EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107187/2023

Held in Glasgow on 1, 3, 4, 5, 8, 9 & 10 July 2024

Employment Judge P O'Donnell
Members Ms J Anderson & Mr J Burnett

Ms Donna Wilson	**Claimant** **Represented by:** **Mr S Smith** **Solicitor**
Millennium HD Limited **c/o Horizon Chartered Accountants**	**First Respondent** **Represented by:** **Mr R Katz -** **Solicitor**
Hazel Florence McMillan **c/o Horizon Chartered Accountants**	**Second Respondent** **Represented by:** **Mr R Katz -** **Solicitor**
Michelle O'Hara **c/o Horizon Chartered Accountants**	**Third Respondent** **Represented by:** **Mr R Katz -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is that:

1. The claimant was unfairly dismissed by the first respondent and is awarded the sum of £10043.19 (Ten thousand and forty three pounds, nineteen pence) in compensation.

2. The claims under the Equality Act 2010 against all three respondents are not well-founded and are hereby dismissed.

3. The claim that the claimant was not provided with a statement of terms and conditions of employment as required by s1 of the Employment Rights Act 1996 was withdrawn by the claimant and is dismissed under Rule 52 of the Tribunal Rules of Procedure.

REASONS

Introduction

1. The claimant has brought the following complaints:

    a. A claim of unfair dismissal under s94 of the Employment Rights Act 1996 against the first respondent.

    b. Claims of direct discrimination (s13) and harassment (s26) against all three respondents under the Equality Act 2010. The claimant relies on the protected characteristics of sex, age and disability. There were a number of allegations of acts or comments by the respondents which were said to amount to unlawful discrimination/harassment. The claimant also alleges that her dismissal amounted to direct discrimination.

    c. A claim that the respondent had failed to provide her with a statement of terms and conditions of employment as required by s1 of the Employment Rights Act. This claim was withdrawn during the course of the hearing and has been dismissed under Rule 52.

2. The respondent resists all the claims. The argue that there was a fair reason for the claimant's dismissal and that it was not done on the grounds of any protected characteristic. They also deny that the other alleged acts of discrimination/harassment occurred at all or were related to any protected characteristic.

3. There were two jurisdictional issues to be resolved as part of the hearing.

4. First, the respondents had disputed that the claimant was disabled as defined in s6 of the Equality Act. The claimant had relied on two conditions; ADHD and depression. During the course of the hearing, the respondents conceded

that the claimant was disabled in terms of her ADHD and the claimant withdrew depression as a disability relied upon in the case. The issue of disability status, therefore, fell away and did not require to be resolved by the Tribunal.

5. Second, the respondents argued that certain of the allegations of discrimination/harassment were out of time. The claimant's position was that there was an act of discrimination continuing over a period culminating in the claimant's dismissal. The claimant accepted that if her dismissal did not amount to unlawful discrimination then the other allegations were out of time. In that circumstance, the Tribunal would, therefore, have to consider whether it would exercise its discretion to hear those allegations out of time.

Evidence

6. The Tribunal heard evidence from the following witnesses:

   a. The claimant

   b. Karen McMahon (KMcM) – a former client of the claimant.

   c. Mia Dickson (MD) – a salon junior employed by the first respondent during part of the claimant's employment.

   d. Nathan Wilson (NW) – the claimant's son.

   e. Julie Kerr (JK) – a stylist employed by the first respondent at the salon.

   f. Michelle O'Hara (MO) – the third respondent, previous owner of the salon and stylist employed by the first respondent.

   g. Hazel McMillan (HM) – the second respondent, director of the first respondent.

7. There was an agreed bundle of documents prepared by the parties running to 430 pages. A reference to a page number below is a reference to a page in that bundle.

Findings in fact

8. The Tribunal made the following relevant findings in fact. The Tribunal heard evidence about a number of matters which have proved to be irrelevant and so the Tribunal has made no findings in fact about those matters. In part this is because some of the evidence led at the hearing was wholly irrelevant to the issues in dispute and in part because some of the evidence has, in light of the conclusions reached by the Tribunal, become irrelevant because the Tribunal has not had to make findings of fact on certain of the claims for the reasons set out below.

9. The first respondent operates a hairdressing salon in Wishaw. The salon was opened a number of years ago and was initially run by MO and one of her sisters. When that sister emigrated to Australia, MO ran the salon in partnership with her (now) ex-husband. When that relationship ended, MO discovered that her ex-husband had run up considerable debt in the business. She approached another of her sisters, HM, and her husband to assist and they set up the first respondent limited company to take over the salon.

10. HM was a director of the first respondent and was responsible for the day-to-day running of the salon. She would consult with MO on decisions relating to hiring and firing (although the events of this case are the first time any employee had been dismissed). MO remained a stylist in the business and was the stylist who brought in the most work.

11. The claimant had worked in the salon when she was a teenager but had no involvement with the business for a long time prior to her period of employment starting in 2020. She went to college to obtain qualifications in hairdressing and had a career in the beauty industry working in different salons in the Wishaw area before coming to work for the first respondent.

12. On 16 October 2020, HM contacted the claimant by text message to ask if she was looking for a hairdressing job. The claimant confirmed that she was and it was agreed that the claimant would come to work for the first respondent from 17 November 2020 (pp217-218). This was during the covid pandemic at a time when the restrictions on the population fluctuated. At the

time the claimant commenced employment, businesses were able to open with restrictions to ensure social distancing but shortly after that a period of lockdown was put in place which meant the salon could not open at all.

13. The claimant was employed to work three days a week, Thursday to Saturday. The start time was 9am but there was no set finish time and the claimant would work on until all clients had been seen.

14. The claimant had been treated for depression for a number of years and took medication for this condition. In December 2020, the claimant's sister suggested to her that she may have Attention Deficit Hyperactivity Disorder (ADHD) as she had displayed a number of symptoms since childhood. The claimant spoke to her GP about this who referred the claimant to a psychiatrist. In February 2021, the claimant received a formal diagnosis of ADHD.

15. The respondents concede that they had knowledge of the claimant's ADHD; HM concedes that she knew of this from some point in late 2021 but cannot give a precise date; MO concedes that she knew of it after a meeting with the claimant in February 2023 described below.

16. During the claimant's employment at the salon, there were two other stylists, MO and JK. The claimant's clientele tended to be a predominantly younger group than those of MO and JK although all stylists had a mix of clients in terms of age.

17. There was also a nail technician, Alice, and different salon juniors employed during the claimant's time at the salon. MD was the junior at the time of the claimant's dismissal and started after the claimant commenced employment. There were other junior staff employed for different periods including the claimant's daughter and HM's daughter.

18. When the claimant started there was another stylist, Pamela. The claimant had been told she was to replace Pamela but they worked together for a period of time. Pamela became pregnant and went on maternity leave. She did not return to work from maternity leave.

19. It was common ground that the claimant was regularly late for work. No evidence was led by either party as to how frequently this would occur. There was some dispute as to how late she was but it was clear that this could vary from a few minutes to quarter of an hour.

20. However, the respondent's raised no issue with the claimant about her timekeeping, either informally or as a formal warning, until the very end of the claimant's employment. It was accepted by the respondents that the claimant's poor timekeeping was something they needed to tolerate as part of employing her. The claimant attributed her poor time-keeping to her ADHD and an effect described as "time blindness" where she would not perceive the passage of time.

21. It was also common ground that there had been occasions when HM would ask the claimant to wear make-up. None of the witnesses could give specific details of what was said, when this was said or how frequently but it was agreed that the issue had been raised. HM had never raised it as a disciplinary issue prior to the claimant's dismissal and the claimant was given no warning that her appearance fell below an acceptable standard.

22. HM raised the issue of wearing make-up with other staff including her own daughter. Again, there was no detail of this but it was common ground that this was done.

23. During the course of her employment, the claimant separated from her husband. This resulted in financial difficulties for the claimant including a need to move house with her teenage children. The claimant also began dating after her separation. Again, it was common ground that the claimant would discuss these issues about her personal life with clients but, again, neither party led any detailed evidence about what was said, when it was said and to whom. The respondents did not raise any concerns about this until the February 2023 meeting (even then no formal warning was given).

24. The claimant described oversharing of personal information as another symptom of her ADHD.

25. On 24 February 2023, HM sent a text message to the claimant informing her that HM and MO needed to speak to her after work the next day. The claimant replied agreeing to meet and then asking what it was about and if she was getting sacked. HM replied *"no not at all".* The exchange is at p123.

26. The claimant met with HM and MO as arranged. It was explained to the claimant that HM and MO had concerns about a drop in the number of clients which the claimant had and, in particular, the fact that certain clients were not booking repeat appointments. No specific figures were given to the claimant and the only specific client mentioned to the claimant was KMcM. HM and MO attributed these issues to complaints from clients about the claimant but did not give any detail of who had complained or why. It was explained to the claimant that the respondents would need to cut her down to two days as there were not enough appointments for her to justify the claimant working three days.

27. The claimant was upset at what was raised at this meeting and considered it to be a personal attack on her. She sought advice from ACAS after the meeting about this and other matters relating to her employment (such as break times) but did not pursue matters further at that time.

28. On or around the same date as the meeting with the claimant, HM and MO had a meeting with someone named Lauren Roberts. She was a college friend of HM's daughter who was studying hairdressing and wanted some career advice. HM and MO met with her on a Sunday when the salon was closed but they were present because MO was doing HM's hair. After this meeting, there was no further contact between the respondents and Ms Roberts until after the claimant's dismissal.

29. In March 2023, KMcM was in contact with the claimant by text message to book an appointment and explain why she had not been to the salon for a while (p145). This was because she did not have her usual transport to the salon (the family member who would normally drive her was working away) and she did not drive due to an accident.

30. The claimant's days did reduce to two a week (she stopped working Fridays) but this did not last. There were some existing appointments booked for a Friday that she came into work to fulfil and over time the amount of appointments led to her regularly working on a Friday again.

31. No further issue was raised by the respondents with the claimant regarding the amount of appointments, the lack of repeat appointments or complaints by customers between the February meeting and her dismissal in June 2023.

32. On 17 June 2023, HM and MO were attending a family wedding. They attended the salon to have their hair done along with other family members but were otherwise not present for that day. The salon was staffed by the claimant, JK and MD.

33. It was common ground that MD attended work hung over on that day. This was obvious to others including clients who commented on this fact. At one point, MD fell asleep at the reception desk.

34. MD and the claimant had arrived at work together. At this time, MD was living with the claimant. The claimant had stayed at her boyfriend's house the night before and went home to get changed before travelling to work with MD.

35. The next week JK informed HM that the salon had been chaotic on 17 June 2023 in her absence. She made specific reference to MD being hungover and clients commenting on this but made no specific reference to the claimant other than to describe her as appearing to be "high" with no explanation of what was meant by this. She apologised that the salon had not been cleaned. She informed HM that she would need to contact clients who had been in on 17 June to apologise for how things had been. HM did subsequently call clients to apologise.

36. At this point, HM and MO discussed matters and decided to dismiss both the claimant and MD. HM typed up a letter (p201) setting out the reasons for the claimant's dismissal. This was presented to the claimant at the end of the working day on 24 June 2023. The claimant was told by HM (with MO present) that she was being dismissed and that the letter would explain

everything. The claimant was then allowed to gather her possessions and asked to leave the salon.

37. MD was dismissed at the same time in the same way (that is, being told she was dismissed and handed a letter setting out the reasons). The letter given to MD was not produced at the hearing but it was not in dispute that this made specific reference to her conduct on 17 June 2023 in attending the salon hung over and falling asleep at the reception desk.

38. The letter given to the claimant stated that she was being made redundant. The reasons given by the respondent why the claimant was redundant were as follows:

    a. There had been a 50% loss of client which was "drastically" affecting the business and could no longer be *"substantiated".* The wording of the letter does not make it clear if it was the claimant or the business as a whole that had lost these clients. No detail was given of the clients lost and in evidence the respondents accepted that the 50% figure was not based on actual data.

    b. The claimant's late coming and time keeping had affected clients returning to future appointments.

    c. The claimant's appearance had been "inconsistent" which was considered to be unacceptable for the reputation of the salon.

    d. The respondents had received feedback from clients that they had been made to feel uncomfortable about the claimant's personal and financial circumstances resulting in them not returning to the salon. No detail was given of which clients had provided this feedback.

39. The letter did not offer the claimant a right of appeal. She was paid a sum of money equivalent to statutory redundancy pay as well as any wages and holiday pay due to her.

40. The respondents did not immediately replace either the claimant or MD. The work done by them was spread between HM, MO and JK. However, it quickly

became clear that there was too much for three people to do. HM recalled Ms Roberts being close to finishing at college and contacted her to see if she was looking for work. On or before 11 August 2023, Ms Roberts was offered a job at the salon; she would work as a stylist but would also do work that a junior would do. She commenced employment on 30 August 2023.

41. The claimant sought to continue working in the hairdressing business and rented a chair at another salon in Wishaw shortly after her dismissal. However, there was not enough work to make this viable and this arrangement came to an end. She did some shifts at another salon in December 2023 but, again, there was not enough work for her.

42. The claimant was in receipt of Universal Credit during her employment and this continued after she was dismissed albeit at a higher rate.

43. The claimant commenced employment at Morrisons supermarket on 8 April 2024. She earns a higher wage in this job that she did with the first respondent.

Submissions

44. Mr Smith gave oral submissions on behalf of the claimant. Mr Katz produced written submissions and gave oral rebuttal of the claimant's submissions. For the sake of brevity, the Tribunal does not intend to set out the submissions in details. These have been noted and the Tribunal will refer to any point raised that requires to be specifically addressed in its decision below.

Relevant Law

45. The test for unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA).

46. The initial burden of proof in such a claim is placed on the respondent under s98(1) to show that there is a potentially fair reason for dismissal. There are 5 reasons listed in s98 and these include redundancy and conduct.

47. The reason for a dismissal was described by Cairns, LJ in *Abernethy v Mott Hay and Anderson* [1974] IRLR 213 (approved by the House of Lords in

subsequent decisions such as *W Devis & Sons Ltd v Atkins* [1977] AC 931 and *West Midlands Co-operative Society v Tipton* [1986] IRLR 112) as follows:-

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

48. It is a matter of law as to whether any such set of facts or beliefs falls into one of the categories of potentially fair reasons for dismissal and, if so, which one(s).

49. If the respondent discharges the burden of showing that there was a potentially fair reason, the test then turns to the requirements of s98(4) for the Tribunal to consider whether dismissal was fair in all the circumstances of the case. There is a neutral burden of proof in relation to this part of the test.

50. In considering s98(4), the Tribunal should take into account all relevant factors such as the size and administrative resources of the employer. There are two matters which have generated considerable case law and which are worth highlighting

51. First, there is the question of whether an employer has followed a fair procedure in dismissing the employee. The well-known case *of Polkey v AE Dayton Services Ltd* [1987] IRLR 503 it was held that a failure to follow a fair procedure was sufficient to render a dismissal unfair in itself (although the compensation to be awarded in such cases may fall to be reduce to reflect the degree to which the employee would have been fairly dismissed if the procedural errors had not been made – the so-called "Polkey" reduction).

52. Procedural fairness includes giving an employee the opportunity to explain their actions or provide some form of mitigation.

53. The Tribunal should have regard to the ACAS Code of Practice on Disciplinary Practices and Procedures in Employment ("ACAS Code") in assessing the procedural fairness of any dismissal as well as considering whether the employer had complied with their own procedures and policies.

54. On the question of whether the procedure followed by the employer was reasonable, the case of *Sainsbury's Supermarket v Hitt* [2003] IRLR 30 is authority for the proposition that the band of reasonable responses test applies to conduct of the process leading to dismissal.

55. The importance of warnings to allow an employee to improve their conduct, performance or attendance is confirmed in paragraph 19 of the ACAS Code of Practice:

"Where misconduct is confirmed or the employee is found to be performing unsatisfactorily it is usual to give the employee a written warning. A further act of misconduct or failure to improve performance within a set period would normally result in a final written warning."

56. Warnings give the employee an opportunity to change and improve as recognised by Lord Denning in *Retarded Children's Aid Society v Day* [1978] IRLR 128 at 130:-

"It is good sense and reasonable that in the ordinary way for a first offence you should not dismiss a man on the instant without any warning or giving him a further chance."

57. Warnings are relevant to both the question of whether a fair procedure has been followed and whether dismissal was a fair sanction.

58. The second broad issue in considering s98(4) is that the Tribunal needs to consider whether the dismissal was a fair sanction applying the "band of reasonable responses" test. The Tribunal must not substitute its own decision as to what sanction it would have applied and, rather, it must assess whether the sanction applied by the employer fell within a reasonable band of options available to the employer.

59. The Equality Act 2010 protects individuals from discrimination on the grounds of various protected characteristics. These include, for the purposes of this case, sex, age and disability.

60. The definition of direct discrimination in the 2010 Act is as follows:

13 Direct discrimination

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.

61. The burden of proof in claims under the 2010 Act is set out in s136:

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(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.

62. The burden of proving the facts referred to in s136(2) lies with the claimant. If this subsection is satisfied, however, then the burden shifts to the respondent to satisfy subsection 3.

63. Although the test for direct discrimination forms a single question, the caselaw indicates that it is often helpful to separate this into two elements; the less favourable treatment and the reason for that less favourable treatment.

64. In order for there to be less favourable treatment, the claimant must be subjected to some form of detriment. The question of whether there is a detriment requires the Tribunal to determine whether "by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work" (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 HL).

65. A claimant can rely on an actual or hypothetical comparator for the purposes of establishing less favourable treatment. There must be no material difference in the circumstances of the claimant and comparator (s23 of the

Equality Act 2010). In deciding how a hypothetical comparator would have been treated, the Tribunal is entitled to have regard to the treatment of real individuals (see, for example, *Chief Constable of West Yorkshire Police v Vento* [2001 IRLR 124).

66. However, a difference in treatment and a difference in protected characteristic is not enough to establish that the difference in treatment was caused by the difference in protected characteristic; "something more" is required (*Madarassy v Nomura International* [2007] IRLR 246). The Tribunal needs evidence from which it could draw an inference that race was the reason for the difference in treatment.

67. It is important to remember that unreasonable or unfair behaviour is not enough to allow for an inference of direct discrimination (*Bahl v The Law Society* [2004] IRLR 799).

68. It is a well-established principle that Tribunals are entitled to draw an inference of discrimination from the facts of the case. The position is set out by the Court of Appeal in *Igen v Wong* [2005] ICR 931 (as approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] IRLR 870).

69. The *Igen* case was decided before the Equality Act was in force but the guidance remains authoritative, particularly in light of the *Hewage* case.

70. Harassment is defined in s26 of the Equality Act 2010:

26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) …

(3) …

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

age;

disability;

gender reassignment;

race;

religion or belief;

sex;

sexual orientation.

71. In Hartley v Foreign and Commonwealth Office UKEAT/0033/15 (27 May 2016, unreported) it was held that the question whether there is harassment must be considered in the light of all the circumstances of the case. Where the claim is based on things said it is not enough only to look at what the speaker may or may not have meant by the wording.

72. However, even where certain elements of the test for harassment are met (for example, unwanted conduct and the violation of the claimant's dignity), the Tribunal must still consider the *"related to"* question and make clear findings as to why any conduct is related to a protected characteristic (*UNITE the Union v Nailard* [2018] IRLR 730; *Tees, Esk and Wear Valleys NHS Foundation Trust v Aslam* [2020] IRLR 495, EAT).

73. The provisions relating to the time limit for bringing a claim under the Equality Act 2010 to the Employment Tribunal is set out in s123 of the 2010 Act:

> *(1) Subject to section 140B [a reference to the provision extending time for ACAS Early Conciliation] proceedings on a complaint within section 120 [the section giving the power to the Tribunal to hear claims under the Act] may not be brought after the end of—*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable.*
>
> *(2) …*
>
> *(3) For the purposes of this section—*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
>
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
>
> *(a) when P does an act inconsistent with doing it, or*
>
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

74. The time limit runs from when the act of discrimination occurs and not when the claimant becomes aware of it (*Virdi v Commissioner of Police of the Metropolis* [2007] IRLR 24).

75. The Tribunal does have a broad discretion to hear a claim out of time under s123(1)(b) of the 2010 Act. In *British Coal Corpn v Keeble* [1997] IRLR 336,

it was confirmed that this involved a consideration of the prejudice each side would suffer taking account of all the relevant circumstances of the case.

76. *Keeble* also suggested that the factors set out below are ones which the Tribunal should take into account in exercising its discretion. However, in subsequent decisions it was made clear that the Tribunal has been given a very wide discretion under the 2010 Act and it should not treat these factors as a "checklist" (*Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] ICR D5) but, rather, take into account all relevant factors with no one factor being determinative.

77. The length and reason for any delay as well as the question of any prejudice to the Respondent arising from the delay have been said to always be relevant factor (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] IRLR 1050) although the Tribunal requires to bear in mind that no one factor is determinative.

78. The factors which may be relevant to the exercise of the Tribunal's discretion are:

    a. the length of and reasons for the delay;

    b. the extent to which the cogency of the evidence is likely to be affected by the delay;

    c. the extent to which the party sued had co-operated with any requests for information;

    d. the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action;

    e. the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

79. Other factors which may be relevant to the exercise of the discretion are:

a. the presence or absence of any prejudice to the respondent if the claim is allowed to proceed (other than the prejudice involved in having to defend proceedings);

b. the presence or absence of any other remedy for the claimant if the claim is not allowed to proceed;

c. the medical condition of the claimant, taking into account, in particular, any reason why this should have prevented or inhibited the making of a claim;

80. The burden of proof in the exercise of the discretion lies on the Claimant and past cases have made it clear that it should be the exception and not the rule, with no expectation that the Tribunal would automatically extend time (*Robertson v Bexley Community Centre* [2003] IRLR 434). This does not, however, mean that exceptional circumstances are required for the Tribunal to exercise its discretion and the test remains what the Tribunal considers to be just and equitable (*Pathan v South London Islamic Centre* UKEAT/0312/13).

Decision – unfair dismissal

81. The Tribunal will deal with the claim of unfair dismissal first before turning to the claims under the Equality Act.

82. The first question for the Tribunal in considering the unfair dismissal claim is whether the first respondent has proved that there is a potentially fair reason for dismissal. In this section of the judgment, a reference to “the respondent” is a reference only to the first respondent as the unfair dismissal claim does not lie against the other respondents.

83. The Tribunal considers that the respondent’s position on the reason why the claimant was dismissed is so hopelessly confused that the Tribunal is not persuaded that the respondent even knows why they dismissed the claimant.

84. The letter of dismissal states that the claimant was being dismissed by reason of redundancy due to a 50% loss of clients (the letter is ambiguous as to

whether it is the claimant or the salon as a whole which is suffered this loss and it was accepted by the respondent in evidence that the 50% figure was not based on any actual data) and sets out three reasons said to have led to this loss; the claimant's timekeeping and late coming; her inconsistent appearance; client's feeling uncomfortable about the claimant discussing her personal and financial circumstances.

85. In the ET3, the respondent expressly abandons redundancy as the reason for dismissal shifting to conduct. Despite this, however, the respondent led evidence about the claimant losing clients (albeit based on figures which the respondent conceded were potentially inaccurate and could not be relied upon) and HM asserted that she could no longer pay the client if she was not bringing in sufficient clients.

86. The conduct pled in the ET3 were the same three issues set out in the dismissal letter as being the reasons why the respondent perceived there had been a loss of clients; lateness, appearance and what the claimant discussed with clients.

87. However, in respect of lateness, HM gave evidence that this was not an issue for the respondent. It was her evidence that the claimant was late throughout her employment, that this was accepted as part of employing her and that the salon worked around this.

88. During her evidence, HM, for the first time, asserted that the claimant was guilty of gross misconduct in relation to the events of 17 June 2023. This had never been said before; the events of 17 June were not mentioned in the claimant's dismissal letter (although they were in MD's dismissal letter); these events were narrated in the ET3 as part of the chronology leading to the claimant's dismissal but were not pled as the reason (or part of the reason) for dismissing the claimant.

89. It was not clear from the evidence led by the respondent what the gross misconduct was said to be. In the ET3 it was asserted that the respondents had been told by JK that the claimant was intoxicated but JK's evidence was that she had told HM that the day had been chaotic but did not specify what

was meant by this. The only specific detail given by JK which potentially related to the claimant was that the salon had not been cleaned by the end of the day. She did not give any evidence that she told HM that the claimant was intoxicated. HM's evidence was that JK had said that the claimant seemed "high" and was talking about her night out on the Friday. HM assumed from this that the claimant was intoxicated.

90. There had been more detail given of the conduct of MD on that day, specifically that she had been hungover and had fallen asleep at the reception desk. JK had said to HM that she would need to call the clients who had been in that day to apologise (which she did) but neither of them gave evidence of what HM had to apologise for. In particular, there was no evidence that it was something done by the claimant.

91. In these circumstances, the Tribunal does not consider that the respondent has led clear and cogent evidence as to what was in the mind of those making the decision to dismiss (that is, HM and MO) at the time the decision was made. The reason had changed between the letter of dismissal and ET3, the respondent continued to lead evidence about reasons which had been abandoned (using unreliable evidence) and a new reason was asserted during the hearing which was not supported by any evidence.

92. For the purposes of the unfair dismissal claim, it is not for the Tribunal to decide what it thinks was the real reason for dismissal. Rather, it is for the respondent to lead evidence to discharge the burden on them in proving there was a potentially fair reason for dismissal. For the reasons set out above, the Tribunal does not consider that the respondent has discharged this burden and the Tribunal finds that there is no potentially fair reason for dismissal.

93. On this basis alone, the Tribunal would find that the claimant was unfairly dismissed but, for the sake of completeness, the Tribunal will go on to consider whether the dismissal would have been fair under s98(4) ERA if there had been a potentially fair reason for dismissal.

94. There is absolutely no question that the dismissal was procedurally unfair. There was no procedure followed at all, let alone a fair procedure which

complied with the ACAS Code. It is notable that the submissions from Mr Katz did not even attempt to argue that there was a fair procedure.

95. The failings by the respondent are not as simple as just the failure to hold some form of disciplinary meeting with the claimant to give her a chance to put her side before dismissing her. There are far more fundamental failings.

96. First, there was no attempt to carry out any form of reasonable investigation into the claimant's alleged conduct. For example, there was no investigation of the events of 17 June 2023 and the evidence led before the Tribunal shows the importance of this; the respondent's ET3 asserted the claimant was intoxicated but this was not supported by the evidence of JK; HM gave evidence that she had assumed the claimant was intoxicated because JK described her as "high" but this is, at best, ambiguous and a proper investigation, rather than an assumption, would have clarified what JK meant by this and how it manifested in the claimant's conduct; there was no clear separation between the conduct of MD and the claimant; there was no clear explanation of what the claimant had done wrong. A proper investigation could have addressed all of these failings.

97. If it was the loss of clients which was the reason for dismissal then there was no investigation of why clients were not returning. Again, the evidence led before the Tribunal shows that assumptions had been made by the respondent (that is, in relation to why KMcM had not returned) would have been dispelled if they had actually investigated this.

98. Second, the claimant had been given no formal warnings that her conduct could lead to her losing her job. Although there was a meeting in February 2023 in which there was an attempt to discuss her conduct, the express evidence given by HM and MO was that this was not a disciplinary hearing. Certainly nothing was said that the claimant's conduct was putting her job at risk and nothing was said that could, even on the most generous interpretation, be construed as a warning.

99. This is important because a warning is the opportunity for an employee to understand that there will be consequences if they continue to conduct

themselves in the same way and have the chance to change in order to keep their job.

100. It is particularly important where, as in this case, certain conduct had been continuing for some time without apparent issue; an employee needs to understand that things which had been tolerated in the past had reached a point where they could not be tolerated anymore and that changes are needed. It was common ground that, for example, that the claimant was regularly late for work for almost her whole employment and that this had not been an issue. Similarly, issues around her appearance had not been a disciplinary issue in the past. The claimant was given no understanding that these issues would not be allowed to continue as they had and so had no opportunity to change.

101. In all these circumstances, even if the Tribunal had found that there was a potentially fair reason for dismissal, it would have had no hesitation in finding that the claimant's dismissal was unfair on a procedural basis.

102. The Tribunal is also not persuaded that dismissal was within the band of reasonable responses. An employer does have a very wide discretion as to what sanction to employ but it is not unlimited. As set out above, despite the assertion by HM regarding gross misconduct, there was no evidence before the Tribunal of anything done by the claimant which warranted instant dismissal.

103. In particular, the three issues which the respondent assert as the reasons for dismissal in their ET3 had persisted for some time with no apparent issue. Again, the lack of warnings is a significant factor where the nature of the conduct relied upon is of a minor or lesser seriousness. The Tribunal considers that the issues were all matters which required some form of warning to the claimant to give her the opportunity to change. It would only be if the conduct continued despite a warning that dismissal would become a reasonable option for the respondent.

Decision - discrimination

104. In considering the claims under the Equality Act 2010, the Tribunal will first address the question of whether the claimant's dismissal amounts to an act of discrimination before dealing with any other issues.

105. The reason for this is that the dismissal is the only alleged act of discrimination which was in time and so this will determine how the Tribunal deals with the issue of time bar. If the claimant's dismissal was not discriminatory then the other allegations of discrimination are out of time and so the Tribunal needs to consider whether to exercise its discretion to hear those claims. It is only if the Tribunal exercises its discretion in the claimant's favour that it then would need to determine the substantive merits of the earlier allegations. On the other hand, if the claimant's dismissal is an act of discrimination then the Tribunal will need to assess whether it forms part of an act continuing over a period that includes those earlier allegations. This would involve making findings about the substance of those allegations.

106. The claimant asserts that her dismissal was an act of direct discrimination. This is not immediately apparent from the ET1 (which erroneously makes reference to s103 of the Employment Rights Act rather than any provision of the Equality Act). However, it was clear from what was discussed during submissions that this was the claim being advanced. In particular, it was agreed that the issue of knowledge of the claimant's disability was not relevant because no claims under s15 (discrimination arising from disability) or ss20 & 21 (duty to make reasonable adjustments) were being advanced.

107. The claimant relies on the protected characteristics of disability and/or age. The Tribunal will address each of these in turn.

108. In relation to disability, the Tribunal needs to be satisfied that someone without ADHD would not have been dismissed in the same or similar circumstances as the claimant. No actual comparator was advanced by the claimant and so the Tribunal has to consider whether there was any evidence that a hypothetical comparator would have been dismissed.

109. However, there was no evidence at all that someone without ADHD would not have been dismissed. The only evidence about any other employee being dismissed was MD who was dismissed at the very same time as the claimant and whose dismissal was triggered by the events of 17 June 2023 in the same way as the claimant's dismissal was said by the respondents to have been triggered.

110. When asked about this during his submissions, Mr Smith could only suggest that the fact that the claimant had not been dismissed previously showed that someone without ADHD would not be dismissed. The Tribunal does not consider that this provides any assistance to the claimant; it was conceded by the respondents that HM had known of the claimant's ADHD since 2021 and there was nothing in the evidence which suggested why she would dismiss the claimant for this reason in 2023. If anything, the inference to be drawn from these facts is that something else other than ADHD was the driving force behind the decision to dismiss.

111. In these circumstances, to the extent that it could be said that the claimant was dismissed because of her conduct, there was no evidence that someone without ADHD whose conduct fell below an acceptable standard would not have been dismissed. Indeed, the only evidence the Tribunal had about how anyone else had been treated when issues of conduct arose showed that they were also dismissed.

112. The Tribunal has borne in mind the finding above in the unfair dismissal claim that the respondent had not provided clear and cogent evidence sufficient to discharge their burden of proof in that claim. However, the absence of a cogent explanation from the respondent does not mean, in and of itself, that the Tribunal should fill that absence with a finding of discrimination. There needs to be evidence from which the Tribunal could infer that the claimant's ADHD was the real reason and there is simply no such evidence.

113. Mr Smith had submitted that certain of the reasons advanced by the respondent (that is, timekeeping and her oversharing of personal information) were manifestations of her ADHD. However, the difficulty for the claimant is

that the Tribunal was dealing with a claim of direct discrimination and not discrimination arising from disability. The Tribunal was, therefore, having to decide if the decision to dismiss was because she had ADHD in itself and not because of something which may have arisen from that condition. In other words, the Tribunal needs evidence that someone else who was regularly late or overshared personal information but who did not have ADHD would not have been dismissed and there no such evidence was led by the claimant.

114. In these circumstances, the Tribunal does not consider that the claimant has discharged the burden of proving that, on the face of it, her dismissal amounted to direct disability discrimination. In particular, there was no evidence from which the Tribunal could draw the inference that someone without ADHD was or would have been treated more favourably in the same or similar circumstances.

115. The claim of direct age discrimination was based on the theory that the respondents wanted to replace the claimant with a younger (and, therefore, cheaper in terms of wages) stylist. The whole of this argument hinges on the fact that the respondents employed a new stylist (who was newly qualified) in August 2023 who HM and MO had met before the claimant was dismissed.

116. The Tribunal considers that this is a case of “2+2=5”. The claimant has taken events about which she has no direct knowledge and reached an assumption for which there is no evidence. The Tribunal accepts the evidence of the respondents that the initial meeting between this other stylist and the respondents was initiated by HM’s daughter on behalf of a friend who was looking for career advice. There was no evidence that this was a job interview; no-one else was present for this meeting (including the claimant); there was no evidence (direct or hearsay) that either HM or MO had described the meeting as an interview to anyone.

117. Similarly, the other stylist was not recruited until nearly two months after the claimant was dismissed; the claimant herself produced evidence of social media posts by the other stylist dated 11 August 2023 stating that she was starting work with the respondents at the end of August 2023 (p428). There

was no evidence of any earlier instance of this stylist suggesting she was going to work for the respondents nor was there any other evidence that the stylist had been recruited at some earlier point in time.

118. The Tribunal accepted the evidence of the respondents that they had recruited this other stylist only when it became clear that the existing employees were not sufficient. It is important to bear in mind that it was not just the claimant who had been dismissed but also MD. The respondent had, therefore, lost two employees (almost half the workforce in the salon) and the Tribunal finds it unsurprising that they eventually concluded that they needed more staff to cope with the amount of work in running their business.

119. Further, there was no evidence that, at any point, the respondents had had an issue with the claimant's age. The claimant makes a number of allegations in her ET1 about comments regarding her weight, appearance or behaviour which she relates to her sex and/or disability but makes no allegations that her age was ever the subject of derogatory comments.

120. The only other allegation relating to age is that younger employees were not asked to wear make-up but that is not borne out by the evidence. The claimant herself gave evidence that HM's daughter (who was younger than the claimant) was asked to wear make-up when she worked at the salon.

121. In these circumstances, the Tribunal does not consider that there is any evidence from which it could draw an inference that the claimant was dismissed because of her age or dismissed in order that she could be replaced by a younger employee who would attract a lower wage.

122. The ET1 does include claims of sex discrimination but no case was advanced at the hearing that the claimant's dismissal was an act of sex discrimination. The allegations of sex discrimination relate to earlier matters, in particular, comments allegedly made about the claimant around Christmas 2022.

123. However, for the sake of completeness, the Tribunal considers that there was no evidence whatsoever that the claimant was dismissed because she was a woman.

124. It is the conclusion of the Tribunal that the claimant's dismissal did not amount to act of unlawful discrimination and so that claim is hereby dismissed.

125. The remaining allegations of discrimination are out of time in the sense that the ET1 was not presented within the time limit set out in s123 of the 2010 Act (including any extension of the time limit in respect of ACAS Early Conciliation). This was accepted by Mr Smith on behalf of the claimant. The Tribunal does not, therefore, have jurisdiction to determine the claims relating to those allegations unless it is prepared to exercise its discretion to hear those claims out of time.

126. The Tribunal has not set out the detail of the other allegations of discrimination (which are a mix of direct discrimination and harassment), either in this section of its decision or in its findings of fact. The reason for this is that, given the Tribunal's decision on time limits, it does not need to address the substantive merits of the claims of discrimination and so it is unnecessary to set out the facts of these claims in detail. It would simply make this judgment longer than it needs to be for the parties to understand why the Tribunal has reached the conclusions which it has.

127. The Tribunal bears in mind that the exercise of its discretion to hear those claims out of time should be the exception and not the rule. It needs to be satisfied that the relevant factors set out in *Keeble* weigh in favour of the claimant to the extent that it would be just and equitable to allow the claims to be determined.

128. The Tribunal does not consider that the claimant has presented any adequate explanation why she did not lodge a claim about the earlier allegations in time. She has not suggested that there was any impediment to lodging such a claim in time. For example, there is no suggestion that she was not aware of any relevant facts until a later date and it was clear that all the facts on which she relies were in her knowledge from the outset. Similarly, there is no evidence that there were any health reasons which prevented or hindered her in bringing a claim earlier.

129. The claimant gave evidence that she sought advice from ACAS in or around February or March 2023. It was her evidence that there was a discussion about some of the comments which now form the basis of the earlier allegations of discrimination as well as other issues. The claimant was, therefore, in a position to have obtained advice that these matters could have been pursued to the Tribunal (including the issue of time limits) but did not do so.

130. The only explanation given by the claimant why she did not take action earlier was that she was not "a moaner" and chose to ignore the earlier comments because it was not worth the hassle. The claimant is entitled to take such a view but there are consequences to choosing not to take matters forward in a timeous manner.

131. The Tribunal also notes that there was a considerable delay in the claims being pursued after the claim was dismissed and sought legal advice. ACAS Early Conciliation was not engaged until September 2023 and was concluded on 2 November 2023. The ET1 was presented a month later on 1 December 2023.

132. Whilst this would not have been an issue if the only act of discrimination was the claimant's dismissal, it does mean that the claims in relation to any earlier allegation have not been pursued promptly.

133. It was clear that the delay in lodging claims in relation to the earlier allegations had adversely affected the quality of the evidence about those allegations. For example, no dates could be given for many of the comments the claimant alleges were made about her weight or discussions about her ADHD/medication. This did prejudice the respondent who could do no more than make general denials rather than give a specific response to such allegations.

134. The claimant would not be wholly deprived of any remedy if the Tribunal did not exercise its discretion in her favour. She has still been able to advance claims in respect of her dismissal which the Tribunal considers is the real core of this case. It was quite clear from what the claimant said that, had she not

been dismissed, she would not have pursued the claims in respect of the earlier allegations and would have just chosen to ignore these.

135. In these circumstances, the Tribunal considered that the balance of prejudice fell in the respondents' favour.

136. For all these reasons, the Tribunal does not consider that there is any basis to exercise its discretion to determine the remaining claims under the Equality Act which had been lodged out of time. In such circumstances, those claims are dismissed.

Remedy

137. There were a number of issues that the Tribunal required to determine in considering what compensation it would be just and equitable to award in respect of the claim for unfair dismissal.

138. First, the Tribunal considered whether there was any basis to reduce the award for contributory fault by the claimant. There must be culpable and blameworthy conduct on the part of the claimant which contributed to her dismissal. The Tribunal was not persuaded that, given the lack of clear and cogent evidence of the reason for the claimant's dismissal, there is any evidential basis on which it could find that there was such conduct on the part of the claimant.

139. Mr Katz sought to argue that the claimant's failure to engage with the respondents at the February 2023 meeting amounted to contributory fault. However, there was no evidence that this was one of the reasons for the decision to dismiss and so it cannot be said that this contributed to the claimant's dismissal.

140. Further, this meeting was not, on the respondent's own evidence, a disciplinary meeting which would have resulted in any formal warning to the claimant that her employment was at risk. It cannot be said that this was the one and only opportunity for the claimant to realise that she was at risk of losing her job. The respondent had ample opportunity between that meeting

and the claimant's dismissal (approximately four months) in which they could have engaged in a proper disciplinary process.

141. The Tribunal does not, therefore, consider that there is any basis to make a deduction for contributory fault.

142. Second, there is the question of whether to make a "Polkey" deduction to reflect the prospects of the claimant having been dismissed anyway if a fair procedure had been followed. This would arise where the Tribunal has found that the dismissal was unfair solely on the basis of procedural defects and so has to consider whether the claimant would still have been dismissed if a fair procedure had been followed.

143. In the circumstances of this case, where there was no fair reason for dismissal, there is no basis on which the Tribunal could conclude there was any prospect of the claimant being dismissed at all.

144. In any event, even if the Tribunal had found the claimant's dismissal to be unfair only on a procedural basis, the Tribunal does not consider that there was sufficient evidence that, had the respondent engaged in some form of fair process, the claimant would still have been dismissed.

145. The difficulty for the respondent is that, having failed to engage in any form of process at all, they have created for themselves a particular steep hill to climb in terms of the evidence needed to show that the claimant would still have been dismissed.

146. For example, as noted above, had the respondent carried out a proper investigation as to why clients were not returning rather than making assumptions there is a clear possibility that this would have disclosed reasons other than the claimant's conduct. This is certainly the case for KMcM and there was no evidence that she was an outlier or sole example.

147. The respondent and the claimant produced emails from clients to the Tribunal which were presented very different views of the claimant (pp366-369 and pp412-414). The Tribunal has not placed particular weight on any of these emails as none of them were contemporaneous and had only been produced

for the purposes of the hearing. However, it does show that there was not a clear position that the claimant's conduct was driving clients away.

148. Similarly, a proper investigation into the events of 17 June 2023 would have very likely resulted in a clear position as to the claimant's conduct on that day and what it was she was said to have done. As matters stand, there is no evidence to suggest that the claimant did anything that day which would have resulted in her dismissal even if a disciplinary process had been followed.

149. If the respondent had even held a disciplinary hearing or given the claimant a right of appeal she would have had the opportunity to reply to the complaints against her and present the sort of information she has now produced to the Tribunal. This would have allowed the respondent to have assessed this and made an informed decision as to whether dismissal was warranted.

150. There is also the failure to give the claimant any formal warning before dismissing her. As the Tribunal has already addressed above, she was not, therefore, given any chance to realise that her behaviour had become an issue for the respondent and the opportunity to change her behaviour. There was no evidential basis on which the Tribunal could conclude that the claimant would not have taken such an opportunity if she had been given it.

151. For these reasons, the Tribunal has not made any "Polkey" deduction and would not have made one even if the claimant's dismissal was unfair solely on procedure.

152. Third, there is no question of a failure to mitigate the claimant's loss. The burden of proving this lies on the respondent who has advanced no evidence or argument to discharge this burden.

153. Fourth, and finally, the claimant sought an uplift to his compensation in relation to a failure by the respondent to follow the ACAS Code of Practice. The Tribunal considers that the respondent wholly failed to comply with the ACAS Code given the complete lack of any dismissal procedure. This failure was wholly unreasonable; the respondent gave no explanation, let alone an

adequate one, why they did not engage in any process. An uplift is, therefore, appropriate.

154. In terms of the amount of any uplift, the Tribunal considers that the wholesale failure by the respondent to act in accordance with the Code means that it is appropriate to start at a 25% uplift.

155. The Tribunal has then considered whether there is any basis why this should be reduced. The Tribunal considers that there are no mitigating factors that would lead it to reduce the uplift significantly. The Tribunal has taken into account the actual amounts of money involved as well the size and resources of the respondent. It is only those latter factors which has led the Tribunal to consider that a 15% uplift is appropriate.

156. Turning now to the calculation of the award to be made and the Tribunal starts with the basic award. Although the respondent abandoned redundancy as a reason for dismissal, it remains the case that they made a payment to the claimant described as redundancy pay. The claimant needs to give credit for this and, given that statutory redundancy pay and basic award are calculated by the same formula, the Tribunal considers that the most straightforward way to do so is for the payment made by the respondent to cancel out the basic award.

157. Turning to the compensatory award, there are a two heads of damages; loss of past wages and loss of statutory rights. The Tribunal will address each of these in turn before considering whether the statutory cap applies.

158. In respect of the loss of past wages, the Tribunal considers it appropriate to award this from the date of dismissal (24 June 2023) to the date when the claimant commenced her job at Morrisons (8 April 2024). The claimant earns more in this new job and so her past loss ends once she commences this employment. This amounts to 41 weeks.

159. The claimant's net pay fluctuated and so the Tribunal has calculated the average pay by taking an average of the claimant's pay for the months of March, April and May 2023. The Tribunal did not use the pay for June 2023

because the claimant did not work the whole month and so it was not representative. This produces an average weekly take home pay of £200.81.

160. The total loss of past wages to the date of the Tribunal amounts to 41 x £200.81= £8233.21.

161. The Tribunal makes no award for future loss on the basis that the claimant earns more in her new job than she did with the respondent.

162. The claimant has sought £850.60 in respect of loss of statutory rights. This is based on 4 weeks wages at £331.21 a week. It is not explained how the sum of £331.21 was calculated and so the Tribunal is not prepared to use this sum when it is considerably more than the claimant's average take home pay.

163. Further, the Tribunal does not consider that would be appropriate to award a sum equivalent to four weeks' wages in respect of this head of compensation given that the claimant's period of employment was only two complete years. The Tribunal considers that a sum of £500 is more appropriate given her length of service, the statutory rights she would have acquired, how long it would take her to acquire similar rights in a new job and her average pay.

164. The total unadjusted compensatory award is, therefore, £8733.21. This is less than the claimant's annual earnings and so the statutory cap does not apply.

165. The Tribunal awards a 15% uplift to the compensatory award as set out above which amounts to £1309.98. This brings the total compensatory award to £10043.19.

166. In these circumstances, the Tribunal makes a total award for unfair dismissal of £10043.19 (Ten thousand and forty three pounds, nineteen pence).

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Employment Judge: **P O'Donnell**
Date of Judgment: **31 July 2024**
Entered in register: **02 August 2024**
and copied to parties

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