EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104561/2020 (V)

Hearing held by CVP on 17 – 20 May and 2 November 2021 (and in chambers on 3 November and 20 December 2021)

Employment Judge Cowen
Tribunal Member Ms Hossack
Tribunal Member Mr Atkinson

Mrs T MacLean	**Claimant** **Represented by** **Mr D MacLean** **(Husband)**
Kura (CS) Limited **Response (building Rewarding Relationships) Ltd and Rhl Direct Ltd**	**Respondent** **Represented by** **Mr Hay (Counsel)**

This has been a remote video hearing which was attended by the parties. A face to face hearing was not held because it was not practicable and all the issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The Claimant's claim of s.98 ERA unfair dismissal succeeds and the respondent shall pay the claimant £27,861.30.

2. The claimant's claims of direct sex and race discrimination, s.103A ERA automatically unfair dismissal and breach of contract are dismissed.

REASONS

Introduction

1. The claimant brought claims of unfair dismissal, dismissal due to protected disclosures, race and sex discrimination and breach of contract, by an ET1 dated 21 August 2020. The claimant had worked for the respondent as a call centre agent for almost 7 years. The respondent asserted that she was dismissed for 'Some Other Substantive Reason' as a result of their client Scottish Power telling them to remove the claimant from the contract as the lowest ranking agent based on 'missed opportunities' in a period in May 2020.

2. Although there was no formal preliminary hearing note, the respondent had drawn up a List of Issues based on the claimant's pleadings, including Further and Better Particulars. This list was agreed by the claimant at the beginning of the hearing as reflecting the claims she wished to make. It was therefore referred to throughout and followed by the Tribunal.

3. A joint bundle of productions was provided in hard copy to the Tribunal, together with a separate hardcopy bundle of the witness statements of the claimant, Mr Gordon, Ms MacInnes, Mr Murray, Mr MacLennan, Mr Strachan, Mr Holmes and Mr Calder. The latter two statements being served shortly before the hearing, but allowed to be relied upon by the Tribunal.

4. Between the first set of hearing dates and the second, the claimant's husband as her representative submitted some additional productions which were allowed to be added to the bundle.

5. The Tribunal was held entirely over CVP. Regular breaks were taken and time was allowed for the claimant's husband as her representative, to prepare his questions for each of the respondent's witnesses. He was guided by the Tribunal where necessary to ensure that effective questions were put to the witnesses. Both parties gave closing submissions and the

decision was reserved, in order that the Tribunal could have time to deliberate. That took longer than anticipated and a further half day was allocated in December. Hence the delay in producing this judgment, for which we apologise.

6. All the witnesses who gave statements also gave live evidence and were subject to cross examination.

The Facts

7. The claimant is of Thai national origin and identifies as an Asian woman. She worked for the respondent in their call centre in Forres, on behalf of Scottish Power. She started working there in 2013. In 2020 she worked in the team dedicated to 'Home Move' dealing with customers who were moving house and therefore starting and ending their utility supply with Scottish Power. All the claimant's calls with customers were recorded and part of the team leader/manager role was to listen to a number of calls each week to ensure that performance standards were maintained. One of the standards required was for the claimant to ask for payment from the customer, even where the final bill was based on an estimated amount.

8. Until 2020 the claimant was viewed as a successful and good employee with no disciplinary action against her. She had a good success rate and had won awards and bonuses for her efforts. As a result of the Covid-19 pandemic and the order to work from home, the claimant had to work from home from the end of March 2020. This led to problems with her ability to collect cash from customers over the phone.

9. In 2020, the issue of cash collection became a focus for Scottish Power and hence for the respondent as well. It became a matter which the team managers focused upon in their conversations with agents. The issue of cash collection (i.e. the amount received from a customer by payment over the phone) was closely monitored and the amount collected each week by agents was charted. Related to this was the attempt to take such

collection. Where no attempt was made, this was referred to as a 'missed opportunity'. There was some confusion as to whether a missed opportunity would arise where no cash was collected, or only where no request for payment had occurred.

10. It would appear that whilst the respondent charted the amount collected as well as what was said, Scottish Power were concentrating purely on the missed opportunities.

11. In May 2020 a training session was extended to all staff in the Home Move team. This covered a new IT system for cash collection over the phone. The claimant had not been provided with IT hardware for her home working and therefore was reliant on using her mobile phone to watch the training session. She was not able to see the full extent of the training documents, due to the reduced size of the screen. This was an issue which no-one at the respondent had considered or addressed either prior to the training, or afterwards.

12. On 26 May 2020, the claimant undertook a training session which was presented by Mr MacLennan. His expectation and belief was that at the end of the session, the agents would be able to take payments on a new system called UI5 as well as on the previous CRM system. This was not true of the claimant, who found that she could not take such payments. She repeatedly attempted to put the customer's credit card number into the system, but it was not accepted and no payment could be made. Each time this occurred she would report it to her manager as a system issue as well as pass the customer's account to another office where it could be dealt with appropriately. There were also some problems with the UI5 system and the respondent was aware of these at the time.

13. It later transpired that in fact it was not a problem with the software, but that the claimant had not understood that under the new system, the customer dialled in their card details on their telephone. Once the claimant

understood this, she was able to start to take payments once again.

14. By the end of May 2020 the claimant's ability to take cash collections had dropped to zero. She had also stopped asking customers for payments as she knew she could not take them. In addition to this, the claimant also felt that it was wrong to ask customers to pay a final bill based on an estimated reading. She believed that in many cases this amounted to a substantial overbilling of the amount due. She also believed that the respondent and Scottish Power were aware of this and yet instructed her and her colleagues to press for payment in any event. The respondent told her that she should collect the amount on the account and that any overpayment would be corrected when the account was closed.

15. During telephone conversations between Scottish Power and managers of the respondent, it became clear in early June 2020 that Scottish Power wished to identify the lowest performing agents and have them removed from the contract. This led to a number of conversations between Scottish Power and the respondent.

16. Scottish Power were provided with some statistics by the respondent, in order that they could monitor the situation themselves. From this Scottish Power identified the person they saw as the lowest achieving agent; the claimant. Their statistics were based on statistics up to the week commencing 4 June 2020.

17. On 8 June 2020 the claimant had a KPI coaching session with Mr MacLennan, this was the first of these sessions he had held with the claimant as he had taken over as her line manager on 1 June 2020. He noted in this session that on one of the calls which he had listened to, the claimant had failed to ask for payment of the final balance. This was considered to be a missed opportunity. The feedback notes indicate that this was the "first time Thippawan has had feedback regarding missed opportunities".

18. On 12 June 2020 the claimant was sent an email with regard to 'Cash opportunities'. The email from Mr MacLennan reminded the team not to miss opportunities. It provided the statistics for the week ending 10 June, which showed that she had success in 9 out of 11 opportunities (81.2%).

19. On 16 June 2020 the representative of Scottish Power wrote to the respondent's managers indicating that they wished a number of people to be removed from the contract, this included the claimant, whom they said had a 0% hit rate on opportunities in the three week period. On the same day, the respondent commenced a disciplinary investigation of the claimant.

20. At a meeting held by Mr MacLennan, he told the claimant that she was being investigated for underperformance. No HR representative was present at the meeting but a note-taker was present. Mr MacLennan told the claimant her current rate was 66.33%. The target was 80%. The claimant explained in this meeting that she had not been able to take cash payments since she started working from home. She said it was a system issue and she had reported it a lot. Mr MacLennan said that system errors had been taken out of the statistics and therefore the results being shown were times where the claimant had not asked for payment. The claimant's explanation for not asking for payment was because she felt strongly that this was neither legally, nor morally appropriate.

21. Following on from this meeting Mr MacLennan wrote an investigation report which indicated that the matter should proceed to a disciplinary hearing as a matter of conduct. On 19 June 2020 the claimant was invited to a disciplinary hearing on 22 June. She was told that the issue was one of misconduct in relation to underperformance and failure to follow a process.

22. When she attended the hearing with Mr Gordon on 22 June it became clear

that the claimant had not received copies of the relevant documents. Mr Gordon sent these to the claimant who was given time to look at them. The claimant confirmed to Mr Gordon that she wished to proceed with the meeting. She told him repeatedly during the meeting that she did not think it was fair to customers to charge them a final bill based on an estimated meter reading.

23. The claimant also explained to Mr Gordon that she had requested help from her manager on a number of occasions, but had not received any. Mr Gordon made it clear that calls relating to a 'system issue' were not included in the statistics. Towards the end of the meeting a further miscommunication was identified. Mr Gordon referred to the meeting being in relation to misconduct, whereas the claimant informed him that the letter she received referred to gross misconduct.

24. Mr Gordon adjourned the meeting to confer with the managers whom the claimant said she had contacted. It was during his call with Mr Holmes that Mr Gordon was instructed to suspend the claimant. He therefore reconvened the meeting and suspended the claimant, telling her that this was now a matter of gross misconduct. He wrote to her to confirm these details.

25. On 23 June the claimant queried why her actions were now considered a gross misconduct. Mr Gordon replied to say that this was an error and the issue was one of misconduct. But when the letter inviting the claimant to a disciplinary hearing was sent on 29 June, it once again referred to gross misconduct.

26. On 29 June Ms MacInnes was asked for her help in relation to the process of this matter. She indicated in an email to Mr Holmes that in order for there to be a gross misconduct charge, there would need to be more evidence. After the claimant was suspended, Mr MacLennan updated his previous investigation report to reflect the fact that the claimant had been

suspended, in accordance with Ms MacInnes' advice. When these notes were given to the claimant, this change was not identified to her. On 30 June Ms MacInnes also advised Mr MacLennan that he would need to add a rationale as to why it was deemed a risk to the business.

27. A disciplinary meeting was held on 2 July 2020 with Mr Holmes, Mr Murray and Ms MacInnes present with the claimant. At that meeting the claimant indicated that she was aware that Scottish Power were asking for people to pay a final bill on an estimated reading which may not be correct. The claimant indicated that the respondent and Scottish Power knew that they were asking for an incorrect amount and that she was being asked to lie to customers. She said that she wanted to be fair and honest with her customers and that it was "wrong to knowingly overcharge the customer".

28. The claimant also said in relation to her own disciplinary that she could not input the 16 digit customer card number so could not take payment. She said she had reported this to her manager. The discussion therefore had two separate elements to it, although the claimant saw them as being intertwined.

29. Mr Holmes adjourned the meeting for 20 minutes to consider his decision. Ms MacInnes told the Tribunal that the decision was pre-determined as Scottish Power had instructed the respondent to take the claimant off the contract and as there was no other work in Forres, this meant she was dismissed.

30. When he reconvened the meeting Mr Holmes told the claimant that she was dismissed for gross misconduct as she was deemed a risk to the business. She was dismissed with immediate effect due to some other substantial reason. He went on to say that as her dismissal "does not constitute gross misconduct you are entitled to 6 weeks payment in lieu of notice". She was told that this decision would be confirmed in writing. This

did not happen as Mr Holmes was absent from work shortly after this and did not return.

31. The claimant wrote to Ms MacInnes on 9 July to ask whether she had a right to appeal given that she had not received an outcome letter. Ms MacInnes replied the same day to say that she was entitled to appeal and the details of how to do this would be included in the outcome letter. She told the claimant that there was a delay with the letter as Mr Holmes was absent.

32. On 21 July Ms MacInnes confirmed to payroll that there was no outcome letter but that the matter was recorded as misconduct and not gross misconduct and that they would not re-employ.

33. On 23 July Ms MacInnes wrote to the claimant to say that there was no outcome letter but that the claimant could write to her with an appeal. The claimant chose not to do so.

The Law

Direct Discrimination

34. Section 13 of the Equality Act 2010 is worded as follows: "*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*."

35. The Claimant must compare herself to a hypothetical non-Asian, or male comparator. The Tribunal will then consider how that comparator would have been treated. Such a hypothetical comparator must in all other respects be in a comparable position to the Claimant apart from her race or sex.

36. The focus is on the mental processes of the person that took the action said to amount to discrimination.

37. Section 136(2) of the Equality Act 2010 provides as follows: (2) If there are facts from which the Court could decide in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred; (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

38. Guidance on the burden of proof was given by the Court of Appeal in ***Igen v Wong*** [2005] ICR 931. This guidance has subsequently been approved by the Court of Appeal in ***Madarassay v Nomura International plc*** [2007] ICR 867 and by the Supreme Court in ***Hewage v Grampian Health Board*** [2012] ICR 1054 (at paras 22-32).

39. The burden of proof starts with the Claimant. It is for the Claimant to prove facts from which the Tribunal could infer, in the absence of a satisfactory explanation, that alleged detriment was in part the result of her sex or race. The Tribunal must therefore be satisfied that the act did take place and that the reason for that act was on grounds of the claimant's sex or race.

40. In order for the burden of proof to transfer from the Claimant to the Respondent, it is well established it is insufficient for the Claimant merely to show a difference in status and detriment treatment (see ***Madarassay*** at paragraph 54). There must be something more, which is capable of giving rise to an inference of discrimination if not adequately explained.

41. If such facts potentially giving rise to an inference of discrimination are established, then the burden of proof transfers to the Respondent to establish on the balance of probabilities that the protected characteristic formed no part of the reasoning for the decision to discipline and dismiss the claimant.

<u>Protected Disclosure</u>

42. In order to claim that a detriment or dismissal has been made as a result of a protected disclosure, the claimant must show that such qualifying disclosure has been made.

43. s.43B ERA sets out that a 'qualifying disclosure' is a disclosure of information which in the reasonable belief of the worker making the disclosure tends to show that one of a number of types of action has, or will occur. This includes that a criminal offence has or will be committed, or that a failure to comply with a legal obligation has or will occur. The worker making the disclosure must do so in the public interest.

44. s.43C ERA sets out that the disclosure should be to a representative of the employer.

45. If the claimant can show that the disclosure made fulfils these requirements, then they must also show that the detriment (or dismissal) was carried out because the claimant made the protected disclosure. It therefore is essential that the protected disclosure precedes the act of detriment or dismissal.

46. s.103A ERA states that "*An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure*".

S.98 Unfair Dismissal

47. The respondent asserts that if there was a dismissal, then it was for the fair reason of 'some other substantial reason' connected to a third party request to dismiss the claimant ***Henderson v Connect South Tyneside Ltd*** 2010 IRLR 466, EAT, said this could be an example of some other substantial reason, although it is still subject to the test of reasonableness and the employer must do all that it can to avoid or mitigate any injustice to the employee. The employer may be expected to try to change the client's mind, or to find employment elsewhere for the claimant.

48. In such a dismissal the employer is obliged to show that they came under

pressure to dismiss;***Securicor Guarding Ltd v R*** 1994 IRLR 633, EAT, the EAT held that it was unfair to dismiss without having actually asked the client if they objected to the claimant continuing to work in the circumstances.

49. In any event, s.98(4) ERA states that whether the dismissal is fair or unfair "*depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee*".

50. The employer cannot merely rely on the instruction, they may need to question it or consider whether the request is reasonable ***Pillinger v Manchester Area Health Authority*** 1979 IRLR 430, EAT.

51. ***Dobie v Burns International Security Services (UK) Ltd*** 1984 ICR 812, CA, said that the Tribunal should look at the reasonableness of the dismissal and whether it is an injustice to the employee.

Range of Reasonable Responses

52. In accordance with ***Iceland Frozen Food v Jones*** [1982] IRLR 439 the Tribunal will consider whether the decision to dismiss was a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer.

Contribution

53. The Tribunal must also consider under s.123(6) ERA 1996 whether deduction should be made from the compensatory award for any contributory actions by the employee which could be said to be blameworthy and have led to the dismissal.

Breach of contract

54. In order to claim a breach of contract, the employee must show that there is a term either implied or stated in the contract which the respondent has breached by their actions.

55. Where this involves reference to a policy or procedure, that policy must be found to be part of the contract of employment.

Decision

Discrimination

56. (i) failure to provide training
The evidence indicates that the claimant received the same training session as her colleagues on 26 May 2020. This was carried out in small groups. The claimant did not specifically request further training, nor did she highlight that due to using her mobile phone for training, she had not been able to comprehend some of it. The claimant may have required or wanted further training and Mr McLennan did not appreciate this or allow it. However, the Tribunal consider that to be a separate issue from failing to provide the claimant with the standard training which was given to all staff. There was therefore no evidence to support the suggestion that the claimant was treated less favourably, as she was provided with the same training session as others.

57. (ii) ignored by Mr McLennan when she asked for help
The claimant repeatedly told Mr McLennan that there were “system issues”. Mr McLennan took that to mean that there was a problem with the IT system, as it was failing to process payments. The claimant’s emails show that the problem was her understanding of the new system and how to work with it. Mr McLennan misunderstood this as a problem with the IT system, as there had been some problems with IT and he believed that the claimant was merely repeatedly highlighting these issues.

58. The claimant had had no problem with cash collection prior to home working. It was only when she started to work from home that the issue arose. Mr McLennan did not notice or appreciate this, nor look into why this had happened. He became the claimant's line manager on 1 June 2020 and first spoke to her about the issue of cash collection on 9 June. The claimant did not point out to him in such a direct manner that the issue was her lack of understanding. That was in part because she didn't appreciate that the problem was her inability to work the system. It was only when her colleague explained to her that the customer had to put in the number that she realised that she had been doing it wrong all along.

59. Had the claimant been working in the office, Mr Gordon indicated that the issue would have been identified more easily as being outside of the norm for the claimant and then could have been rectified. The Tribunal accept that to be correct. The inability to lean across and clarify with a colleague is just one of the negative aspects of home working during the pandemic.

60. In fact, it was not until he gave his evidence at the Tribunal hearing that Mr McLennan understood that when the claimant had spoken of a 'system issue' she did not mean the IT system, but a 'user issue' in relation to her ability to use the system. The claimant therefore failed to show that Mr McLennan's action in ignoring her request for help was due to her sex or race. It was due to his misunderstanding of the point she was raising. He did not treat her less favourably than another member of staff who said the same as the claimant. His failure to understand the point the claimant was making was not related to her sex or race.

61. (iii) Mr McLennan bullied the claimant into a disciplinary meeting and didn't listen to her

There was a meeting on 16 June which was an investigatory meeting. Mr McLennan didn't listen to the claimant in the sense that he did not understand what she was saying. He did not appreciate that she had

missed the chance due to her inability to take a cash payment. He did not try to resolve her problem by putting in place an action plan. As he knew that there was a pre-determined outcome to the investigation and that it would progress to a disciplinary hearing, he didn't investigate what she raised.

62. Mr McLennan was aware that Scottish Power were pushing the respondent on the issue of cash collection and missed opportunities. He did therefore push the claimant into a disciplinary hearing. However, there was no evidence to support the assertion that this was less favourable treatment than other staff with the same cash collection issue and therefore in the same situation.

63. Alternatively, the allegation refers to Mr McLennan in a disciplinary meeting. Such a meeting did not occur until 22 June and Mr McLennan was not present at that meeting. Therefore, this allegation is not proved in relation to the disciplinary meeting.

64. (iv) – (viii) These allegations date back to a period more than 3 months prior to the issue of the claim. They are therefore out of time with regard to s. 123(a) Equality Act 2010 which stipulates that a claim must be brought within 3 months of the date of the discrimination. S.123(b) indicates that the Tribunal may allow the claim to progress if there are grounds for the Tribunal to believe it to be just & equitable to allow an extension.

65. The ET1 was issued on 21 August 2020, thus anything prior to 22 May 2020 is out of time. The allegations contained in (iv) to (viii) of the list of issues occurred between 2 January 2018 and 17 July 2018. The Tribunal considered whether there were grounds to allow a just and equitable extension of time and/or whether these acts could be said to be a 'continuing act' of any of the matters which were brought in time.

66. (iv) Mr Calder apologised for this error and the claimant did not take any

further steps in relation to this matter at the time. Mr Calder is unconnected with any of the other acts and therefore there is no continuing act. There was no explanation as to why the claimant had not brought this claim within the time limit and therefore no grounds on which to consider an extension.

67. (v)- (viii) Mr Murray was not involved in any of the decision making about the claimant at a later date and was not her manager during the period relevant to her dismissal. Whilst the Tribunal accepted the claimant's evidence in relation to the events of shouting at the claimant in front of colleagues and making false allegations as well as the fact that the claimant felt bullied by him, the Tribunal could see no explanation why this allegation had not been brought before the Tribunal within time. There did not appear to be any connection between Mr Murray and the later events and hence no connection to assert that a continuing act occurred.

68. The Tribunal therefore concluded that issues (iv) to (viii) were out of time and that no just and equitable extension should occur.

69. (ix) Documents issued on 30 June were falsified
The claimant did not identify specific documents which she alleges were falsified. Her evidence related to her suspension. The Tribunal found that Mr McLennan did send a document on 30 June, this was an amended version of the investigation report. However, as the investigation report was dated 16 June 20, this document must have been updated after it was first produced, to include reference to the suspension, as the suspension took place on 30 June. It must have been altered to reflect the change in the situation. However, this change was not explained to the claimant at the time. Nothing about it was false.

70. The Tribunal also found that the document changed the allegation from misconduct to gross misconduct. Whilst this was a significant change, it was not a falsification. It reflected an alteration in the attitude of the

respondent towards the claimant's actions. Nothing about the change is untrue and therefore the changes cannot be said to be falsifications. On that basis, the claimant has failed to prove the facts of the allegation.

71. (x) Other staff allowed to use SAP to correct errors
The only evidence in support of the allegation was the claimant's assertion. There was no evidence to corroborate this. The claimant has therefore failed to discharge the burden of proof in relation to this allegation by not proving facts from which we can, without further evidence infer that any discrimination has occurred.

72. (xi) The claimant flagged that the meeting minutes were inaccurate
This allegation asserts an act by the claimant and does not assert any discriminatory act by the respondent. There is therefore no discriminatory act alleged.

73. (xii) The claimant was not sent investigation notes in response to her email to Mr Holmes
This allegation suggests that as a result of the claimant's email sent to Mr Holmes an investigation was commenced. There was no evidence that there was such an investigation as a result of this email, nor any notes made. Nor was there any evidence that Mr Holmes received this email. The Tribunal therefore could not find as a fact that there were any investigation notes which were not sent to the claimant.

74. (xiii) Mr Holmes failed to properly investigate prior to meeting
The evidence of both the claimant and Mr Holmes was that he was the chair of her disciplinary meeting. In accordance with the disciplinary policy and ACAS guidance, it was not his responsibility to investigate the issues. He was to make a decision based upon the investigation previously carried out. The Tribunal therefore could not find as a fact that there was any failure on the part of Mr Holmes prior to the meeting.

75. (xiv) HR did not attend the meeting on 22 June

The evidence which the Tribunal accepted was that the respondent's HR protocol indicated that they were not to attend a disciplinary meeting unless dismissal was a possible outcome. At the time of the meeting on 22 June, dismissal was not an option and therefore the failure of HR to attend did not amount to less favourable treatment of the claimant.

76. (xv) No investigation into why the claimant was not supported when requested

The claimant raised the fact that she felt unsupported in meetings on 16 and 22 June and in an email to Mr Holmes on 2 July. In response to these the respondent investigated the claimant's training record which showed that the claimant had attended training in May, in the same way as her colleagues. There is therefore no evidence to support the allegation that no investigation took place. No discrimination can be inferred from the actions taken by the respondent.

77. (xvi) No copy of the investigation carried out by Mr McLennan.

This allegation was not pursued by the claimant.

78. (xvii) This allegation did not contain an allegation of discrimination by Mr McLennan. There was no evidence that Mr McLennan excluded any data.

79. (xviii) This allegation did not contain an allegation of discrimination by Mr Holmes or Ms MacInnes.

80. (xix) The claimant was not given information for the meeting on 22 June with Mr Gordon

The claimant was not sent the information. When this became known to Mr Gordon at the start of the hearing, he offered to postpone the meeting further. It was the claimant who chose to proceed once she had had a short time to read the papers. The reason for the failure to send the

claimant the papers was a human error. Whilst this would amount to less favourable treatment, there was no evidence to suggest that it was due to race/sex of the claimant.

81. (xx) Team and Operations Managers trying to trick the claimant who was working in a second language.
The claimant's own evidence was that she had been working in English for 7 years, in a job which was telephone based and therefore relied on excellent spoken English. The respondent agreed in evidence that until the lockdown, the claimant had been a good employee who had won bonuses and prizes. There was therefore no suggestion that the respondent felt that there was any issue with the claimant's use of English as her second language.

82. The evidence did show that on 30 June the respondent did not highlight the change from misconduct to gross misconduct in respect of the allegation. The correspondence showed that there was confusion within the respondent about whether it ought to be considered a gross misconduct. Ms McInnes indicating that a dismissal would not be appropriate unless it was considered gross misconduct and that to do so would require further evidence. However, there was no evidence to suggest the decision to move the allegation to one of gross misconduct was due to sex/race.

83. (xxi) The claimant cannot be suspended more than once
The evidence showed that the claimant was suspended on 22 June. This suspension continued until her dismissal. The respondent knew that the reason for dismissal was due to the instruction by Scottish Power. The meeting on 2 July obscured the reason. It was not about performance, it was about the fact that Scottish Power had demanded that she be removed from the team. The respondent knew that the claimant's performance had improved. Ms McInnes admitted that the meeting was a sham. However, there was no evidence to suggest that this was related to

sex/race.

84. (xxii) Mr Holmes questioned the claimant about profit and loss on 2 July There was no evidence to suggest that profit and loss was discussed and hence no evidence to suggest that there was any less favourable treatment. In any event there was no evidence to support the allegation that this was related to sex/race.

85. (xxiii) Mr Holmes did not respond to the allegation that Mr Gordon sent documents to the wrong address
There was no evidence that Mr Holmes was aware of it and therefore no evidence that he failed to take it seriously. There was therefore no evidence of less favourable treatment.

86. (xxiv)No outcome letter of disciplinary on 2 July
Mr Holmes was due to send the letter, but quickly was absent from work. The claimant had been aware of the outcome at the meeting and subsequently had the minutes of the meeting. The reason it was not sent was due to the absence of Mr Holmes and the resolute adherence of HR to the respondent's policy. There was no evidence to support the suggestion that the reason it was not sent was due to sex/race.

87. (xxv) Playing football
The Tribunal accepted that this did occur from time to time and that the claimant found it distracting during work time for some colleagues to be playing football. There were no grounds on which to find that this was done on the grounds of the claimant's sex/race. Whilst it may have been unprofessional to allow this behaviour to occur, there was no evidence from which it could be inferred that it was related to the claimant's sex/race. In any event, this claim was out of time and there were no grounds on which to extend time as just and equitable.

<u>Protected Disclosures</u>

88. (i) On 22 June to Mr Holmes

The evidence suggests that the email which the claimant wrote was not delivered to him, as there was an error in the address. On the basis that it was not received by him it cannot amount to a protected disclosure as the information it contained did not pass to the employer. The Tribunal were satisfied that it did contain information that the respondent was knowingly overcharging customers.

89. (ii) The claimant did say to Mr Holmes and Ms MacInnes on 2 July – "It's like I trick on them to get the money, even I know it's wrong". Ms MacInnes accepted that this was a 'flag' of whistleblowing and that she ought to have recognised it. She admitted that she didn't notice at the time. The Tribunal find that this was information of a potentially unlawful action by the respondent in taking payments from customers which were not owed. The claimant had a genuine belief and her disclosure was in the public interest as this was a utility company who were attempting to take money from customers. This comment by the claimant did amount to a protected disclosure.

90. (iii) On 16 June at the investigation meeting with Mr McLennan the claimant said that it was not fair to use estimated readings or ask for high bills. This is not the same as the information that Scottish Power are 'knowingly overcharging'. Whilst the information was passed to Mr McLennan and the claimant had a genuine belief in what she was saying, the Tribunal concluded that the information contained here does not show a potential unlawful act. This does not amount to a protected disclosure.

91. (iv) In the meeting with Mr Gordon on 22 June – the claimant said it was not fair to ask for estimated bill payment. This again is not the same as saying that Scottish Power/the respondent were overcharging customers. The information given to Mr Gordon did not amount to a potentially unlawful act and therefore could not constitute a protected disclosure.

Dismissal under s.103A Employment Rights Act 1996

92. The evidence of the respondent indicated that the reason for the claimant's dismissal was because Scottish Power had directed that the claimant be removed. The decision to do so was made before the disciplinary meeting. Ms MacInnes and Mr Gordon were both clear that this was the case. They were both of the view that Scottish Power had taken this decision some time prior to the disciplinary hearing and that the process had been brought about by the order of Scottish Power to do so. This meant that what the claimant said in the meeting did not influence outcome. Ms MacInnes had described the meeting as a 'sham'. Therefore, the decision to dismiss was not due to making protected disclosure in the meeting, but due to the order of Scottish Power prior to the meeting.

Unfair Dismissal s.98 ERA

93. The reason for the dismissal was 'Some Other Substantial Reason'. The respondent had been told by Scottish Power, their client, to remove the lowest achieving agents. The measurement of the agents to identify the lowest achieving, took account of the number of 'missed opportunities' to request a payment by a customer.

94. This was confused by some with the amount of cash collected, which was not in fact the performance indicator on this occasion, but had been in the past.

95. The claimant was identified as the lowest performer as she had failed to understand the training in the new cash collection system and could not take payments from customers. However, this did not stop her from asking customers for payments. Had she done so she would not have had a 'missed opportunity' even though she did not in fact take any money.

96. Initially the respondent tried to apply a disciplinary procedure due to underperformance. However, the claimant had been a very good performer until April, when she had to start working from home. The process for an underperformer would require further support and training and set targets for the claimant to achieve and may not ultimately lead to her dismissal. The respondent could not take the time to do this as Scottish Power were demanding that the claimant be removed immediately.

97. The respondent started a process which was a disciplinary for underperformance. The initial correspondence refers to a misconduct. The claimant was interviewed at which she highlighted that she had problems with the system- a potential point of mitigation. Mr MacLennan knew at the point when he started the investigation that the claimant's missed opportunity issue had improved and that she was currently at 63%. However, this did not influence his handling of the order from Scottish Power to remove the claimant.

98. The Tribunal found that the respondent was forced by Scottish Power to speed up the process and to move it from a misconduct to a gross misconduct – in order to ensure that the claimant could be dismissed. This explains the fact that HR were not present at the initial meeting and that no reference to gross misconduct was made in the initial letter.

99. Ms MacInnes voiced her concerns that the process was not going to be sufficient for fair dismissal. The Tribunal accept her evidence on this point. She was right to raise concerns. The response to this concern was to push the matter into gross misconduct.

100. The Tribunal accepts that all those involved at the respondent felt that they had no choice but to follow what was the order of Scottish Power, otherwise they risked the relationship between the companies being

soured. Mr Holmes therefore had a genuine belief that the claimant was the lowest performing agent and that their client required that she be dismissed on that basis.

101. The Tribunal has considered whether this amounted to a sufficient reason to dismiss. The Tribunal recognises that the respondent was under a lot of pressure from Scottish Power to carry out their wishes. However, the Tribunal also note that the respondent has an obligation to consider whether it was reasonable to carry out their request and to protect their employee from injustice. There was no evidence that the respondent or their managers tried to protect or defend the claimant to Scottish Power. They did not support the claimant to see if she could improve her performance, or ask Scottish Power for longer to assess her. No evidence was provided to the Tribunal to suggest that Scottish Power had indicated that the contract was in jeopardy if their actions were not followed. The closest that the respondent came to this was to refer to the claimant as a 'business risk'. There was no evidence to support this.

102. However, the Tribunal considered that the respondent did not attempt to fully clarify the situation, or take steps to try to avoid the claimant's dismissal. The situation with regard to the statistics was not clear; some of the witnesses conflated cash collection with missed opportunities. Even when giving evidence in Tribunal some of the respondent's witnesses did not understand that what the claimant referred to as a 'system issue' was in fact a user issue, as she did not understand how to use the IT system. This could have been clear to the respondent had they properly listened and investigated the points made by the claimant in her emails and her interview.

103. Had the claimant's problem with using the system been identified and rectified, she would have been able to collect cash, then her performance data would have improved. Had she received some support and further training, then she may have been able to collect the cash and hence not

miss opportunities. She had shown in the past that she was capable of being a successful employee.

104. The Tribunal also noted that the data from Scottish Power was not accurate. The claimant's statistics had improved the week after the period in which Scottish Power had taken the decision. This was not taken into account in the short snapshot used by Scottish Power to decide who to dismiss. Nor did the respondent take into account the problems initially associated with working from home. None of these points were highlighted by the respondent to Scottish Power.

105. The Tribunal considered that there was a lack of support for the claimant after she started working from home. No follow up to the training was offered and when the claimant indicated that she had 'system issues' these were not investigated by her line manager. The information in Scottish Power's list of failing agents was in contrast to the review which the claimant had on 27 May 2020 which rated her as good.

106. For all these reasons, the Tribunal concluded that it was not reasonable for the respondent to treat Scottish Power's demand as a sufficient reason to dismiss. They failed to challenge Scottish Power's order, nor to protect or mitigate the injustice to the claimant of such a decision.

107. The Tribunal considered whether the dismissal was an outcome which was within a band of reasonable responses. For the reasons outlined above, the Tribunal concluded that there were steps which the respondent could have taken to support the claimant, to ask for more time for improvement from Scottish Power and to defend her as a long serving employee who was struggling with working from home during the pandemic. Whilst the Tribunal accepted that there was no alternative role within the respondent's business which the claimant could carry out, the Tribunal considered that dismissal was not within the band of reasonable responses and would not have been carried out by a reasonable employer

with the knowledge of the respondent at the time.

Contribution

108. The Tribunal considered whether the claimant could be said to have acted in such a manner as to have contributed to her own dismissal. Her conduct would have to be viewed as blameworthy.

109. The evidence showed that the claimant was not prepared to follow the respondent's processes as she indicated that she did not feel comfortable with asking people to pay amounts based on an estimated account. The Tribunal considered that this in part may have been a reason why the respondent was not prepared to defend the claimant to Scottish Power; if she was not willing to do as they asked then they could not fight for her to remain. However, the Tribunal concluded that this was not an issue which was relevant to Scottish Power choosing the claimant for dismissal. It could not therefore be said to be blameworthy conduct in relation to her dismissal.

110. The claimant raised her problems in emails she sent to her manager, the responsibility for her failing to improve therefore lay with the respondent in failing to identify and rectify the problems of cash collection which the claimant faced. Had the respondent's training been successful, or had the claimant been given extra support, rather than criticised for her failure, then she may have improved (she had previously been a good employee). If the issue over how to collect cash had been resolved, then the claimant would not have been on Scottish Power's list and would not have been dismissed.

111. The Tribunal concluded that the claimant did not contribute to her own dismissal.

ACAS Code

112. The claimant admitted that she failed to appeal her dismissal. She indicated that she felt she could no longer trust the respondent. The Tribunal considered it was possible that an appeal could have flushed out the difference between a user issue and a system issue. It would have entirely depended on who heard the appeal and whether they stopped to listen and consider the issue raised by the claimant. On balance, the Tribunal concluded that it was unlikely that an appeal would have rectified the unfair dismissal, as some of the respondent's staff were still not clear about this distinction at the time of the hearing.

113. The Tribunal therefore concluded that no reduction should be made to damages for failure to appeal.

114. In considering whether the respondent had complied with the ACAS Code, the Tribunal noted that on 23 July 2020 the claimant was told of her dismissal, but was not given the specific reasons for it. However, it is clear from the evidence that the claimant was aware of them, having engaged in the process to that point. She was not provided with a letter explaining the reasons for her dismissal.

115. The Tribunal also took into account the respondent's failure to indicate to the claimant that her disciplinary issue had moved to gross misconduct. Nor did they make clear to her that the final allegation was one of 'some other substantial reason' i.e. the insistence of Scottish Power. The claimant continued to believe that the reason for her dismissal was her poor performance which she knew was due to a lack of understanding on her part.

116. The Tribunal also considered that the decision to dismiss the claimant was entirely pre-judged and that nothing which the claimant said at the investigation or disciplinary hearing stages was likely to make a difference. As Ms MacInnes conceded, it was a sham. It therefore lacked both

fairness and transparency. The respondent admitted procedural unfairness and this includes a breach of the ACAS Code.

117. The Tribunal considered it appropriate to award a 25% uplift on the compensatory award to reflect this breach.

Breach of Contract

118. The claimant claimed that the breach of disciplinary procedure by the respondent amounted to a breach of contract. A copy of the claimant's contract of employment was contained in the bundle which specifically sets out that the policies and procedures applicable to the employee are non-contractual. The claimant provided no evidence to suggest that this was incorrect or had been subsequently amended.

119. The evidence therefore indicated that the disciplinary procedure did not form part of the contract and therefore a breach did not amount to a breach of contract.

Damages

120. The claimant started her employment on 2 September 2013 and was dismissed on 2 July 2020.

121. Her weekly gross salary was £456.74 (52 weeks = £23,750.64). Her weekly net salary was £383.81.

122. In relation to damages for s.98 ERA unfair dismissal a statutory cap applies to the compensatory award. The relevant limit in force at the time of the claimant's dismissal in July 2020 was a maximum of £88,519 or 12 months gross pay, whichever is the lower.

Damages for Unfair Dismissal

123. The Tribunal calculated the basic award on six full years of employment over the age of 41 years; 6 x 1.5 x 456.74 = £4110.66.

124. The Tribunal calculated the compensatory award to include a loss of earnings between 3 July 2020 – 1 November 2021= 69 weeks x 383.81 = £26,482.89.

125. The Tribunal considered whether the claimant had sufficiently mitigated her loss by searching for other employment. We took into account the Covid-19 pandemic and the impact on the labour market. By the date of hearing the UK had been out of lockdown for some months and the jobs market had re-opened. The Tribunal noted that the claimant had supplied a list of jobs which she had applied for (many in early years support teaching) and took this to mean that the claimant was attempting to change career. We accept that the claimant has made reasonable attempts to find alternative employment, taking into account her background and the area in which she lives.

126. The Tribunal concluded that it would be reasonable to award full compensation to the date of hearing and a further 3 months further loss to the end of February 2022= £4,605.72,by which time the Tribunal consider that it would be reasonable for the claimant to have found employment at a comparable rate of pay.

127. The Tribunal also awarded a loss of statutory rights at £400. The 25% uplift applies to the compensatory and statutory rights awards 1.25 x 31,488.61=£39,360.76.

Statutory cap

128. As set out above the maximum award is 12 months of gross pay

(£23,750.64). Therefore, the cap applies to reduce the compensatory award.

129. The total award to the claimant is therefore;

Basic award £4110.66;

Compensatory award (with cap) £23,750.64

TOTAL = £27,861.30.

Employment Judge Cowen

Dated: 22 December 2021

Date sent to parties: 23 December 2021