, we accept her submission that a Tribunal should not seek to decide a complaint of unfair dismissal by reference to a comparison with other employees, unless the circumstances are totally similar. We accept that there were here sufficient distinctions for the Respondent's different treatment. Otherwise, we were referred to the well-known authorities on the band of reasonable responses.

31. We are required, of course, to consider the reason for the dismissal (the burden of proof being on the Respondent) and to consider whether the Respondent acted reasonably in treating that reason as a sufficient reason in all of the circumstances (as to which the burden is neutral).

32. As to the former, we did, at one time, consider whether the real reason for the dismissal might have been third party pressure which could properly be classified as some other substantial reason. Upon further consideration, it does not seem to us that that was the case. On the contrary, there is no sufficient evidence of any actual third party pressure or even any third party view. Both Mr Leishman and Ms Davies seem to have been concerned as to the potential for such an approach. Ms Davies accepted that. one month after the Facebook posting, when she heard the appeal, there had been no approach whatsoever from VW to express its concern or otherwise. Nonetheless, she remained concerned as to the potential for such an approach. We accept from the Respondent that the reason for the dismissal was that it believed that the Claimant was guilty of misconduct. That, of course, is an admissible reason within Section 98 Employment Rights Act 1996.

33. As to the reasonableness of the decision, we have already indicated that there are a number of factors which have caused us considerable concern. In any misconduct dismissal, it is, of course, important that there be a reasonable investigation. In the light of the substantial reliance placed upon the relationship between the Respondent and VW (in the person of Mr Hough), the failure to obtain any specific views of Mr Hough was entirely unreasonable. Moreover, whatever views were attributed to Mr Hough through an intermediate Line Manager, none of that was disclosed to the Claimant, who had no information whatsoever as to Mr Hough's views either way. Had that been disclosed to the Claimant, it is at least possible that she might have indicated the relationship she had with Mr Hough as explained to us. She may well have suggested a direct approach to Mr Hough, either through Mr Walsh or personally. We consider that the Respondent unreasonably relied upon a view for which there was no proper evidence.

34. There was a marked distinction between the evidence of Mr Leishman and Ms Davies as to the relevance of the 'bastards grind them down' comment. Mr Leishman accepted this was not work-related. Ms Davies did not do so. Had there been any proper enquiry on her part, she would undoubtedly have reached the same conclusion as Mr Leishman, that this was not in any manner work-related, but was personal. Alternatively, Mr Leishman should properly have set out his decision on that point, so that his views were clear to any appeal officer and to the Claimant.

35. The Respondent entirely failed properly to understand its own disciplinary procedures, rules and policy. Apart from a lack of certainty as to which of those terms properly applies to any particular document, the Respondent argued (as set out above) the inclusion or otherwise of certain provisions as contractual or non-contractual. That position is entirely unsustainable.

36. There was, further, a complete lack of certainty on the part of the Respondent's witnesses as to which of the examples of disciplinary offences at paragraph 12.0 of the policy applied. At various times during the Hearing, we were told that the Claimant's conduct amounted to 'serious breach of any company or client rules and standards'; alternatively 'any willful misconduct which is harmful to the maintenance of discipline or good conduct amongst employees of the company; alternatively 'bringing the company into disrepute'.

37. The alleged serious breach of the company rules and standards was that referred to at paragraph 15 above; namely the alleged obligation of confidentiality in relation to the use of Facebook. We do not consider that the Respondent acted reasonably in relation to these matters. Any reasonable employer would have identified a specific example within the catalogue of disciplinary offences, if reliance was to be placed on one of them. It is not reasonable conduct to rely upon these different examples from time-to-time during the course of the process.

38. Ms Davies was asked on numerous occasions to explain how it was that her initial view of the comments as was "not too horrendous" then changed over a period of a week to conduct which was 'sufficiently serious as to amount to [on her classification] any willful misconduct .....' She was entirely unable to offer any proper explanation as to her change of view.

39. Perhaps the most serious element of the Respondent's unreasonable approach to this entire matter is its attitude to demotion. It is quite clear, on the evidence, that, if Ms Davies believed that she had that option, she would have demoted and the Claimant would not have been dismissed. It is equally clear that the Claimant would have accepted demotion (whether or not there was any contractual provision in the relevant contract), as an alternative to dismissal. We heard no evidence from any representative of the HR Department as to why demotion was considered appropriate on 20 October, but inappropriate on 21 October. We heard no evidence from Ms Davies as to why she accepted that change of position. She simply did so because that was the advice she received. Whether Ms Davies and/or Charlotte are individually at fault is not a decision for this Tribunal. The Respondent, as a

corporate body, clearly acted entirely unreasonably in failing to allow the Claimant the option of demotion, in circumstances where the appeal officer clearly thought that was the appropriate result of the appeal. The Respondent's policy at paragraph 10.0 allows for demotion and there is no reason whatsoever why that option should not have been offered to the Claimant.

40. Finally, we are bound to consider, absent all of the above factors, whether the decision that the Claimant should be dismissed was a reasonable sanction in all of the circumstances. We are aware, of course, that we are not to substitute our own decision for that of the employer. We have not done so. We do, however, consider that the decision that the Claimant should be dismissed, even if all of the earlier factors were not present, and bearing in mind the factors below, was outside the band of reasonable responses open to a reasonable employer of this size and with these administrative resources. We say that for the following reasons. Firstly, the Claimant had an exemplary record, save for the very minor discussion some days earlier. On her evidence, she had a very good working relationship with her customer. Secondly, she had certain personal problems relating to the anniversary of her son's death, a potential concern as to the fidelity of her husband and was taking anti-depressants. All of those amount to strong mitigating circumstances. Thirdly, the language she used did not specifically refer to the client nor was there any evidence that the client suffered any embarrassment or that there was any likelihood of actual harm to the relationship between the two companies. Fourthly, once the Claimant was told of the error of her ways, she immediately apologised and produced the written apology referred to above. All of those, as Ms Davies accepted in her discussions with HR, were strong mitigating factors.

41. Applying all of those factors and weighing them in the balance against the relatively minor nature of the comments made by the Claimant (as Ms Davies herself initially accepted), the decision that the Claimant should be dismissed was outside the band of reasonable responses. If, as we are bound to do, we then add in each of the individual factors referred to in paragraphs 33/39 above, there can be no doubt but that the Respondent acted unreasonably pursuant to the statutory criteria and that the Claimant was accordingly unfairly dismissed.

42. We then dealt with issues as to remedy. The Respondent argued that there had been a failure to mitigate. This was an unusual case, in that both parties presented the Tribunal with a very substantial bundle of evidence of applications for employment on the one hand (from the Claimant) and other material evidence of the number of positions for which the Claimant could have applied (from the Respondent). We are grateful to both parties for their detailed preparation on an issue which is often ignored.

43. We accept from the Claimant and Mr Cashman that the Claimant applied for a total of 101 positions. She obtained two interviews for similar work, but was rejected. In the end, she settled for a position as a checkout operator at Iceland Frozen Foods. That is hardly a comparable position. The Claimant's reasoning is that she was and is required to disclose to potential employers

that she was dismissed for gross misconduct. She had no option but to do so. The Respondent failed to provide a reference because it does not do so when there is a gross misconduct dismissal. That is understandable, but the consequence to the Claimant is that she could not obtain any work of a similar nature to that she enjoyed with the Respondent.

44. All of that is, of course, the consequence of the Respondent dismissing the Claimant for gross misconduct. Where that occurs and no reference is provided, it is not open to a Respondent to argue that there has been a failure to mitigate. The obvious cause of the Claimant's inability to obtain work is the reason for the dismissal. The Claimant should not therefore suffer any loss by reason of the entirely unreasonable decision of the Respondent.

45. The parties did, however, accept the suggestion of the Tribunal that there must here be an element of contribution on the part of the Claimant. Clearly, her conduct was blameworthy and culpable, as she herself accepted. The Tribunal suggested to both Solicitors that the appropriate reduction was one of 20% and both agreed. The calculation below is made upon that basis.

46. The only other issue for decision by the Tribunal was the length of the period for future loss of employment. The Claimant believes that she will now have a somewhat easier task, on the basis that she was unfairly dismissed, but she can only work in a relatively small geographical area and it may be some time before similar employment can be obtained. Doing the best we can on the evidence available, we take the view that the proper period of future loss of employment is one of nine months from today.

47. The Basic Award was agreed between the parties in the sum of £1,800.00. The Claimant was dismissed on 23 September 2010, eight months before this Hearing on 24 May 2011. The Claimant was paid monthly. The calculation is made monthly. Loss of earnings to date at the rate of £1,200.00 per month net amounts to £9,600.00. The Tribunal is required to deduct earnings in new employment totaling £1,800.00 and an overpayment of £117.00 producing a loss before any reduction for contribution of £7,683.00. That is reduced by 20% to provide for an Award for loss of earnings to date of £6,146.40, which is also the Prescribed Element.

48. The difference in earnings between the Claimant's employment with the Respondent and her present employment is £888.00 per month. We award that sum for a period of nine months; namely £7,992.00. There is an award of £250.00 for loss of statutory industrial rights. Those figures total £8,242.00, but there is a deduction of 20%, producing a net award of the Non-Prescribed Element of £6,593.60. It follows that the total of the Compensatory Award is £12,740.00.

49. As agreed with Mr Cashman, there is no award in respect of the claim for damages for breach of contract (loss of notice pay) because that is subsumed within the Compensatory Award above.

Employment Judge Colin Grazin

JUDGMENT SENT TO THE PARTIES ON

03 JUNE 2011

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): 1810462/2010

Name of case(s): **Mrs EA Whitham v Club 24 Ltd T/A Ventura**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding discrimination or equal pay awards or sums representing costs or expenses), shall carry interest where the sum remains unpaid on a day ("*the calculation day*") 42 days after the day ("*the relevant judgment day*") that the document containing the tribunal's judgment is recorded as having been sent to the parties.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant judgment day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is:	03 June 2011
"the calculation day" is:	15 July 2011
"the stipulated rate of interest" is:	8% per annum

For and on Behalf of the Secretary of the Tribunals

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, which you received with your copy of the Tribunal's judgment.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding discrimination or equal pay awards* or sums representing costs or expenses) if they remain wholly or partly unpaid after 42 days.

3. The 42 days run from the date on which the Tribunal's judgment is recorded as having been sent to the parties and is known as "the relevant judgment day". The date from which interest starts to accrue is the day immediately following the expiry of the 42 days period called "the calculation day". The dates of both the relevant judgment day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request a reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.

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* The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 prescribes the provisions for interest on awards made in discrimination and equal pay cases.

Claimant **Mrs EA Whitham**

Respondent **Club 24 Ltd T/A Ventura**

ANNEX TO THE JUDGMENT (MONETARY AWARDS)

Recoupment of Jobseeker's Allowance, income-related Employment and Support Allowance and Income Support

The following particulars are given pursuant to the Employment Protection (Recoupment of Jobseekers Allowance and Income Support) Regulations 1996, SI 1996 No 2349, Reg 4, SI 2010 No 2429 Reg 5.

The Tribunal has awarded compensation to the claimant, but not all of it should be paid immediately. This is because the Secretary of State has the right to recover (recoup) any Jobseeker's Allowance, income-related Employment Support Allowance or Income Support paid to the claimant after dismissal. This will be done by way of a Recoupment Notice, which will be sent to the respondent usually within 21 days after the Tribunal's judgment was sent to the parties.

The Tribunal's judgment states: (a) the total monetary award made to the claimant; (b) an amount called the prescribed element, if any; (c) the dates of the period to which the prescribed element is attributable; and (d) the amount, if any, by which the monetary award exceeds the prescribed element. Only the prescribed element is affected by the Recoupment Notice and that part of the Tribunal's award should not be paid until the Recoupment Notice has been received.

The difference between the monetary award and the prescribed element is payable by the respondent to the claimant immediately.

When the Secretary of State sends the Recoupment Notice, the respondent must pay the amount specified in the Recoupment Notice to the Secretary of State. This amount can never be more than the prescribed element of any monetary award. If the amount is less than the prescribed element, the respondent must pay the balance to the claimant. If the Secretary of State informs the respondent that it is not intended to issue a Recoupment Notice, the respondent must immediately pay the whole of the prescribed element to the claimant.

The claimant will receive a copy of the Recoupment Notice from the Secretary of State. If the claimant disputes the amount in the Recoupment Notice, the claimant must inform the Secretary of State in writing within 21 days. The Tribunal has no power to resolve such disputes, which must be resolved directly between the claimant and the Secretary of State.