EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8002805/2025

Held in Aberdeen on 4 June 2026

Employment Judge R Phillips

Ms L Slesser — **Claimant**
In-person

Ayian Ltd — **Respondent**
Represented by,
Mr P Ramalingam
Director

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:

1. the claim of unfair dismissal under Section 94 of the Employment Rights Act 1996 (**ERA**) is well-founded; and

2. the respondent shall pay to the claimant the following by way of compensation:

   2.1. a basic award of **£761.55** (being 2 x 1.5 x 253.85);

   2.2. a compensatory award of **£5,763.85**, comprising past and future losses and loss of statutory rights totalling £9,222.16, less 50% on account of the prospect of the claimant’s employment ending lawfully within 12 months and increased by 25% on account of the respondent’s unreasonable failure to comply with the ACAS Code of Practice on Discipline & Grievance;

   2.3. an award of **£507.70**, being two weeks' pay pursuant to section 38 Employment Act 2002, in respect of failure to issue a written statement of employment particulars; and

   2.4. damages for breach of contract of **£253.85**.

WRITTEN REASONS

Introduction

1. This is a claim for unfair dismissal and wrongful dismissal brought by the claimant against the respondent. There was no written statement of employment particulars issued by the respondent to the claimant.

2. The claimant contends that she was dismissed without correct notice, without a fair reason and without a fair procedure.

3. The respondent accepts that it dismissed the claimant with one week's notice paid in lieu of work but contends that (a) the claimant's employment started on 29 April 2025 and that she did not have the qualifying service to bring an unfair dismissal claim and (b) she was only entitled to one week's notice given her short service with the respondent. If the claimant had the two-year qualifying service for an unfair dismissal claim, the respondent contends that the dismissal was for capability reasons and was reasonable in the circumstances.

4. The claimant appeared on her own behalf. Mr Ramalingam, director, appeared on behalf of the respondent. At each stage, the parties were provided with an explanation of the process.

5. Each party had prepared its own set of documents. Following discussion and by consent additional documents were lodged to both sets of documents during the hearing. The Claimant gave evidence on her behalf. The Respondent led evidence from Mr Ramalingam, Contract Manager.

Issues

6. The issues for the Tribunal were:

   6.1. Whether the claimant had the requisite qualifying service to bring a claim of unfair dismissal;

   6.2. Whether the claimant transferred to the respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) on 29 April 2025;

   6.3. Was the claimant dismissed without full notice entitlement?

   6.4. Was the respondent's reason for dismissal a potentially fair one?

   6.5. Whether the dismissal was fair within the meaning of section 98(4) of the Employment Rights Act 1996 (ERA)?

6.6. If the dismissal was unfair, what remedy is appropriate, including any reduction pursuant to the principles in *Polkey v AE Dayton Services Ltd*.

Findings in Fact

7. The following material facts were admitted or found by the Tribunal to be proven:-

8. The claimant worked as a retail sales assistant at a petrol station located at 98 Station Road, Ellon.

9. The claimant commenced employment with the previous franchisees in or around October 2022.

10. The claimant worked continuously at the petrol station from that date. Her shift was 06.00 to 10.00, Monday to Friday, each week.

11. Her wages were paid in cash by the previous franchisee, and she did not receive payslips or bank payment records.

12. During the claimant's employment prior to the respondent, she had two different employers, who held a form of franchise arrangement with Motor Fuel Group. The claimant described them by the first names only, firstly "Anil" and secondly "Mohip" and "Vibs". Anil left shortly after the claimant's employment began and Mohip and Vibs were running the petrol station between October 2022 until April 2025 when the respondent took over.

13. The respondent took over the operation of the petrol station on 29 April 2025. Prior to this date, Mr Ramalingam, director of the respondent, visited the petrol station at 98 Station Road, Ellon. This visit was before he made the decision to take over the running of this business from 29 April 2025. The petrol station was a going concern and Mr Ramalingam was aware from his visit and that staff were working in the petrol station.

14. On 29 April 2025, the claimant (and other staff) transferred to the respondent. This was a relevant transfer within the meaning of TUPE. The undertaking retained its identity following the change of operator. The same petrol station continued to operate from the same premises with substantially the same activities and workforce. Accordingly, the claimant's employment transferred to the respondent with her date of continuous employment preserved.

15. The respondent wrongly assumed that the claimant's employment commenced on 29 April 2025 and she had no continuity of employment with the previous petrol station operator. When he "recruited" the claimant on 29 April 2025, the claimant had been working in that petrol station in the same role continuously since October 2022. The respondent did not have employment records from the previous employers / franchisees. The respondent appeared to suggest that the claimant's previous work for and employment by the previous operator of the

petrol station could be ignored because there were no employment records, no payslips and no employment contract provided to him.

16. The respondent dismissed the claimant with immediate effect on 10 September 2025 in a meeting in petrol station and was paid in lieu of one week's notice.

17. On 10 September 2025, the claimant had failed to start or complete 12 important training courses allocated to her by Mr Ramalingam. Of the staff at the petrol station, the claimant's completion record of these training courses was 0%, whereas her colleagues were 75% and 91.67% complete. Further, Mr Ramalingam set the claimant a refresher test on age verification for selling tabacco, nicotine and vapour products, after reading current Scottish Government guidance. The claimant scored 5 out of 10 and failed this test. However, the respondent did not carry out any performance management process. The respondent did not:

    17.1. inform the claimant of specific performance concerns in writing or in a structured way;

    17.2. invite the claimant to a meeting to respond to these concerns;

    17.3. give the claimant an opportunity to improve;

    17.4. provide warnings in writing; or

    17.5. indicate that dismissal was being contemplated.

Observations on evidence

18. The focus of the Claimant's evidence was on her service as a retail sales assistant at the petrol station. Mr Ramalingam accepted that he was not living in Scotland at the time and only moved with his family to Ellon, Scotland, when he decided to become the franchisee of the petrol station.

19. The Tribunal accepted that all of the witnesses were genuinely trying to assist the Tribunal by giving truthful evidence as they saw it.

20. In general terms, the Tribunal found the evidence of the claimant to be credible and reliable on the issue of her continuous service. As the Tribunal went on, it became clear that in most circumstances the claimant's recollection of events concerning her continuous service was accurate and that the respondent's witness could offer no meaningful challenge to that evidence, save to confirm that the respondent received no information from the previous franchisee about the claimant's prior service. Neither party called a long serving colleague who worked at the petrol station with the claimant (although on a different shift) and with previous franchisees to the respondent. This would have been an obvious way for the respondent to check the claimant's argument about her continuous

service. Where there remained any factual dispute concerning the claimant's service, the Tribunal preferred the evidence of the claimant to that of the respondent on that issue.

21. The issue of the claimant's performance working for the respondent was another key area of dispute between the witnesses. The claimant's position was that she had been performing the role for years, had received training by previous franchisees and was performing the duties of a retail sales assistant in a petrol station satisfactorily. This was disputed by the respondent's witness who referred to various issues of poor performance between 29 April 2025 and September 2025.

Relevant Law

Unfair Dismissal

22. The Respondent relies upon capability as the reason for dismissal pursuant to section 98(2)(a) Employment Rights Act 1996. Capability means capability assessed by reference to skill, aptitude, health or any other physical or mental quality: section 98(3)(a).

23. The Tribunal must first determine the reason for dismissal and then consider, pursuant to section 98(4), whether the Respondent acted reasonably in treating that reason as sufficient to justify dismissal in all the circumstances, applying the range of reasonable responses test.

24. The leading authority is ***Alidair Ltd v Taylor*** [1978] ICR 445, which establishes that the question is whether the employer genuinely believed the employee to be incapable and whether that belief was founded on reasonable grounds following a reasonable assessment of the available material.

25. In considering the fairness of a dismissal for capability, it is well established that an employer will ordinarily be expected to identify the performance concerns, inform the employee of the respects in which they are failing to perform adequately, warn of the risk of dismissal, and provide a reasonable opportunity to improve before dismissal is contemplated: ***James v Waltham Holy Cross UDC*** [1973] ICR 398; ***Lewis Shops Group v Wiggins*** [1973] ICR 335. While Lord Mackay in the House of Lords in ***Polkey v AE Dayton Services Ltd*** [1988] ICR 142 emphasised that there would be some occasions where the failure to warn employees about their shortcomings would not render a dismissal unfair, Lord Bridge observed that in the great majority of capability cases dismissal will not be reasonable unless those procedural safeguards are afforded.

26. Where the Tribunal finds procedural unfairness, it must further consider whether, had a fair procedure been followed, dismissal would nevertheless have occurred and if so when. Any compensatory award may be reduced to reflect the

percentage likelihood of a fair dismissal occurring in the future pursuant to the principles in ***Polkey***. Such an assessment requires evaluation of the contemporaneous evidence regarding performance, warnings, improvement prospects and the likelihood that the employee would have achieved the required standard.

TUPE

27. Under Regulation 4 of TUPE 2006, employees assigned to an undertaking automatically transfer to the transferee. Their contracts and continuity of employment are preserved. Continuity of employment is treated as unbroken.

Illegality

28. A contract may be unenforceable if it is illegal. However, the burden of establishing illegality rests on the party asserting it. The Tribunal must be satisfied on evidence; mere suspicion is insufficient.

Deliberations

Continuity of Employment

29. The Tribunal finds the claimant was continuously employed from October 2022. Her employment transferred to the respondent under TUPE on 29 April 2025. Accordingly, she had over two years' continuous service at the date of dismissal on 10 September 2025.

Reason for Dismissal

30. The Tribunal accepts that the respondent genuinely believed the claimant's performance was unsatisfactory. Capability was therefore the reason for dismissal. The Tribunal also accepted that there was objective material capable of supporting those concerns. In particular, there was a requirement to undertake and pass mandatory training. This was a reasonable requirement introduced by the respondent and the claimant failed to make any progress with this training requirement. That is not, however, the end of the matter.

Fairness of Dismissal

31. The respondent was required to act reasonably in addressing those concerns. In my judgment it failed to do so. While concerns were raised informally with the claimant by Mr Ramalingam, the respondent failed clearly to identify the improvements required. There was no formal warning that dismissal was being contemplated. There was no structured process allowing the claimant a realistic

opportunity to demonstrate improvement. No adequate review period was stated. Insufficient consideration was given to further support or training.

32. In those circumstances, the Tribunal concluded that the respondent failed to comply with the basic procedural requirements identified in ***Waltham Holy Cross***, ***Lewis Shops*** and ***Polkey***. By dismissing without formal warnings and opportunity to improve, the respondent acted outside the range of reasonable responses open to a reasonable employer.

33. The dismissal was therefore unfair.

Wrongful Dismissal / Breach of Contract

34. The Tribunal finds that the claimant had more than two years' continuous service (and less than 3 years' service) when her employment terminated on 10 September 2025. She was therefore entitled to two weeks' statutory notice. The respondent paid the claimant in lieu of one week's notice only. The claimant is accordingly entitled to damages for breach of contract equivalent to the unpaid balance of her notice entitlement, namely one week's gross pay of £253.85.

Remedy

35. The claimant sought compensation only, rather than reinstatement or re-engagement and damages for breach of contract.

Basic Award

36. The basic award payable to the claimant is based on 2 (as she had 2 complete years' service on 10 September 2025) x 1.5 (as the claimant was more than 41 years of age during this employment) x £253.85 (a week's gross pay for the claimant) which amounts to £761.55.

Compensatory Award

37. With regard to compensatory award, the claimant explained that she had not found any job to replace her income from the respondent since 10 September 2025. The claimant's other part time job (which she was working while employed also holding the retail sales assistant role with the respondent) was not included as earnings in mitigation. The Tribunal carefully considered whether the claimant had not mitigated her loss but accepted that she had not failed in her duty to mitigate her loss. In the Tribunal's judgment, the claimant has acted reasonably in seeking to find another role.

Past Losses

38. To avoid damages being awarded twice, given my judgment in relation to the notice pay claim below, I consider it fair to award damages for wrongful dismissal and assess compensation for the unfair dismissal claim from the day after the damages period ended. As the claimant was dismissed on 10 September, statutory notice would have expired 24 September. Therefore compensatory losses run from 24 September 2025.

39. The Tribunal has calculated the claimant's net weekly pay from the information before the Tribunal, which is £186.92 being the figure the respondent stated in its ET3 (which is higher than the figure given by the claimant).

40. From 24 September 2025 to 4 June 2026, there are 36 weeks. The claimant would have earned 36 x £186.92 which is £6,729.12.

<u>Future Losses</u>

41. Determining when the claimant is likely to secure another job at a comparable rate is necessarily speculative. The Tribunal considers that the claimant should secure another role at a similar rate within 12 weeks from 4 June 2026. Had she worked 12 weeks with the respondent, she would have earned 12 x £186.92, which is £2,243.04.

42. The claimant is also entitled to a sum in respect of the loss of statutory rights she has suffered, in respect of which I award £250.

43. The total compensatory award is therefore £6,729.12 plus £2,243.04 plus £250 which is £9,222.16.

<u>Polkey</u>

44. In relation to remedy, the Tribunal must consider what would probably have occurred had the respondent followed a fair capability procedure – including an opportunity to improve her performance. The Tribunal must undertake a predictive assessment, based upon the evidence rather than speculation, of the likelihood that the claimant would have remained employed had appropriate warnings, support, monitoring and review processes been implemented.

45. The claimant's dismissal was procedurally unfair but there were genuine concerns about the claimant's poor performance at work. This was a genuinely held view by Mr Ramalingam.

46. Having considered the contemporaneous performance evidence, the claimant's response to previous concerns (and her response at the hearing), the nature of the shortcomings identified, and the prospects of improvement, the Tribunal assesses the likelihood of a fair capability dismissal occurring within 12 months at 50%. The compensatory award is therefore reduced accordingly.

ACAS Code

47. As there was no fair performance management process followed by the respondent, the respondent unreasonably failed to comply with the ACAS Code. In all the circumstances an increase of 25% is just as a consequence of the unreasonable failure to comply with the ACAS Code.

Recoupment

48. The recoupment regulations do not apply to this award because the claimant was not in receipt of relevant benefits.

Wrongful Dismissal / Breach of Contract

49. The claimant is accordingly entitled to damages for breach of contract equivalent to the unpaid balance of her notice entitlement, namely one week's gross pay of £253.85.

Summary

50. The claimant is entitled to:

50.1. a basic award of **£761.55**, calculated in accordance with sections 119–122 ERA; and

50.2. a compensatory award of **£5,763.85**, comprising past and future losses and loss of statutory rights totalling £9,222.16, less 50% on account of the prospect of the claimant’s employment ending lawfully within 12 months, reflecting loss attributable to the unfair dismissal (section 123, ERA) and increased by 25% on account of the respondent’s unreasonable failure to comply with the ACAS Code of Practice on Discipline & Grievance;

50.3. an award of **£507.70** in respect of failure to issue a written statement of employment particulars; and

50.4. damages for breach of contract (wrongful dismissal) in the sum of **£253.85**, representing the balance of the claimant's statutory notice entitlement

Date sent to parties **08 July 2026**