



## EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 4101445/2019**

**Remedies Hearing held by CVP on 15 October 2021**

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**Employment Judge I McFtridge  
Tribunal Member K Culloch  
Tribunal Member S Cardownie**

**Mrs D Aitken**

**Claimant  
In person**

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**Fife Council**

**Respondent  
Represented by:  
Mr B Nichol,  
Solicitor**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The respondent shall pay to the claimant a monetary award of Twenty Nine Thousand Five Hundred and Fifty Eight Pounds and Ten Pence (£29,558.10) as compensation for unfair dismissal. The prescribed element is Ten Thousand Two Hundred and Fifty One Pounds and Sixty Three Pence (£10,251.63). The monetary award exceeds the prescribed element by Nineteen Thousand Three Hundred and Six Pounds and Forty Seven Pence (£19,306.47).

### **REASONS**

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1. Following a hearing held on 19, 23 and 26 September 2019 the Tribunal issued a judgment on 13 November 2019 to the effect that the claimant's claims of unfair dismissal, automatically unfair dismissal and disability discrimination succeeded and ordered that the issue of remedy be dealt E.T. Z4 (WR)

with at a later date. Following the issuing of that judgment the respondent appealed to the EAT and on 30 August 2021 the EAT issued a judgment to the effect that the finding of unfair dismissal remained however the claims of automatically unfair dismissal under section 103A of the Employment Rights Act and disability discrimination failed. Accordingly, the matter came back before the present Tribunal for a remedies hearing which took place on 15 October 2021 by CVP. At the commencement of the hearing the respondent's representative confirmed that the respondent did not contend that the claimant had failed in her duty to mitigate her losses. Accordingly, the claimant indicated that she did not feel that she required to lead any additional evidence to that which had been led at the earlier hearing. Both parties then proceeded to make full submissions.

### **Claimant's submissions**

2. The claimant relied on the Schedule of Loss which she had produced for the hearing. It was her position that she was entitled to a basic award based on 14 complete years' service during 11 of which she had been over the age of 41 and considered that her week's pay amounted to £413 per week gross. She indicated that this was based on her full time earnings. It was her position that the basic award and the compensatory award should both be based on her full time earnings. She accepted the findings made by the Tribunal to the effect that the claimant had agreed with her supervisor that following her return to work after the holidays she was to be going on to part time hours. It was her position however that there had been no actual change to her contract ever made and her contractual hours remained full time hours and that her entitlement to compensation should be based on this. With regard to the compensatory award she noted that up until the date of this hearing she had 36 months' wage loss. She calculated this at the rate of her full time net earnings of £1266.04 per month giving a total of £45,577.44. She accepted that she had received various state benefits amounting in total to £5021.17 over this period. She indicated that she believed she was entitled to pension loss but did not provide a calculation of this. She did lodge a document (document C) which showed the latest calculation of the amount of pension she is currently entitled to from her period of employment with the

Council. With regard to future losses it was her belief that she would not be able to find equivalent work before retirement. She spoke of the fact that the respondent had already indicated at an earlier stage that they were not prepared to reinstate her. This effectively meant that she would not be able to work in nursery education again in Fife. She considered her future losses would continue at a rate of £1266 per month until retirement. As at the date of the remedy hearing the claimant's state retirement age was some 12 years away.

3. The claimant spoke of her continuing health issues as a result of what she termed a horrendous experience. She confirmed that she was still working part time at Tesco as she had been as at the date of the previous hearing and as indeed she had done during the course of her employment with the respondent. She was also volunteering at CAR. She mentioned that some days she had difficulties at these two jobs because she is constantly on edge and paranoid. She becomes concerned whenever she meets anyone who had any connection with the nursery since she is not sure what they have heard about the circumstances of her dismissal. The claimant also indicated that she considered it would be appropriate for the compensatory award to be uplifted by 25% to take account of the respondent's failure to follow the ACAS Code in respect of their failure to deal adequately with her grievance and their refusal to give her an appeal against her grievance. She indicated the respondent had no interest in meeting with her before her grievance and no appeal was allowed from the grievance. She confirmed that she was aware that there was a statutory cap on compensation and that her compensation would be limited to this amount but that the cap should be based on her full time earnings.

### **Respondent's submission**

4. The respondent's representative referred to the letter which the respondent had sent to the Tribunal on 20 September 2021 which set out their position. The sole claim for which the claimant was entitled to a remedy was a claim of ordinary unfair dismissal and the statutory cap applied. The respondent's representative said that the respondent had checked their records and it was their position that the figures supplied by

the claimant slightly understated her pay. It was the respondent's position that the claimant's gross full time wage was £413.40 per week. This was based on an annual salary of £21,497. It was their position that the claimant had agreed to part time hours and although the claimant referred to half time hours the respondent's position was that part time hours should be based on 20 hours per week which was slightly more advantageous to the claimant. This brought out the figure £226.35 which they considered was the gross pay on which the basic award should be based giving a basic award of £4413.75. With regard to the compensatory award it was their position that the claimant was entitled to no more than the amount of the statutory cap which was 52 weeks' gross wages and that as a result the maximum compensatory award the ET could give would be £11,770. (52 x 226.35). It was the respondent's position that any compensation going forward should be based on part time earnings. They referred to paragraph 102 of the judgment where the Tribunal had set out that it was its own provisional view that a future compensatory award should be based on part time earnings.

5. The Employment Judge put it to the respondent's representative that whilst the Tribunal had made a finding of fact that had matters not proceeded as they did the claimant would have returned to work on part time hours, the claimant's position was that the contract had never been changed. It was suggested that whilst as a matter of the general law of compensation the measure of the claimant's loss going forward and therefore the compensatory award ought to be based on part time earnings, the concept of a "week's pay" for the purposes of the basic award and the statutory cap should be based on the statutory definition contained in the Employment Rights Act. The respondent's representative accepted that this was the case but indicated that the respondent's position was that in this case the statutory definition of a week's pay should be based on part time hours. It was a question for the Tribunal as to whether a week's pay as defined in the legislation should in the circumstances of this case be based on part time hours or full time hours.

6. It was the respondent's position that no question of an uplift for breach of the ACAS Code arose in this case. The respondent's representative also

clarified that, although in her submissions the claimant had referred to reinstatement, the claimant had previously accepted that reinstatement was impractical and the present hearing was dealing solely with the question of compensation.

5 **Claimant's further submission**

7. The claimant made a brief further submission in which she essentially repeated her previous submission. She added that she felt she was entitled to compensation for loss of pension. She stated that she had contacted the pension company and looked on their website but had been  
10 unable to find any additional information. She maintained her position that her contract had not changed as at the date of dismissal and that both the compensatory award and the basic award should be based on full time hours. She confirmed that she accepted the hearing was just about compensation.

15 **Discussion and decision**

8. At the earlier hearing the Tribunal had made various findings in fact which were relevant to the issue of remedy. A number of these findings are scattered throughout the judgment however in particular paragraph 8 relates to the issue of the claimant's request for part time hours as does  
20 paragraph 32 which notes that initially the claimant's sick pay was based on her part time hours but that after the claimant complained, her sick pay was restored to being based on full time hours. In addition, paragraphs 56-58 briefly set out what the claimant did following the termination of her employment. It was common ground between the parties that the claimant  
25 had not found additional employment to replace her employment with the respondent since her dismissal by the date of this Tribunal. The respondent did not take any issue in relation to mitigation nor did they make any issues regarding contribution or a Polkey reduction. Essentially, the difference between the parties was in relation to whether the claimant's  
30 compensation should be based on her full time earnings or on her part time earnings and more particularly, whether the statutory cap should be based on full time or part time earnings. Before setting out the Tribunal's decision on this matter it is appropriate to set out the statutory background.

9. As noted above, the claimant had indicated at an earlier stage that she was seeking compensation. Although she referred to reinstatement in her submission this was in the context of explaining why she felt she was entitled to future loss up to retirement. It was clear that reinstatement had previously been ruled out in this case. The claimant's entitlement to compensation is to a basic award calculated in terms of section 119 and a compensatory award calculated in terms of section 123. The basic award is a statutory calculation which is based on the concept of a week's pay. The concept of a week's pay is defined in sections 220-229 of the Employment Rights Act 1996.

10. Section 123 of the Employment Rights Act sets out the amount of compensatory award. This is defined in subsection (1) as being

“Subject to the provisions of this section and sections 124 (124A and 126), the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.”

It can therefore be seen that the assessment of the amount of the compensatory award requires consideration of general principles of compensation so as to arrive at the sum which is just and equitable in all the circumstances. This amount is however subject to a statutory cap which is set out in section 124(1ZA) where the statutory cap is said to be the lower of:

- (a) £88,519 and
- (b) 52 multiplied by a week's pay of the person concerned.”

11. Section 220 of the Employment Rights Act states

“The amount of a week's pay of an employee shall be calculated for the purposes of this Act in accordance with this Chapter.”

12. It therefore appears to the Tribunal that the claimant's entitlement to compensation should be calculated as follows:-

- (i) A basic award calculated on the basis of a week's pay as defined in sections 220-229 of the Employment Rights Act
- (ii) A compensatory award based on general compensatory principles based on section 123 of the Employment Rights Act but subject to a statutory cap of 52 x one week's pay where a week's pay is defined in accordance with sections 220-229.

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13. Having decided that that was the appropriate way to proceed the Tribunal then went on to consider the amount of a week's pay in terms of section 220-229. Section 221 states

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“(1) This section and sections 222 and 233 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.

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(2) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week.”

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It is clear from the Tribunal's findings in fact that the claimant was paid a monthly salary which did not vary therefore section 221(2) applies. The Tribunal's view is that this required us to look at remuneration due under the contract of employment as at the calculation date rather than any future date. The calculation date was, in the view of the Tribunal, the date of dismissal.

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14. The Tribunal's understanding of the position as previously set out in our findings of fact was that

(i) The claimant was paid a salary of £21,497 per annum for working full time hours.

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(ii) As per paragraph 8 the claimant decided that she wished to start working part time with effect from the end of the summer holidays in 2017. Discussions took place and it was agreed between the claimant and her Head Teacher that she would return to work part

time after the summer holidays in 2017. Although this was agreed no formal steps were taken to change the claimant's contract. It was the view of the Tribunal that what the claimant had agreed with her manager was that there would be a future variation of her contract which would have taken place when the claimant returned to work after the summer holidays in 2017. In the event the claimant did not return to work and the variation of the claimant's contract never took place. The tribunal is fortified in its view by the findings at paragraph 32 which note that whilst the claimant was initially paid sick pay on the basis of her part time hours the claimant complained about this and her sick pay entitlement was restored to being based on full time hours and this continued up until the point where the claimant went on to nil pay shortly before she was dismissed. The Tribunal's view was that as at the date of dismissal the claimant's contract of employment had not been varied and the claimant was contractually entitled to work and be paid on the basis of her full time hours.

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15. On the basis of those findings the claimant's view was that the week's pay for the purposes of the basic award and the statutory cap was the amount of gross pay of £413.40 per week.

16. This means that the claimant is entitled to a basic award of £8061.30. (19.5 x 413.40). The parties were agreed the appropriate multiplier was 19.5 based on the claimant's 14 years service, during 11 of which she was over the age of 41

17. So far as the compensatory award is concerned the Tribunal's view is that as a starting point we have to look at what the claimant's earnings would have been had she not been unfairly dismissed. The Tribunal's view is that although the contractual variation had not taken place then the overwhelming likelihood is that had the claimant not been dismissed and returned to work in the usual course then she would have returned on part time hours for which the claimant would have received £226.35 per week gross. We were not given a figure for net pay however given the amount of the claimant's earnings and considering that, as will be seen, the precise amount of the compensatory award over and above the statutory



cap is somewhat academic the Tribunal considered it appropriate to work on the basis that the claimant's net pay would be around £200 per week.

18. The claimant indicated in her schedule of loss that she was claiming 36 months wage loss for past losses up to the date of hearing and future wage loss of approximately 120 months up to her date of retirement. The claimant was dismissed on 8 November 2019 and the true figure for past wage loss up to the date of this hearing is therefore just over 23 months. It would appear that, in her calculation the claimant is seeking compensation for the wage loss she suffered in the period leading up to her dismissal where she was on nil pay. The tribunal did not consider that we could make such an award where we are compensating for unfair dismissal. The claimant may have been entitled to recompense for this sum had the claim of disability discrimination succeeded but that is no longer the case. We cannot make an award for wage loss prior to the date of dismissal as that would not be a loss flowing from the dismissal in terms of s123. We decided that it would be appropriate to award the full wage loss up to the date of the hearing. With regard to future loss we felt it appropriate to award the claimant something but did not feel it appropriate to award the 12 years wage loss sought by the claimant. the Tribunal notes that the claimant has not found alternative work to date. It is clear that the claimant's current losses will continue for some time. There is currently no prospect of the claimant obtaining replacement employment and the respondents accept that to date no issue of a failure to mitigate loss arises. The claimant states she enjoyed her job and would have continued in it until retirement but given the general vicissitudes of life this may not have happened. The tribunal felt, taking these matters into account, the appropriate course of action would be to base the claimant's compensatory award on a total wage loss of 36 months' pay thus awarding her around 13 months' future wage loss.
19. Total wage loss, past and future is therefore £31,200. (200 x 156)
20. The Tribunal considered it appropriate to make an award of £400 for loss of statutory rights.

21. With regard to pension loss the claimant did not provide the Tribunal with any detailed calculation. The Tribunal is also mindful of the guidance to deal with matters of pension calculation in a proportionate way and that it would not be appropriate to adjourn and fix a further hearing so that actuarial evidence could be presented.
22. From the document provided by the claimant, it appears to the Tribunal that on the basis of her pension contributions to date the claimant will receive a pension of £4786.15 per annum as at her state pension date of 67 on 31/07/33. Had she continued in the respondent's employment she would have accrued CARE benefits at the rate of 1/80<sup>th</sup> per annum. The Tribunal's view is that, as with future wage loss, this would be based on her part time earnings of £11,942.77 per annum gross (21,497 x 20/36). The tribunal felt it appropriate to base compensation for pension loss on the same three year basis as we used for wage loss. On this basis, had the claimant remained in employment for a further three years she would have received an additional pension of £447.85 per annum at state pension age. This is the amount of her lost pension. We then sought to obtain the present day value of this applying the principles set out in the current edition of the "Employment Tribunal Principles for Calculating Pension Loss". The tables at p103 show that the appropriate multiplier (based on a discount rate of -0.75% is 26.83. The current value of pension loss per the Ogden Tables for a pension age of 67 for a 55 year old female is 26.83. This means that in order to be compensated for a loss of pension of £447.85 per annum from her anticipated retirement age the claimant would require to the present compensation in the sum of £12,015.82. This would bring the total compensatory award to the claimant based on her losses to date up to £43,615.82 (12,015.82 + 31,200 + 400).
23. The Tribunal considered the claimant's application for an uplift in terms of the ACAS Code. The Tribunal was bound by the findings of fact which we have made to date. It is clear that whilst there were some issues with the way that the respondent dealt with the claimant's grievance the dismissal process which led to the claimant's ultimate dismissal was carried out in accordance with the ACAS Code. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 states:

“In the case of proceedings to which this section applies it appears to the tribunal that

(a) the claim to which the proceedings relate concerns a matter to which a relevant code of practice applies.....”

5 In this case the tribunal is dealing purely with a claim of unfair dismissal. We decided it would be too much of a stretch to state that the claim “concerned” a matter (the grievance) to which the code applied. Accordingly the tribunal did not believe that the terms of s207A were engaged and no uplift was appropriate.

10 24. The compensatory award which we have calculated as above is subject to the statutory cap. We have already decided a week’s pay is £413.40 per week. The statutory cap is therefore 52 times this amounting to £21,496.80. This is the maximum amount of compensatory award which can be made. The total award is therefore £29,558.10 (21496.80 +  
15 8061.30).

20 25. It is clear that the claimant received recoupable benefits. It is inappropriate for these simply to be deducted from the compensatory award. The recoupment regulations apply. The prescribed element requires to be based upon the compensation for wage loss which the claimant has been awarded for the period from 8 November 2019 up until the date of hearing (15 October 2021). The total amount was £20,800 but as a result of the statutory cap the actual sum awarded under this head was reduced to £10,251.63. The prescribed element is therefore  
25 £10,251.63 and relates to the period between 8 November 2019 (date of dismissal) and 15 October 2021. The monetary award exceeds the prescribed element by £19,306.47. (29558.10 - 10251.63).

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**Employment Judge:**  
**Date of Judgment:**  
**Date sent to parties:**

**I McFatridge**  
**21 October 2021**  
**21 October 2021**