EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110196/19 (V)

Hearing held on the 19th April 2021 on the CVP/Kinly platform

Employment Judge Porter

Mrs L Lawson	**Claimant** **Represented by:** **Mr Wells, solicitor**
New Horizons Borders	**Respondents** **Represented by:** **Mr Chehal, Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the judgment of the Tribunal that the claimant was unfairly dismissed. The Tribunal orders the respondents to make payment to the claimant in the sum of £6552 (SIX THOUSAND FIVE HUNDRED AND FIFTY TWO POUNDS) basic award; £32,760 (THIRTY TWO THOUSAND SEVEN HUNDRED AND SIXTY POUNDS) compensatory award (loss of wages); and £625 (SIX HUNDRED AND TWENTY FIVE POUNDS) compensatory award (loss of statutory rights). A 25% uplift has been applied to the compensatory awards made to the claimant under s207A TULRA (C) 1992. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply. The monetary award in this case is £39,937. The prescribed element is £32,760. The prescribed period is 15th August 2019

to 19th April 2021. The monetary award exceeds the prescribed element by £7117.

REASONS

Introduction

1. The claimant was employed by the respondents as a Service Manager between the 1st of November 2009 and the 18th of June 2019 when she was dismissed on the grounds of gross misconduct. In these proceedings the clamant brings claims of unfair dismissal, notice pay and failure to provide a written statement of reasons for her dismissal.

2. The claimant's claims are resisted and the case was set down for a full Hearing on the Merits for 5 days commencing Monday 19th April 2021. In the course of the morning of the 19th April 2021 liability was conceded by the respondents and the case concluded in the afternoon of the 19th April 2021.

3. In advance of the Hearing on the Merits the parties intimated a Joint Bundle of Productions which was numbered **1- 662** and was referred to in the course of the Hearing.

4. The respondents were unable to lead evidence from their key witnesses Nicola Glendinning, Stephen Eggie and Louise Hogg on health grounds. By letter of 7th April 2021 the respondents' representatives applied to have evidence accepted from these witnesses by way of written statements only. After considering written objections from the claimant's representative this application was refused on the 12th April 2021 by the sitting Employment Judge. The application was refused on the basis that the evidence of these witnesses could not be tested by cross examination, and in these circumstances it was inconsistent with the overriding objective and the need to ensure parties are on an equal footing to allow the same.

5. In terms of a further communication of the 12th April 2021 the respondents' representative asked that the prejudice to the respondents in disallowing these witnesses to give evidence by statements be noted by the Tribunal. At the outset of the Hearing on the Merits this issue was revisited and Mr Chehal then acknowledged that such witness statements, had they been allowed, would have added little evidentiary value to the respondents' case in the absence of the witnesses themselves.

6. In these circumstances, and given that liability was conceded, the Tribunal heard only from James Skinley, IT consultant as a witness for the respondents together with the claimant herself.

7. In advance of submissions Mr Wells submitted that the claimant claims compensation in respect of unfair dismissal only. Mr Wells restricted the compensation to 1 year's salary only in view of the statutory cap that is applicable to any award made.

8. In advance of the Hearing on the Merits the parties agreed a Joint Statement of Facts. The Joint Statement of Facts is replicated below as matters then agreed are relevant to the issue of remedy.

Joint Statement of Facts

(i) The claimant was employed from 1st November 2009 until her employment was terminated on 18th June 2019. She was employed as a Service Manager.

(ii) The claimant raised two separate grievances against her employer, the terms of which are at page **(154**-**156)** and (**265**-**266**) of the bundle.

(iii) The outcomes to the grievances can be seen at pages (**226**-**238**) and (**267** -**268**), with the outcome of the appeal at (**438** – **501**)

(iv) The claimant was subject to a disciplinary investigation and the initial finding, which was confirmed at the disciplinary hearing on 8th May 2019, was that no action or finding was to be taken against her.

(v) The claimant was due to return to work on 20th May 2019 as a result, and also to go through a period of mediation to try and assist her in her return to work.

(vi) By letter dated 16th May the claimant was suspended for a second time.

(vii) By letter of 13th June 2019 the respondent confirmed that the claimant had been verbally informed by the board that no disciplinary issues were being upheld against her at the aforementioned disciplinary meeting.

(viii) The claimant was then not called to a separate disciplinary hearing before being dismissed by letter of 18th June 2019.

(ix) The claimant appealed against the decision to dismiss her by letter of 21st June 2019, within that letter the claimant asked the respondent provide her with answers as to how they'd come to the conclusion that trust and confidence had been lost and also requested that they provide detail as to what led them to the decision to dismiss her despite the initial findings on the 8th May 2019.

(x) At the Appeal Hearing on 12th July 2019 the claimant provided the respondent with her own minutes (page **539** of the bundle) of the disciplinary hearing and a letter dated 31st May from KPMG (page **637** of the bundle).

(xi) The claimant received the outcome of the dismissal appeal dated the 12th of July 2019.

9. In addition to the agreed facts, the Tribunal made the undernoted essential Findings in Fact from the evidence presented at the Hearing.

Findings in Fact

10. The claimant's letter of dismissal was dated 18th June 2019 and is to be found at **528-529** of the Bundle. That letter stated : *"After consideration and consultation the Board have decided that as you were the manager responsible for this small local charity, run by members and volunteers for all aspects of New Horizons Borders that they have 'agreed' they cannot give you the same benefit of the 'Doubt' or risk your continued employment, having lost all trust and confidence in your management of New Horizons Borders. Also, as a separate issue is your long term absences for which you have been in receipt of generous sick pay in excess of your contractual entitlement. Where the Trustees have again lost all trust and confidence that you can sustain regular and stable attendance for this pivotable role of manager. You are therefore dismissed for 'Gross Misconduct' with immediate effect."*

11. By letter of 21st June 2019 the claimant appealed the decision to dismiss her. The letter of appeal was detailed in its terms and in that letter the claimant asked for additional information on the reasons for her dismissal **(530-535)**. The letter of appeal contained the statement: *"I think it is necessary that the Board provide me with the answers as to how they have come to the conclusion that they have lost trust and confidence in my management of New Horizons Borders as to date no evidence has been produced to discredit my professionalism. I feel that it is necessary for the board to detail what has led them to this decision after being exonerated on the 8th May only to be suspended again by letter of 16th May citing 'fresh grievances' and I require to know what these grievances are and to be given an opportunity to address them. As far as I am aware, no investigation has taken place for these 'Fresh Grievances' and no attempt has been made to obtain my position on the same to date."* **(532-533)**

12. The claimant's Appeal against her dismissal took place on the 8th July 2019 at the premises of the respondents. The Appeal Hearing was chaired by Mike Scott. The Notes of that Appeal are to be found at **554-556.** The Tribunal noted

that the in the course of the Appeal the claimant again asked the respondents what the gross misconduct was that she was dismissed for. At p**554-555** it is recorded: *" Laura asks what the gross misconduct is, Mike went onto state that there are several charges to the gross misconduct, Mike went to state that Laura is fully aware of them. Laura went through the dismissal letter and states that it mentions Dubiety, KPMG, Sickness'. Mike stated that this is correct. Laura states that she was exonerated for these at her disciplinary hearing. Mike also stated that the main part of it was that the charity had lost confidence in Laura, because of everything that was in the original suspension hearing. Laura states that she was exonerated of all charges. Mike went onto state that the board looked at it again after that decision and found that the evidence did not match. Laura stated that she has never seen any fresh evidence of this from New Horizons Borders."* (**555**)

13. Against that background the Tribunal accepted the evidence of the claimant that she was not able to argue her appeal as, as at the date of appeal, she remained unclear as to the basis for her dismissal. To this end, the Tribunal found the failure of the respondents to articulate the basis for the claimant's dismissal to be unreasonable.

14. The claimant's Appeal was dismissed by letter of the 12th July 2019 **(549)**. That letter stated:*" Having considered grounds of appeal and grievances submitted 21st June 2019, the Trustees have decided that no issues were identified to change the reasoning and outcome outlined in the letter of dismissal dated 18th June 2019."*

15. The Tribunal accepted the evidence of the claimant that she has worked in mental health in the Scottish Borders for a significant number of years and that the mental health sector in the Scottish Borders comprises a small community. The Tribunal accepted the evidence of the claimant that her dismissal for gross misconduct by the respondents was widely known and, as she put it, 'well discussed' within the Mental Health Sector in the Scottish Borders.

16. The Tribunal accepted the claimant's evidence that this impacted on her ability to secure further employment in the mental health sector. An example of this was her application to for the post of DBI Practitioner in the Scottish Borders **(661)**. The Tribunal accepted the evidence of the claimant that, whilst she was successful in securing an interview for this post, she was questioned at interview as to why she was dismissed from her previous position due to gross misconduct. She was ultimately unsuccessful in her application for this post.

17. In the absence of contradiction, the Tribunal accepted the claimant's evidence that, as a generality, it is difficult to secure full time employment within the Scottish Borders.

18. At all material times the claimant has acted and continues to act as a carer for her husband who suffers from a severely compromised immune system. As such the claimant's husband required to shield during the first lockdown in 2020, as did the claimant as his carer. The Tribunal accepted the evidence of the claimant that both the fact of the lockdown and the requirement to shield impacted on her search for employment and that this affected her ability to obtain employment from March 2020.

19. The claimant gave uncontested evidence that during the period June 2019-June 2020 she did not have access to a car.

20. The Tribunal accepted the claimant's evidence that had she still been in the employment of the respondents at the time of the first lockdown she could have carried out her job remotely.

21. Since the date of her dismissal the claimant has applied for 6 jobs in total, including her application to become a DBI Practitioner. She also registered for 'Indeed', an online recruitment agency. The jobs applied for by the claimant are listed at **658**. She was unsuccessful in her application for these positions.

22. The claimant gave evidence in chief and was tested under cross examination as to why she had applied for only 6 jobs. The Tribunal accepted the claimant's

explanation for the amount of her job applications and found in fact that the reasons for this were: (i) the requirement to work locally within the Scottish Borders due to the fact that she is also her husband's carer, coupled with her lack of access to a car in the period June 2019-June 2020; (ii) the lack of employment opportunities in the Mental Health sector and generally within the Scottish Borders (to this end the Tribunal noted that the claimant had applied to work in Telesales in a Call Centre but had no acknowledgement of her application); (iii) the fact that the claimant's dismissal for gross misconduct was widely known within the Mental Health sector in which she has experience; and (iv) the pandemic in March 2020 and the requirement for the claimant to shield as her husband is categorised as a vulnerable person.

23. Prior to her dismissal, the claimant earned £504 per week gross, £400.38 per week net. She earned £26,208 per year gross.

24. The claimant and her husband have been in receipt of Universal Credit since the 15th August 2019 **(642-655)**.

25. In October 2020 the claimant commenced part time studies for a social psychology degree. As at the date of the Tribunal, the claimant continues these studies.

Observations on the Evidence

26. The Tribunal considered that James Skinley was a credible witnesses. James Skinley fairly said in evidence that he could not conclude that the claimant had been responsible for the failures and breaches outlined in his correspondence to the respondents be found at **153** and at **334**.

27. The Tribunal considered that the claimant was also a credible and reliable witness. She was candid in her explanation of the difficulties in which she found herself in attempting to secure alternative employment in the Scottish Borders following her dismissal, such difficulties being only exacerbated by the pandemic and her husband's health. It was put to the claimant on a number of

occasions by Mr Chehal that homeworking jobs were available during the pandemic; however, without specific examples of such homeworking jobs it was impossible for the Tribunal to conclude and find in fact that the claimant had acted unreasonably in not applying for the same.

28. The Tribunal observed that no evidence was led from the respondents that could lead the Tribunal to consider that there was a chance that the claimant would have been dismissed in any event. Accordingly no findings in fact were made by the Tribunal which could lead to a deduction in compensation in terms of **Polkey v AE Dayton Services Ltd (1987 IRLR 50(HL)).**

29. The Tribunal also observed that no evidence was led from the respondents that could have led to a deduction in respect of contributory conduct in terms of **s122**(**2**) of the Employment Rights Act 1996 ("ERA 1996") and **s123**(**6**) of the ERA 1996.

30. To this end the Tribunal observed that the 'high water mark' of the respondents' evidence in respect of deductions in terms of **Polkey** or contributory conduct was the evidence of James Skinley who fairly said that he could not conclude that the claimant had been responsible for the failures and breaches outlined in his correspondence to the respondents to be found at **153** and **334**.

The Law

31. It is a fundamental principle that any claimant will be expected to mitigate the losses they suffer. The claimant is expected to take reasonable steps to minimise the losses suffered as a consequence of the unlawful act. The burden of proving a failure to mitigate is on the respondents **(Fyfe v Scientific Furnishing Ltd (1989) IRLR 331).** It is insufficient for the respondents merely to show that the claimant failed to take a step that it was reasonable for them to take: rather, the respondents have to prove that the claimant acted unreasonably. If the claimant has failed to take a reasonable step, the

respondents have to show that any such failure was unreasonable **(Wright v Silverline Car Caledonia Ltd UKEATS/0008/16)**.

32. The question of reasonableness is to be determined by the Tribunal itself, with the claimant's wishes and views simply one of the factors in its analysis. Tribunals are encouraged not to apply too demanding a standard of the claimant.

Submissions

33. In advance of submissions both parties undertook to advise their parties of the terms of the Employment Protection (Recoupment of Benefits) Regulations 1996 SI 1996 given that evidence had been heard that the claimant is in receipt of Universal Credit.

The parties provided a summary of their submissions in their own words, which are replicated below:

Submissions for the claimant (in her representative's own words)

Following the concession of liability by the respondent, we are now only focused on remedy.

The claimant's Schedule of Loss includes a claim for a Basic Award of £6552, plus a Compensatory Award capped at 1 years' gross salary of £26,208 – both to be increased by way of a 25% uplift due to a failure to follow the Acas Code of Practice Total sum being £40,950).

What is clear from the joint statement of facts, and the claimant's evidence, is that at the disciplinary hearing that took place – the claimant was advised no action was being taken against her, and steps were taken to get her back to work following mediation.

All the claimant received after that point regarding what was to happen next before being dismissed, was a letter confirming she was suspended again, which hints that

something had changed the minds of the respondent. That letter does not set out what is suggested in para 60 of the respondent's further and better particulars.

That, I would submit, is simply not good enough, and the decision to dismiss here without giving her a fair opportunity to address any issues that had come to light, if indeed there were any, rendered the decision to dismiss her as unfair on a procedural level at least.

I would also suggest that this is something that should have been clear to both the respondent, and their representative, prior to the start of this hearing.

Further, this amounts to a breach of the Acas Code of Practice with regard to :

- The failure to give the claimant an opportunity to put their case in response before any decision was made (section 4).
- The failure to provide sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting (section 9)

The respondent then compounded the situation, by refusing to engage in a meaningful manner with the claimant during her appeal hearing – despite fair notice of what the claimant's appeal was based upon.

In these circumstances, I would submit that there should be an uplift of 25% on any award made by the Tribunal in favour of the claimant.

With regards to remedy, the claimant's Schedule of Loss sets out her losses, with the Compensatory Award now being in excess of 12 months gross salary.

I would submit that there can be no reduction for contributory fault or POLKEY in this case, given my previous comments on a lack of evidence from the respondent, but I would also ask the Tribunal to note that even without witnesses, the respondent has failed to provide any documentary evidence which suggests what information came to light after the disciplinary hearing, nor why it was viewed as being sufficient to (a) terminate the claimant's employment and (b) do so without given her the opportunity to contest that view. As such, this is not case where any chance of the claimant being dismissed anyway can be found. As the claimant said under cross-examination, she had addressed all of the issues put to her.

I would also submit there has been a lack of evidence produced to show that the claimant did not do enough to seek alternative employment, and the onus is on the respondent to provide this, if they want to argue this point.

The claimant under cross examination explained what jobs she had looked for, the difficulties she faced due to location, her lack of access to a vehicle, and just as importantly, the difficulties caused by the finding of gross misconduct she had received.

Whilst I appreciate the respondent can put to the claimant that she had not done enough to look for work, that is all that has been suggested – with no evidence of jobs she could have applied for being produced.

If you are not with me on this line, then I would submit that the Claimant should get the Basic Award in full, and at a minimum her 9 weeks statutory notice pay, before any limitations are placed on any award on the basis of mitigation, or lack thereof.

However, I accept that this is ultimately a matter for the Tribunal to consider.

Submissions for the respondents (in their representative's own words)

The Respondent will argue that the Claimant has failed to mitigate her losses fully.

She has given evidence that apart from applying a telesales marketing job, she had only applied for jobs within the mental health sector and restricted within the geographical area of Scottish Borders both pre and during the lockdown.

She has admitted that she only applied for one job per month and on indeed. She also admitted that she only looked for jobs on indeed. She also said that she had not registered herself with any recruitment agencies.

She had said that she had not applied for any supermarket jobs because these jobs were beneath her skill set.

The lock down was imposed in March 2020 and there is very limited evidence in the bundle to suggest that the Claimant has been proactively seeking alternative employment.

Respondent will argue that many employers have moved towards partial or even complete remote working. Therefore, the Respondent will argue that the Claimant should cast her net far more widely in geographical terms when looking for a new position than when office-based working was more prevalent and therefore potentially limited the area where the employee could reasonably be expected to look for work.

The Respondent will also argue that the Claimant should have broaden the type of roles she was applying for rather than restricting them to mental health sector.

Respondent will also argue that the Claimant's reason for not being able to find a suitable job due to her gross misconduct dismissal is not plausible as this is not a criminal conviction that would bar her form getting another job either within the mental health sector or elsewhere and most potential employers don't tend to ask if the employer had had any disciplinary unless it is a regulatory body.

With regards to uplift, the Respondent will say that had they followed the correct procedure, then there is a possibility that the Claimant would have been dismissed and therefore there should be contributory factor in deciding the remedy.

With regards to uplift, the Respondent will argue that the uplift should be zero % because the Respondent did conduct a dismissal appeal to address the relevant points raised by the Claimant.

Respondent will argue Polkey, that had a correct procedure been applied there is a possibility that the claimant would have been dismissed.

Respondent will also invite the tribunal to take into account that the Respondent had conceded to liability on the onset without the need of a full trial.

DISCUSSION AND DECISION

34. The only matter which the Tribunal had to decide in this case is the issue of remedy, liability having been conceded.

35. In assessing remedy, the Tribunal had regard to their observations that no evidence was led by the respondents that could lead them to conclude that there should be any deductions on the basis of either the principles within **Polkey** or contributory conduct.

Basic Award

36. The Tribunal calculated the basic award due to the claimant in the sum of **£6552** after having regard to the claimant's weekly wage and 9 years' service with the respondents.

Compensatory Award

37. The claimant claims a year's salary by way of compensatory award. In determining the compensatory award due to the claimant the Tribunal had regard to the respondents' submissions on the claimant's failure to mitigate her loss. To this end the respondents argued that the claimant failed to mitigate her loss in that she has only applied for 6 jobs to date; and that the claimant should have expanded her search both geographically and in terms of the roles she was prepared to undertake.

38. The Tribunal gave careful consideration to the arguments made by the respondents. In their consideration of such arguments the Tribunal had regard

to the fact that the burden of proof is on the respondents in demonstrating that the claimant has failed to mitigate her loss, and that the respondents have to demonstrate that the claimant acted unreasonably.

39. After hearing her evidence the Tribunal concluded that the claimant was a reliable and credible witness. The Tribunal concluded that the reasons for the fact that the claimant had applied for only 6 jobs were: (i) the requirement to work locally within the Scottish Borders due to the fact that she is her husband's carer, coupled with her lack of access to a car during June 2019-June 2020; (ii) the lack of employment opportunities generally within the Scottish Borders and particularly within the Mental Health Sector; (iii) the fact that the claimant's dismissal for gross misconduct was widely known within the Mental Health Sector in the Scottish Borders in which she has many years' experience; and (iv) the pandemic in March 2020 and the fact that the claimant was required to shield as her husband is categorised as a vulnerable person.

40. Against that background the Tribunal concluded that it could not be said that the claimant acted unreasonably in her attempts to mitigate her loss and accordingly the respondents have not discharged the onus of proof on them in establishing failure to mitigate loss.

41. In these circumstances and given these findings, the Tribunal awards a year's gross salary in the sum of **£26,208** to the claimant.

42. The Tribunal also awards the claimant the sum of **£500** as a further compensatory award in respect of loss of statutory rights as the claimant had 9 years' full service with the respondents.

Acas Uplift

43. The claimant seeks a 25% uplift to her basic and compensatory awards under **s207A** of the **Trade Union & Labour Relations** (**Consolidation**) **Act 1992** on the basis that the respondents failed to fulfil the requirements of the ACAS Code of Conduct. To this end the respondents state that no uplift should be

made as there is a possibility that the claimant would have been dismissed and in any event the respondents did conduct a dismissal appeal.

44. The Tribunal noted firstly that **s124A ERA 1996** limits any uplift to compensatory awards only.

45. The Tribunal concluded that the respondents had produced no evidence to suggest that the claimant would have been dismissed in any event. Insofar as the dismissal appeal was concerned, the Tribunal found that the claimant was not able to argue her the appeal as she remained unclear on the basis for her dismissal.

46. The ACAS Code of Practice (2015) provides:

> *"4.3(4) ...whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:*
> *Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made."*

47. The Tribunal observed that it is a matter of agreement (being contained within the Joint Statement of Facts) that the claimant was not called to a separate disciplinary hearing before being dismissed by letter of 18th June 2019. The Tribunal further finds that the claimant was argue her case on Appeal as she remained unaware of the charges leading to her dismissal.

48. The ACAS Code of Practice (2015) further provides:

> *"9 Inform the employee of the problem*
> *If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee*

to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification."

49. It is a matter of agreement that the claimant was not provided with the 'notification' specified in section 9 prior to dismissal. The Tribunal further finds that such notification was not provided to the claimant either before or during her Appeal.

50. In these circumstances it is the decision of the Tribunal to allow a 25% uplift in respect of the awards made to the claimant as compensatory awards. The Tribunal reaches this decision on the basis that the claimant was dismissed after no procedure whatsoever being followed; and that the Appeal against dismissal was conducted with the claimant being unaware of the charges levelled against her. Accordingly the Tribunal awards the claimant the sum of **£32760** for loss of wages and **£625** in respect of loss of statutory rights.

51. It is the judgment of this Tribunal therefore that the claimant was unfairly dismissed; and that the claimant be awarded the sum of **£6552** basic award ; and **£32,760** (loss of wages) and **£625** (loss of statutory rights) as compensatory awards.

Employment Judge: Jane Porter
Date of Judgment: 22 April 2021
Entered in register: 01 May 2021
and copied to parties