EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No. 4100604/2025

Held in Aberdeen on 4 & 5 March 2026

Employment Judge Smith

Ms S Caroline — **Claimant**
Represented by
Mr D Burnside,
Solicitor

ICTS (UK) Limited — **Respondent**
Represented by
Mr R Katz,
Solicitor

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claimant's claim of unfair dismissal is well-founded and succeeds.

2. The respondent shall pay to the claimant a basic award of compensation in respect of her unfair dismissal in the sum of **£7,350**, representing 10.5 times a week's pay of £700.

3. The respondent shall pay to the claimant a compensatory award of compensation in the sum of **£37,779.21**, made up of the following components:

    3.1. Past loss of earnings: £17,656.64.

    3.2. Future loss of earnings: £19,289.88.

    3.3. Loss of statutory rights: £500

3.3.1. Subtotal: £37,446.52

3.4. Grossing up of the amount in excess of £30,000 = £9,308.15

3.4.1. Subtotal: £39,308.15

3.5. Statutory cap applied (52 weeks' gross pay): £37,779.21.

4. The claimant did not engage in culpable conduct prior to her dismissal and no reduction was made to the basic award.

5. The claimant did not engage in culpable conduct which contributed to her dismissal and no reduction was made to the compensatory award on this basis.

6. The Tribunal declined to make any reduction in compensation applying the principle in ***Polkey v A E Dayton Services Ltd***.

7. The recoupment provisions do not apply.

REASONS

Introduction

1. By way of a claim form dated 8 April 2025 the claimant presented a claim of unfair dismissal to the Tribunal. That claim was fully defended by the respondent, and the full hearing took place over two days beginning on 4 March 2026.

2. I was presented with a productions file amounting to some 185 pages, to which certain additions were made. I was taken to some of those documents during the course of the evidence.

3. The claimant gave oral evidence in her own case at the hearing. For the respondent I heard oral evidence from Mr Dumitru Chelaru (employed at the material time as Station Manager, Aberdeen, but now a Divisional Director) and Mr Manuel Pombo (at the material time, Divisional Director in England).

4. There was insufficient time to deliver an oral judgment at the conclusion of the hearing, meaning that judgment had to be reserved. I regret that it has taken longer than anticipated to promulgate this judgment but this was due to a combination of other judicial commitments, annual leave and illness on my part.

Findings in fact

5. The claimant was employed by the respondent as a Security Supervisor based at Aberdeen Airport. As the title suggests, her role was safety focused and she

had responsibility for supervising and instructing staff on security duty at the Airport, for observing passengers and sometimes for carrying out physical searches of individual passengers, their luggage and their vehicles. Her tasks also included loading trays into the X-ray scanning machine.

6. The respondent is a provider of security services across various industries in the UK and Ireland, including at various airports (of which Aberdeen is one). It has a large workforce of around 4,000 employees spanning its various locations, and it has access to HR support and legal advice where necessary.

7. The claimant's employment commenced in the first week of April 2017. The precise date is not agreed but is immaterial to what I have to decide. She was initially employed by Aberdeen International Airport Ltd but her employment transferred to the respondent with effect from 17 December 2019 by virtue of a relevant transfer under the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("**TUPE**").

8. This case concerns the claimant's sickness absences. It is not in dispute that the claimant had the following periods of absence from work through sickness, and I find they were all genuine:

    8.1. 12 February to 12 April 2023 (34 days) following an operation to repair a rotator cuff;

    8.2. 13 to 16 August 2023 (4 days) with a Covid-19 infection;

    8.3. 28 to 29 November 2023 (2 days) with an eye scratch which required treatment;

    8.4. 31 December 2023 (1 day) with a Covid-19 infection;

    8.5. 8 February 2024 (1 day) with sickness/diarrhoea;

    8.6. 20 to 21 June 2024 (2 days) with cold/flu symptoms;

    8.7. 8 August 2024 (1 day) with diarrhoea (this was treated by the respondent as a full day's absence although the claimant did attend work on that occasion but left two hours and forty minutes into her shift);

    8.8. 21 October to 3 November 2024 (10 days) with shoulder pain.

9. The respondent has an attendance management policy, which it inherited from the claimant's previous employer prior to the **TUPE** transfer. It is a policy which

has been agreed with the relevant Trade Union, Unite. The purposes of the policy are set out in its opening section, which reads:

> *"The purpose of the Attendance Management Policy is to ensure that employees undergoing or returning from a period of sickness absence receive the attention they need to:*
>
> - *Minimise the disruption in their working life that this will have caused.*
> - *Minimise the disruption to their colleagues; working conditions and to the business.*
> - *Ensure that they are well enough to re-commence work.*
> - *Ensure that there are no conditions or issues, of either health or psychological well-being, which could detract from their welfare over the longer term and possibly lead to further absences."*

10. The policy sets out quite a detailed procedure for dealing with absences, but in essence it works using "trigger points". If absences meet the triggers of three or more occasions within a rolling twelve-month period, or an overall total of ten or more working days with that rolling period, an employee must attend an initial meeting to discuss their absence. This is known as an "Absence Counselling" interview.

11. Assuming an employee meets either trigger point and has an Absence Counselling interview, the normal outcome is that the employee is placed on "AMP Level 1", which is a further monitoring period that expires twelve months after the employee's last absence. However, in certain circumstances the policy deems it inappropriate to place an employee on AMP Level 1, even if they have met a trigger point. These circumstances are:

    11.1. Where *"any of the absences which counted towards the prompt should be exempted because they were occasions of Special Case Management which qualify for exemption..."*;

    11.2. Where *"it is clear from the employee's absence history over the longer term that the absences which led to the current prompt being reached have been an exception to the norm"*; and,

    11.3. Where *"there are any other mitigating circumstances"*.

12. "Special Case Management" is defined by the policy, and if it applies it takes matters on a modified course. Amongst the situations covered by Special Case Management is where the employee has *"informed a manager at any other time that they feel that they have a medical condition which will continue to affect their ability to perform their present role"*.

13. Employees who are placed on AMP Level 1 are required to attend another Absence Counselling meeting if they meet further trigger points within the twelve-month monitoring period. Those triggers are three or more occasions of absence, or a total of five or more working days' absence, in any three-month period, *"and/or"* three or more occasions of absence, or a total of ten or more working days' absence, in any twelve-month period.

14. Again, assuming a trigger is met and a second Absence Counselling meeting goes ahead, the normal outcome is that the employee is placed on "AMP Level 2", subject to the first and third (but expressly not the second) of the circumstances listed in paragraph 11, above.

15. AMP Level 2 is a further monitoring period of twelve months, and if the employee meets any of the AMP Level 1 triggers set out in paragraph 13, they will be invited to what is described as a "Contractual Review" meeting. The purpose of the Contractual Review meeting is, in essence, for the respondent to evaluate the situation and decide whether the employee should be dismissed.

16. Employees who are dismissed at the Contractual Review stage have a right to a first and second appeal under the policy, both of which take the form of a review. The policy expressly provides that in the case of Scottish airports the first appeal is to be heard by a Managing Director, and the second appeal by the Managing Director of Scottish Airports.

17. Based on the first four of the absences set out in paragraph 8 (above), the claimant met a trigger point and was therefore invited to an Absence Counselling meeting. That meeting took place on 19 January 2024 and was held by Mr Ryan Collins, Operations Manager.

18. The meeting was short (lasting 15 minutes) and from the notes, uneventful save to note that when asked about her shoulder, the claimant told Mr Collins that *"she had mostly recovered however her op could take up to a year to heal fully"*. Mr Collins' decision was to place the claimant on AMP Level 1, but in his letter confirming this he stated that *"...you had been given an operation through the NHS on your shoulder. You stated that you had recovered from this with no underlying issues"*. That was inconsistent with what the claimant had actually told Mr Collins.

19. Based on the fifth, sixth and seventh absences set out in paragraph 8 (above) the claimant met the first of the trigger points applicable to AMP Level 1, and accordingly she was invited to a second Absence Counselling meeting by Mr Collins. That meeting took place on 14 August 2024.

20. That meeting was also short (lasting 20 minutes) and much like on the previous occasion, a discussion was had between the claimant and Mr Collins about the absences and the reasons behind them. The claimant's shoulder operation was not mentioned, but it had not been the reason for any of the triggering absences on this occasion. The claimant declined Mr Collins' suggestion that she might be referred to Occupational Health (OH). Mr Collins' decision was to place the claimant on AMP Level 2.

21. As mentioned in paragraph 8 (above), the claimant's final period of absence was from 21 October to 3 November 2024, with what was described as shoulder pain. The fit note obtained from the claimant's GP gives the reason for her unfitness for work as being *"dizziness and rotator cuff pain"*. The claimant was referred to OH and on 6 November 2024 a report recommended that she be given lighter duties and a phased return over a period of three weeks. The respondent implemented those recommendations.

22. Based on the final absence set out in paragraph 8 (above) the claimant met the second of the trigger points applicable to AMP Level 2 within the monitoring period, and accordingly she was invited to a Contractual Review meeting. The meeting was to be chaired by Mr Chelaru, and in the invitation letter the claimant was warned that one possible outcome was that her employment might be terminated.

23. The Contractual Review meeting took place on 25 November 2024, which was around the time the claimant's phased return would just have finished. It was attended by the claimant, Mr Chelaru, an HR Advisor and a colleague of the claimant's, Mr Michael Middleton. The claimant's absences were discussed and Mr Chelaru said that he had discounted the absence relating to her operation; I accept that he did exclude it. The claimant mentioned – for the first time – that she was suffering from anxiety and "mental health issues", and that she had had been undertaking counselling arranged through her GP. She also mentioned that she thought she may have reactive arthritis (as in, a body response to her having had Covid-19 several times), and that this might explain her joint pain, having discussed the matter with her GP.

24. By email on 3 December 2024 Mr Chelaru informed the claimant that he had decided to dismiss her. He informed her that she would be paid in lieu of a month's notice, but given her length of service the claimant was in fact entitled as a matter of law to seven weeks' notice. A formal dismissal letter was attached to the email.

25. The letter itself narrates the history of the claimant's absences. Within the letter Mr Chelaru acknowledged the claimant having mentioned suffering from anxiety but discounted it as explaining any of the absences which had brought the

claimant into the territory of a Contractual Review meeting. Mr Chelaru stated that he had taken into account the OH report of 6 November 2024, and that the OH practitioner had concluded that the claimant did *"not suffer any underlying health conditions"*. It was on this basis (the letter said) that Mr Chelaru decided to dismiss the claimant.

26. In examination-in-chief Mr Chelaru was asked why he decided to dismiss the claimant. His answer was that he had discounted anxiety and mental health as a factor explaining the absences, and that the decision was *"made in line with policy"*. This was an unsatisfactory answer and did not really explain why the decision to dismiss was made. In cross-examination the truth of the matter was exposed when Mr Chelaru stated that *"We follow an absence management process and that's the direction the policy is taking us to. I would look at the absence and see if there's any Special Case Management and any special considerations, and if there are no special considerations the result would be dismissal."*

27. In my judgment, the real reason Mr Chelaru dismissed the claimant was because of her absences and because he believed that the policy gave him no other option. He was following a policy for the sake of the policy, rather than trying to achieve any of the actual objectives of the policy. It was a classic case of a dismissing manager adopting "tunnel vision".

28. Despite what Mr Chelaru recorded in his dismissal letter, the OH report did not in fact state that the claimant had no underlying health conditions. It stated that, in the view of the OH practitioner, the claimant was unlikely to satisfy the test for "disability" under **section 6** of the **Equality Act 2010**, which is an altogether different matter. Mr Chelaru took no steps to establish whether there in fact may have been an underlying condition. That was despite him being told by the claimant in the Contractual Review meeting that there may well be an underlying condition that may have explained some of the absences (of which her GP was aware): reactive arthritis. Mr Chelaru could have referred the claimant back to OH on this specific point, for example, but he did not. He could have asked the claimant to provide information from her GP, for example, but again he did not.

29. Mr Chelaru was asked whether he considered any alternative step that could have been taken in respect of the claimant other than dismissing her; he initially said he did, but when pressed on the matter he accepted that he had not: what he had actually done was check *the policy* to see whether there were any alternatives to dismissal, and found there were not.

30. Whilst the claimant in general terms agreed that there must have been some impact on the respondent's operations as a result of her absences, Mr Chelaru was asked whether he had himself identified what impact the claimant's

absences had had. He initially explained in vague terms that the respondent would *"not be able to deliver on certain contractual obligations to the client due to supervisory cover"*, but did not say what they were. He then suggested that *"we have KPIs... and if there is any absence on the supervisory team that means there is more pressure on colleagues to deliver on those KPIs"*. No documentary evidence was provided by the respondent in relation to any real-world business impact at all in relation to the KPIs, nor could Mr Chelaru point to any specific example of the claimant's absence(s) causing any particular inconvenience other than absence of 20 June 2024, where other supervisors had to cover for her when she had to leave part of the way into her shift.

31. Again, on this point I found Mr Chelaru's evidence to be unsatisfactory. In my judgment, this point about considering the impact of the claimant's absence on business appeared to have only occurred to Mr Chelaru when asked about the matter at the hearing rather than being something he gave thought to at the time. I find that the impact of the claimant's absences on the business was something that simply did not occur to Mr Chelaru to even have to consider at the time, and that he did not consider it. This was entirely consistent with the "tunnel vision" approach adopted throughout, and contrary to one of the clear goals of the policy: minimising disruption to the business *etc*. In trying to achieve that goal the place to start would logically have been to assess what disruption there had actually been.

32. The claimant exercised her right to a first appeal on 12 December 2024, by emailing Mr Robert Horsburgh (Aviation Divisional Director for Scotland) as instructed in the dismissal letter. It was agreed that her grounds of appeal were summarised accurately by Mr Pombo in his letter to the claimant inviting her to an appeal meeting, set out as follows:

    32.1. The claimant felt she had not been provided with any meaningful support in managing her overall attendance levels;

    32.2. She felt the sanction issued was too severe as she stated since her *"Level 2 review [she] had one period of sickness which is something* [she has] *confirmed is currently being investigated by* [her] *doctor and feel it would have been appropriate for other routes explored firstly to allow* [her] *to remain in* [her] *role*"; and,

    32.3. She stated that there should be *"responsibility to fellow colleagues and vulnerable passengers in regard to preventing the spread of Covid"*.

33. The first appeal was heard by Mr Pombo, who was not of the level of Managing Director despite the express provision in the policy that matters relating to Scottish airports be assigned to a Managing Director. The claimant was invited

to an appeal meeting and this took place on 16 January 2025, with the claimant and Mr Pombo in attendance along with two members of HR staff and Mr Middleton.

34. Matters relating to the claimant's grounds of appeal were discussed in the meeting, including Mr Middleton (on the claimant's behalf) once again raising the issue of reactive arthritis. He informed Mr Pombo that the claimant's GP would be able to write to confirm that she did in fact have arthritis (by this time she had received a diagnosis), but also that her GP was investigating the possibility that the severity of her Covid-19 episodes was related to it. At the conclusion of the meeting the claimant told Mr Pombo herself that she had an underlying condition.

35. At one point in the meeting the claimant mentioned – for the first time – an issue concerning her working relationship with Mr Chelaru, arising from the time of her shoulder operation in early 2023. In summary, she told Mr Pombo that she had a "fractured relationship" with him, and gave some limited particulars concerning (1) a fear that her pay would be stopped and that she would have to take annual leave to cover at least part of her post-operative recovery leave, and (2) that she had felt attacked by him whilst following a process relating to shifts.

36. She told Mr Pombo that she had started an *"informal process"* in relation to this, but there was no evidence provided to me about what this process was or what it involved, and I accepted Mr Chelaru's evidence when he said he had no knowledge of it. The point being made to Mr Pombo, however, was that it had been inappropriate for Mr Chelaru to have conduct of the Contractual Review meeting because he was not impartial towards the claimant.

37. By letter dated 27 January 2025, Mr Pombo informed the claimant of his decision that her first appeal had not been upheld. As Mr Pombo confirmed in evidence, the letter itself was drafted by the respondent's legal representatives (Peninsula); he simply signed it off and sent it.

38. The letter was seemingly drafted on the basis of an investigation report compiled by Mr Pombo and sent to Peninsula. That document was brief but it included the three grounds of appeal he had fairly summarised in his letter inviting the claimant to the appeal meeting. The part setting out Mr Pombo's thinking reads, *"I could not find, through the initial investigation documentation and in any other points that Susan discussed with me anything that could be accepted as a mitigation factor to rethink or revise the initial decision. I had the opportunity to read all the stages AMP1, AMP2 and AMP3 and feel that Susan had ample opportunities given to either express any other deeper concerns or avoid all those absences."*

39. This insight into Mr Pombo's thinking is, in my judgment, quite revealing. I find that his decision was based on a review of the documents that were available and also partly upon what the claimant had told him at the meeting. However, I find that he did not give careful thought to the actual specific grounds put forward by the claimant in her appeal, nor did he adequately address them or follow up on any of the points she had raised.

40. Some of those points were ones which could have warranted further exploration. The first concerned Mr Chelaru's impartiality and the question of whether it was appropriate for him to have been the decision-maker at the Contractual Review stage. The second was whether any alternatives (*"other routes"*, as the claimant had put it in her second ground of appeal) might have been available to avoid dismissal. The third was whether there was indeed an underlying health condition which may have explained some of the claimant's absences.

41. As to the matter of Mr Chelaru's impartiality, in cross-examination all Mr Pombo said he did was to ask HR whether there *"had been any cases coming out of Aberdeen"*. He did not say what answer was forthcoming from HR, or indeed whom he spoke to. None of this information appeared in the investigation report or indeed the outcome letter (to which I shall return), nor was it mentioned by him in his evidence in chief. When pressed on the matter, Mr Pombo ultimately admitted that he *"didn't look at this specific allegation"*. Based on this entirely unsatisfactory and contradictory evidence, I rejected Mr Pombo's assertion that he asked HR anything. My finding is that Mr Pombo took no steps to investigate Mr Chelaru's impartiality at all.

42. There was no evidence that Mr Pombo considered alternatives to dismissal, or took any steps to look into whether any *"other routes"* may have been available which might have been suitable in order that the claimant could return to employment. I find that the matter did not enter into his thought process.

43. Mr Pombo also took no steps to establish whether there in fact was an underlying health condition which might have explained some of the claimant's absences. It was at all times within his gift to refer the claimant back to OH but he did not, and this was despite the claimant by that time having a diagnosis of reactive arthritis and her telling him that she was undergoing further investigations through her GP. He also did not consider whether Mr Chelaru, as the initial decision-maker, had permissibly approached this issue.

44. Peninsula's outcome letter – as endorsed by Mr Pombo – is also entirely inadequate. Despite Mr Pombo having fairly summarised the claimant's three grounds of appeal in his invitation letter, the outcome letter only deals with one ground (which is actually the second of the three). The others are simply not mentioned at all.

45. The reasoning behind Mr Pombo's decision in relation to that ground is stated as, *"As there have been various absence review meetings held over a short period of time, there had been approaches made to support your absences and changes made to aid in returning to work on each occasion."* In my judgment, this short passage in no way addresses the main thrust of the second ground, which concerned the *"other routes"* (i.e. alternatives) point as well as the underlying condition point. The objective observer would not have been able to decipher from this passage what Mr Pombo's conclusions on either of those points were.

46. At the conclusion of the letter the claimant was told *"You have now exercised your right of appeal under our procedures and this decision is final"*. This was inaccurate, as the respondent's policy allows for a second appeal. In the case of Scottish airports, it is evident from the policy that it is considered by the respondent to be a particularly important right given that the seniority of the person to hear a second appeal must be the Managing Director of Scottish airports themselves. The result of this final passage is that the claimant was effectively denied her right to a second appeal.

47. At the point of her dismissal the claimant had seven years' complete service, all of which had been undertaken when she was over the age of 41 (she was aged 60 at the effective date of termination of 3 December 2024; "EDT").

48. The claimant's gross annual salary at the EDT was £37,883, meaning her gross weekly pay was £726.35. Her net monthly salary at the EDT was £2,687.13, plus employer pension contributions at 12%. It was agreed by the parties that the overall net monthly earnings amounted to £3,090.91 taking into account the pension contributions element.

49. Following her dismissal the claimant registered with an employment agency and registered with online agencies as well. She applied for several positions and in many cases received no response, but she did obtain several interviews. She obtained new employment with the Aberdeen Dyce Hotel on 28 January 2025, less than two months after being dismissed by the respondent, albeit on a lesser gross annual salary of around £24,000.

50. Between the commencement of that employment and the hearing of this claim the claimant has obtained two promotions at the Hotel, meaning her gross annual salary at the date of hearing was £26,124.65.

51. Scope for further promotion at the Hotel is limited, but the claimant continues to receive notifications about jobs through Indeed and she has taken further steps to find alternative employment. Whilst I accepted her evidence that she was still

"not strong enough mentally" following her dismissal by the respondent, and that this was a bar to her *"getting out there and selling* [herself] *again"*, she was able to obtain an interview for another role in April/May 2025, this time with Global Healthcare. Unfortunately, she was the second-placed candidate and was not recruited.

52. These findings indicated to me that the claimant had taken reasonable steps to mitigate the losses occasioned by her dismissal by the respondent, and that she had not unduly limited her search to jobs in the security industry. For its part, the respondent put forward no evidence of any opportunities that the claimant could have applied for but did not.

The law

53. A claim of unfair dismissal is a statutory claim. **Section 94** of the **Employment Rights Act 1996** confers the right upon an employee not to be unfairly dismissed by their employer, subject to the qualification (under **s.108(1)**) that they have two years' continuous service. There are categories of unfair dismissal claim for which two years' continuous service is not required, but the claimant's case is not one of them.

54. One of the potentially fair reasons for dismissal is a reason relating to the conduct of the employee (**s.98(2)(b)**). Another is capability, which covers cases of incapability by reason of ill-health (**s.98(2)(a)** and **(3)(a)**). Another is "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held", commonly abbreviated to the initials "SOSR" (**s.98(1)(b)**), which may be anything that appropriately fits within the boundaries of that statutory definition.

55. In the case of dismissals resulting from a series of absences, the higher courts have had to grapple with the question of which of the statutory labels best applies. In ***Wilson v Post Office*** [2000] IRLR 834 the England and Wales Court of Appeal decided that in such cases the appropriate label was usually SOSR rather than capability, but in ***Ridge v HM Land Registry*** UKEAT/0485/12/DM the EAT provided useful guidance on the distinction. At [61] HHJ Richardson stated:

> *"... It can be a difficult question whether to classify a dismissal following repeated periods of absence as a capability dismissal or a "some other substantial reason" dismissal. The* **Employment Rights Act 1996** *contains a definition of "capability": it means "capability assessed by reference to skill, aptitude, health or any other physical or mental quality." If these considerations are to the forefront of the employer's mind when dismissing an employee, then the reason for dismissal will relate to the capability of the employee for performing work of the kind which he was*

> *employed by the employer to do: see* **section 98(2)(a)***. But it is not unusual, particularly in cases of repeated short-term absence for a variety of reasons, for the recurring absences themselves to be the reason for dismissal, the operation of an attendance policy having been triggered: see* ***Wilson v Post Office*** [2000] IRLR 834*. In that case the better label may be "some other substantial reason".*

56. Whilst in series-of-absences case an Employment Tribunal is entitled to find that the reason for dismissal was one relating to conduct (see, for example, ***Williams v Cheshire Fire & Rescue Service*** UKEAT/0621/07/ZT) the label of "conduct" is not normally apt, because as the EAT has made clear in cases such as ***Lynock v Cereal Packaging Ltd*** [1988] IRLR 510, absences are not normally to be treated as a disciplinary matter.

57. Where an employee has sufficient continuous employment to qualify for the right not to be unfairly dismissed, the burden of proof is always on the employer to show a potentially fair reason for dismissal (**s.98(1)**).

58. If the employer has satisfied the Tribunal that the sole or principal reason for dismissal is a potentially fair one, the question for the Tribunal is whether the dismissal was actually fair. The test to be applied is that set out in **s.98(4)**. The burden of proof is neutral but the Tribunal must determine the fairness of the dismissal, having regard to the employer's reason, depending *"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"* and *"in accordance with equity and the substantial merits of the case"*.

59. In series-of-absence cases under the capability or SOSR labels there is authority governing Employment Tribunals in how they should assess the fairness of a dismissal through the lens of **s.98(4)**. The leading case remains ***Lynock*** (cited above), which sets out the following principal points for the Tribunal to consider, namely:

    59.1. Did the employer carry out a fair review of the absences and the reasons for them?

    59.2. Were appropriate warnings given after the employee had an opportunity to make representations?

    59.3. Was consideration given to whether improvement had materialised?

60. Those points – and fairness overall – are to be considered in the following context however, as described by Wood J in ***Lynock*** at [14]:

> *"The approach of an employer in this situation is, in our view, one to be based on those three words which we used earlier in our judgment – sympathy, understanding and compassion. There is no principle that the mere fact that an employee is fit at the time of dismissal makes his dismissal unfair; one has to look at the whole history and the whole picture. Secondly, every case must depend upon its own fact, and provided that the approach is right, the factors which may prove important to an employer in reaching what must inevitably have been a difficult decision, include perhaps some of the following – the nature of the illness; the likelihood of recurring or some other illness arising; the length of the various absences and the spaces of good health between them; the need of the employer for the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the exercise carrying out of the policy; the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching. These, we emphasise, are not cases for disciplinary approaches; these are for approaches of understanding."*

61. At all stages the actions of the employer are to be objectively assessed according to the established standard of the reasonable employer acting reasonably or, as it is sometimes put, whether the employer acted within a "band of reasonable responses" (***Iceland Frozen Foods Ltd v Jones*** [1982] IRLR 439, EAT). Equally, the Tribunal cannot substitute its own view as to what it would have done had it been in the dismissing officer's position (***Trust Houses Forte Leisure Ltd v Aquilar*** [1976] IRLR 251, EAT); it is the sanction imposed by this employer which falls to be determined according to the band of reasonable responses test.

62. If this is a case where the claimant could be said to be at fault in some respect, the (statutory) *Acas Code of Practice on Disciplinary and Grievance Procedures* would have applied to her situation, and the Tribunal should have regard to it.

63. If I find that the claimant's dismissal is unfair I may nevertheless reduce any basic award under **s.122(2) Employment Rights Act 1996** if I find that the claimant engaged in culpable or blameworthy conduct prior to her dismissal.

64. Equally, I may also reduce any compensatory award under **s.123(6)** if I find that the claimant's culpable or blameworthy conduct caused or contributed to her dismissal. Any reduction on this basis should be in a proportion the Tribunal considers just and equitable.

65. Also, if I find that the claimant's dismissal was unfair it is necessary for me to consider whether there was a chance that she would have been dismissed in any event (the principle expressed in ***Polkey v A E Dayton Services Ltd*** [1987]

3 All ER 974, House of Lords). The task for the Tribunal has been explained by the EAT (in ***Hill v Governing Body of Great Tey Primary School*** [2013] IRLR 274) in the following terms:

> *"First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have been dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done)… The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand."*

66. Polkey deductions are not limited merely to procedural unfairness; they may be made in cases of substantive unfairness as well (***Gove v Propertycare Limited*** [2006] ICR 1073, Court of Appeal).

Analysis and conclusions

67. Applying the law to the facts I have found, my conclusions in relation to the claim are as follows. In reaching these conclusions I have borne in mind the helpful submissions provided by Mr Burnside and Mr Katz during the hearing, but it has not been necessary for me to rehearse them in full.

Reason for dismissal

68. Pursuant to my finding at paragraph 27 (above), the principal reason Mr Chelaru dismissed the claimant was because of her absences and because he believed the respondent's policy afforded him no other option but to do so. This was not a reason that related to the claimant's health as such but one that related to her absences and the operation of a policy, and therefore fell on the SOSR side of the ***Wilson*** divide, as explained in ***Ridge***.

69. As his primary argument Mr Katz put the reason as being SOSR, as a failure on the claimant's part to adhere to the absence management policy. This does not seem to materially differ from the principal reason I have found, and for this reason I consider that the respondent has discharged its burden under **s.98(1)**.

70. However, whilst it is not now necessary for me to decide whether his secondary argument should succeed, Mr Katz submitted in the alternative that the principal reason related to the claimant's conduct; essentially, the same reason but with the "conduct" label applied. I would have rejected that submission, firstly on a

legal basis because of the observation made in ***Lynock*** (at [14]) that these are not cases for *"disciplinary approaches"*, but also on the basis of my finding (at paragraph 8) that all of her illnesses were genuine. In evidence, either of the respondent's witnesses suggested that the claimant was indeed to blame for any of her absences either.

71. In any event, the contention that the reason related to the claimant's conduct was conclusively defeated by my finding as to what the real reason was. That reason was, as SOSR, a potentially fair reason for dismissing the claimant.

Fairness

72. In deciding whether the claimant's dismissal was actually fair within the meaning of **s.98(4)**, I have been greatly assisted by the approach and considerations endorsed by the EAT in ***Lynock***.

73. Turning first to the respondent's attendance management policy, it was not suggested by Mr Burnside that the policy itself was unfair. Indeed, the policy appeared to me to be one a reasonable employer could have adopted in dealing with attendance and absence.

74. The policy provides for reviews and reviews were carried out by Mr Collins at the AMP Levels 1 and 2 stages, and by Mr Chelaru at the Contractual Review stage. Dealing with the second of the ***Lynock*** questions, no issue was taken by the claimant with the appropriateness of the warnings given by Mr Collins at the AMP Levels 1 and 2 stages, in line with the policy, and no unfairness arises from those.

75. Also, at the Contractual Review stage – and dealing with the third of the ***Lynock*** questions – I was satisfied that Mr Chelaru was entitled to conclude that the claimant's attendance had not improved over the course of the review period. That was evident from the pattern of absences set out at paragraph 8 (above), and no unfairness arises from that point either in my judgment.

76. However, whilst no particular criticism was levelled at Mr Collins and his involvement during the earlier stages of the procedure, in my judgment the actions of Mr Chelaru fell well short of ensuring that a *"fair review"* of the absences, and the reasons for them, took place (the first of the ***Lynock*** questions).

77. As I found in paragraph 28, Mr Chelaru wrongly concluded that OH had stated that the claimant had no underlying health conditions. OH had said no such thing, and it is unclear whether they were even asked to comment on that matter. But the claimant had positively asserted that there may have been an underlying issue. In my judgment, to have acted reasonably in these circumstances a

reasonable employer would have made a referral back to OH or taken some step to investigate whether there in fact was an underlying problem; the fact that Mr Chelaru did nothing in this regard was in my judgment unfair and outside of the range of options open to the reasonable employer faced with this situation.

78. As Wood J (in ***Lynock***) observed, one of the features of a *"fair review"* can be the taking into account of the impact of the employee's absence on their colleagues and the business. Whilst I accept that not all of the factors mentioned by Wood J will always be relevant, the impact of the claimant's absence on the business was in this case very important, in my judgment. As I found in paragraphs 30 and 31 (above), there was almost no evidence that the claimant's absences had had any real-world impact on the business or her colleagues, save for the time she had to leave mid-shift by reason of diarrhoea, and her work had to be covered by other supervisors. Most significantly of all, the issue never even crossed Mr Chelaru's mind.

79. In the case of an employee with seven years' service in a position of some responsibility (as this claimant had), where an express policy goal of the employer's is to minimise the impact of absence on other employees and the business (as this respondent's was), and where such cases call out for *"sympathy, understanding and compassion"* (as *per* ***Lynock***), to have acted reasonably a reasonable employer would have at least considered what the impact of the employee's absence had been. They might not have carried out a thorough investigation of that matter (indeed, they may not have needed to), but they would have given the matter some thought, even if based on their own understanding of working practices and the available resources. Mr Chelaru's failure to give the matter any thought at all was in my judgment unfair, and firmly outside both the band of reasonable responses and the boundaries of the *"fair review"* expected by ***Lynock***.

80. Mr Burnside submitted that as part of a ***Lynock***-compliant *"fair review"* of the claimant's situation, no reasonable employer would have taken into account her absences by reason of Covid-19. His reasoning was that vulnerable people travelling from the Isles to hospital do so through Aberdeen Airport, and that they might be negatively affected by coming into contact with the claimant if she was working whilst infected with the virus. In support of this contention he referred to a guidance document issued by the Scottish Government in respect of Covid-19.

81. Despite the force with which Mr Burnside put this point, in my judgment a reasonable employer could have acted reasonably in taking into account the claimant's absences by reason of Covid-19. Whilst it is well known that the virus itself can prove deadly, there was in my judgment no compelling justification for treating absences by reason of it differently from other absences. Mr Burnside's rationale could apply equally to any infectious (particularly airborne) disease with

which the claimant was infected whilst at work, as the risk of her passing it on to a member of the public would remain.

82. In any event, the Tribunal's task is not to substitute its own view on the matter but to consider whether it was outside the range of reasonable responses for Mr Chelaru not to discount Covid-related absences. The point was not in fact raised by the claimant before Mr Chelaru at all. In my judgment, no unfairness arises in this regard. In respect of Mr Chelaru's involvement alone the claimant's dismissal was unfair, but for other reasons.

83. I then turn to the appeal. Whilst the subject of appeals was not strictly dealt with in ***Lynock***, providing an employee with a right to an appeal in today's age remains an essential pillar of procedural fairness, in almost every case.

84. In this case, the appeal stage was dealt with in a way that can only be described as shambolic. In reality, Mr Pombo paid no more than lip service to the fact that an appeal had been raised. As *per* my findings:

    84.1. He took no steps to look again at the issue of an underlying condition, despite the claimant having told him directly and stated that her GP was continuing to investigate (paragraphs 34 and 43). It was always within his gift to refer the claimant back to OH. The significance of this is that if the claimant was shown to be right, the entire absence management procedure that had been used in respect of her might have been fundamentally undermined, owing to the possibility that she might have been eligible for "Special Case Management" (paragraph 12);

    84.2. He took no steps to look into her contention that Mr Chelaru's impartiality was compromised, despite the claimant having raised that with him directly and the fact that Mr Chelaru had been the dismissing manager (paragraphs 35, 36 and 41);

    84.3. He took no steps to look into alternatives to dismissal that might have afforded the claimant with a way back into the employment (paragraph 42); and,

    84.4. He actually gave no careful thought to the claimant's grounds of appeal (paragraph 39), which is fundamental to there being an effective right to appeal.

85. Taking all of these matters in the round, it is abundantly clear that the appeal was dealt with by Mr Pombo in a way that no reasonable employer would have done,

acting reasonably. The claimant's dismissal – already unfair by virtue of Mr Chelaru's actions – was also unfair in respect of these matters as well.

86. That unfairness was compounded by the wholly inadequate outcome letter, in which the full grounds of appeal were not dealt with and the reasons for not upholding the appeal vague and unclear. It was further compounded by the respondent's denial of the right of a second appeal to the claimant. Whilst second appeals are unusual today, the respondent's own policy provides for such a right and plainly accords a high degree of importance to it, given that it must be heard by the Managing Director for Scottish airports.

87. For all of the above reasons, in my judgment the claimant's claim of unfair dismissal is well-founded and succeeds.

Conduct

88. In the event that I found the claimant's dismissal to be unfair (which I have) Mr Katz submitted that I should make reductions to both the basic and compensatory awards (to the extent of 50% in both cases) on account of the culpable (and contributory) conduct of the claimant in not letting the respondent know that she had an underlying health condition.

89. This submission fails on the facts. As I found (at paragraphs 28 and 34) the claimant told Mr Chelaru that she *may* have an underlying condition, and she told Mr Pombo that she *did* have one. It was Mr Chelaru and Mr Pombo who failed to do anything with the information the claimant gave them. In my judgment, the claimant did not engage in any conduct that could be said to have been culpable or indeed contributory to her dismissal, and I decline to make any reductions to the basic or compensatory awards for conduct reasons.

Polkey

90. Mr Katz invites me to reduce the claimant's compensatory award to nil under the rule in ***Polkey***, on the basis that Mr Chelaru and Mr Pombo would have made the same decisions they did in fact make anyway.

91. As ***Wood*** and ***Lynock*** respectively recognise, it may potentially be fair for an employer to dismiss an employee for a series of absences, and the fact that the employee is fit and working at the time of dismissal does not of itself make such a dismissal unfair in principle. The situation Mr Chelaru was faced with was a set of circumstances in which the employee was in work but had been through every stage of what was a reasonable policy, because of the series of absences that I recorded at paragraph 8 in my findings in fact. In my judgment, this employer

could *in principle* have dismissed the claimant by reason of the series of absences that were apparent at that time.

92. Following ***Hill***, in deciding this matter I have to assume that this particular employer would have acted fairly, and decide what would likely have happened (if indeed I am able to do so). The task is inherently speculative but should be based on the findings I have made.

93. To have acted fairly Mr Chelaru would have done two main things, and I must assume that he would have done them. Firstly, he would have appreciated from a proper reading of the report that OH had not stated that the claimant did not have an underlying condition, and he would have taken heed of the fact that the claimant herself was suggesting that there may be an underlying cause of some of her absences. To have acted fairly in that situation he would have either referred the claimant back to OH or sought input from her GP. That would have had the effect of postponing the Contractual Review meeting by – doing the best I can – a further month, to 3 January 2025.

94. I note that the claimant had a diagnosis of reactive arthritis by 16 January 2025, the date of the appeal meeting with Mr Pombo. It is therefore possible that she may have had it by 3 January or shortly thereafter. It is likely that any information the GP would have provided by the time of a reconvened Contractual Review meeting would have at least indicated the possibility of the claimant having reactive arthritis, but it might well have included the diagnosis itself given the proximity in time. Equally, had the matter been referred back to OH it is likely that some information relating to reactive arthritis would have been available to Mr Chelaru in a reconvened Contractual Review meeting in early January 2025.

95. At the putative reconvened Contractual Review meeting, and again assuming he would have acted fairly, Mr Chelaru would have appreciated that there was at least a possibility that the claimant had an underlying medical condition which would have affected her ability to do her job. He would therefore have appreciated that the claimant's case would have fallen within the Special Case Management eligibility criteria under the policy, placing him in the position of having to make a decision about which days of absence should be exempted from counting towards the claimant's past progression through AMP Levels 1 and 2.

96. It is at this point that the evidence and my findings leave me in a position of great difficulty in making any form of ***Polkey*** deduction. Mr Chelaru gave no evidence on what he would have decided, in general or in relation to specific periods of absence, had it been shown that the claimant may have had an underlying medical condition. There was no medical evidence presented to me at all about the claimant's diagnosis of reactive arthritis or indeed whether her GP believed

particular absences she had had were linked to that condition in some way. The very height of the matter was the claimant's expression, to Mr Chelaru at the Contractual Review meeting, that the GP believed there *could* be a link.

97. I have concluded that come the time of a reconvened Contractual Review meeting in early January 2025, it is simply too speculative to say what Mr Chelaru's decision would have been in relation to the claimant's employment, had he acted fairly. He may have put a stop to the entire process with whatever information came forth from the GP or OH; he may have decided to continue monitoring the claimant's absences for a further period; and he may have decided that the case was one which required Special Case Management and in doing so, discounted certain periods of absence but not others. In my judgment, the various permutations of what may have happened would depend entirely on the medical information that was forthcoming, and I cannot safely reach any conclusions on what it would have said.

98. In these circumstances, and for these reasons, I have declined to make a ***Polkey*** deduction to the compensatory award.

99. I have nevertheless considered the other things Mr Chelaru would have done in order to act fairly. The second is that he would have given some thought to what impact the claimant's absence had had on the business and on colleagues. On the basis of the evidence I was presented with, there was precious little to support the conclusion that there had been any impact at all. Such evidence that existed was limited to the day the claimant left early because of diarrhoea, and her supervisory colleagues covered for her in that situation. There was no evidence at all about the impact of the other absences, and some were longer (including the most recent absence, of 10 days).

100. Had he given proper consideration to this matter it remained a possibility that Mr Chelaru would have dismissed the claimant had that been the only concern regarding fairness, but of course it was not. He would still have been in the same situation *vis-a-vis* the underlying medical condition issue, and that would have prevented him from dismissing the claimant as at 3 December 2024 and at a putative reconvened Contractual Review meeting in early January 2025. It therefore provides no basis for making a ***Polkey*** reduction of itself.

101. I have also considered whether Mr Pombo would have made the decision he made, again assuming he had acted fairly. Given that I have decided that it is too speculative in this case to make a ***Polkey*** deduction at a (reconvened) Contractual Review stage, it is in my judgment even more speculative to make such a deduction based upon what would have to have been a fairly-conducted appeal. That is because more than one possible permutation of the reconvened Contractual Review meeting would have eliminated the need for

an appeal altogether; because there is great difficulty in pinning down what medical information Mr Pombo would have had before him; and most significantly of all, there is the right to a second appeal (which would not have been denied to the claimant): I simply have no basis for making any decision about what would have happened at the second appeal stage even if Mr Pombo had decided to dismiss, acting fairly.

102. For these additional reasons, I once again decline to make a ***Polkey*** reduction to the compensatory award.

Acas Code of Practice

103. The claimant was not culpable in any way in relation to the events that led to her dismissal, and the respondent did not believe she was culpable. Therefore, the *Acas Code of Practice on Disciplinary and Grievance Procedures* did not apply in this case.

Mitigation

104. The legal burden of proving an unreasonable failure to mitigate loss lies with the respondent, and on the basis of the findings I set out in paragraphs 49 to 52 (above) I decided that there has been no unreasonable failure to mitigate loss on the claimant's part.

Reinstatement/re-engagement

105. The claimant does not seek reinstatement or re-engagement as remedies for unfair dismissal. The remedy is therefore compensation only.

Assessment of compensation: basic award

106. The parties agreed that, adopting the statutory formula (based on the claimant's age at the EDT, her completed years of service as at the EDT, and the applicable statutory maximum week's pay of £700), she would be entitled to a basic award of £7,350. As I have declined to make any adjustment to the basic award, the Tribunal orders the respondent to pay to the claimant that sum.

Assessment of compensation: compensatory award

107. In assessing the compensatory award for unfair dismissal the Tribunal must only compensate the claimant, not provide her with a bonus or punish the respondent. **Section 123 Employment Rights Act 1996** states that a compensatory award shall be *"... such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by*

the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer."

108. The first stage is to assess the extent of the loss suffered by the claimant in consequence of the dismissal insofar as the loss is attributable to action taken by the respondent. The first element of that loss is an immediate loss of earnings.

109. The claimant's EDT was 3 December 2024 but she was paid a month's salary in lieu of notice (albeit short notice was given), meaning there was no loss of earnings until the expiry of that month, on 2 January 2025.

110. Between 3 January and 28 January 2025 (the date the claimant commenced working at the Aberdeen Dyce Hotel) the claimant had no income, and therefore 25 days' full net salary was lost and is due. Based on the findings I made at paragraph 48, her net monthly salary plus pension contributions was £3,090.91. This amount, multiplied by 12 then divided by 365, gives a net daily rate of £101.62. Multiplied by 25 days, the loss for this period is £2,540.50.

111. The only evidence I had as to the claimant's gross starting salary with the Hotel was an approximation, which led to my finding in approximate terms at paragraph 49: £24,000 *per annum*. I also found that the claimant had been promoted twice since starting on 28 January 2025 (paragraph 50), but was not told when these promotions occurred or what the intermediate salary was, other than it must have been somewhere in between around £24,000 and £26,124.65.

112. By the time of the hearing the claimant was employed at the Hotel in her current role, and it was agreed between the parties that the monthly difference between the net pay she received from the respondent and from the Hotel was £1,071.66. Multiplying that by 12 gives an annual difference of £12,859.92, and dividing it by 365 gives a daily difference of £35.23.

113. The period of loss between 28 January 2025 and the date of the hearing (4 March 2026) is 401 days. Multiplying the daily differential of £35.23 by 401 gives a subtotal of £14,127.23.

114. However, I should also take account of the fact that that difference is based upon the later (and thus higher) salary figure and not the earlier, lower figures. Without firm information relating to those preceding salaries it is impossible to make a certain calculation, but doing my best and taking account of the approximate and likely intermediate salaries I consider that an additional factor of 7% should be applied to the £14,127.23 figure to reflect the actual loss.

Doing so gives a total loss for the period 28 January 2025 to the date of the hearing as £15,116.14.

115. The total net loss from the EDT to the date of the hearing is therefore £17,656.64 (£2,540.50 for losses to 28 January 2025, plus £15,116.14 for losses from that date to the date of the hearing). Having found that the claimant had not unreasonably failed to mitigate her loss (paragraphs 49 to 52 and 104), there are no deductions to be made from this amount on that basis.

116. I then turn to future loss. Whilst this is inherently speculative, I have taken into account firstly the claimant's age (currently 61) and that it can be harder for people within that age bracket to obtain new employment. I have also taken into account the claimant's history of sickness-related absences. However, it is right to also recognise the fact that the claimant had little trouble in obtaining employment following her dismissal by the respondent, and indeed she has since been promoted twice and come second in separate job application in the meantime, despite those health issues. She plainly has considerable experience and transferable skills that are not restricted to a particular industry, given the difference between the security industry in which the respondent operates and the hospitality industry pertaining to the Hotel.

117. 24 months' future losses are sought by the claimant in her Schedule of Loss, but to me that appears unduly pessimistic given the relevant factors I have taken into account (above). Whilst it is speculative, with the diligence she has thus far shown in obtaining and succeeding in new employment gives me rather more confidence that the claimant will be able to obtain employment at a commensurate salary to that which she enjoyed at the respondent within a period of 18 months.

118. I was provided with no information relating to the potential for future pay rises at either the respondent or the Hotel, so for this reason I have calculated the future losses based upon the current agreed net monthly differential of £1,071.66. That sum, multiplied by 18, is £19,289.88.

Loss of statutory rights

119. The parties agree that I should also compensate the claimant for the loss of her statutory rights in the sum of £500, and I endorse their agreement.

Total compensatory award

120. As *per* my decisions in relation to contributory conduct and ***Polkey*** deductions (paragraphs 88 to 102), and the applicability of the *Acas Code of Practice* (paragraph 103), there are no deductions to make to the compensatory award.

Subject to grossing up (see below) the total compensatory award is therefore £37,446.52, made up of the following elements:

120.1. Past loss of earnings: £17,656.64.

120.2. Future loss of earnings: £19,289.88.

120.3. Loss of statutory rights: £500.

Grossing up and statutory cap

121. Because the compensatory award exceeds £30,000 it would normally be necessary to gross up the amount that exceeds that threshold (£7,446.52) to reflect the fact that the claimant would be taxed on the excess. The purpose of grossing up is to place in the claimant's hands the sum she would have held had she not been unfairly dismissed. The Tribunal would normally be required to estimate the amount of tax that would become payable, applying a marginal tax rate.

122. Assuming a marginal tax rate of 20% in this case (given the claimant's current salary), £7,446.52 divided by 80/100 equates to £9,308.15.

123. Grossing up the excess amount above the £30,000 threshold results in an overall compensatory award of £39,308.15 (the untaxed £30,000 plus the grossed-up excess of £9,308.15).

124. However, the statutory cap of 52 weeks' pay in this case would have been £37,779.21 (gross annual salary of £37,883 divided by 365, multiplied by 7 (days) and then multiplied again by 52). The total grossed-up compensatory award exceeds the cap, but the cap is applied once the grossing up exercise has taken place.

125. Having applied the statutory cap, the grand total compensatory award in this case is therefore £37,779.21, and that is the amount the Tribunal orders the respondent to pay to the claimant.

Recoupment

126. The claimant did not claim state benefits and as a result, the recoupment provisions do not apply.

Date sent to Parties 24 April 2026