



5

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000145/2024

10

**Final hearing in Glasgow
on 23 and 24 July 2024**

15

**Employment Judge A Jones
Tribunal member S Singh
Tribunal member F Paton**

20

Ms K Baillie

**Claimant
In person**

25

McCurrach Ltd

**Respondent
Represented by
Ms J Veimou,
Litigation Consultant**

30

JUDGMENT

It is the unanimous judgement of the Tribunal that:

35

1. The claimant was unfairly dismissed by the respondent and the respondent is ordered to pay to the claimant a basic award of £930.44 and compensation of £12,595.72 (net).
2. The claimant was not a disabled person for the purposes of section 6 Equality Act 2010 at the material time.
3. The compensatory award is subject to recoupment. The prescribed element of the compensation is £6,280.47 and the prescribed period is 14 December 2023 to 24 July 2024.

40

Introduction

1. The claimant lodged a claim on 16 February 2024 claiming unfair dismissal and disability discrimination. The respondent's position was that the claimant was dismissed for a potentially fair reason being capability and that the respondent did not know and could not reasonably have known that the claimant was a disabled person at the material time. Although the claimant had initially suggested that she was due notice pay, she subsequently accepted that she had been paid in lieu of notice.
2. The respondent led evidence from Mr Barry whom had been the claimant's manager in the latter stages of her employment and Ms Middler who was an HRBP with whom the claimant had a conversation. The claimant gave evidence on her own account and a joint bundle of documents was lodged.
3. During the course of the hearing, it became apparent that the respondent did not intend to lead evidence from the person who had taken the decision to dismiss the claimant. The Tribunal pointed out the evidential difficulties arising from that position, given that there would be no evidence from the decision maker as to the reason for dismissal of the claimant. After a short adjournment, the respondent made a request to adjourn the hearing after the evidence of its two witnesses to allow the Tribunal to hear from Mr McGeehan who had been the dismissing manager. The Tribunal was informed that Mr McGeehan was currently on holiday and could not be reached. The Tribunal expressed its surprise that the respondent had not taken steps to ensure evidence could be led regarding the decision to dismiss the claimant. The hearing had been listed for some time and no reason was provided by the respondent's representative as to why Mr McGeehan had not been identified as a relevant witness. The Tribunal refused the request for an adjournment of the hearing.
4. After the respondent's witnesses had concluded giving their evidence, a further request was made for a short adjournment to make arrangements for the person who determined the claimant's appeal against her dismissal to come and give evidence. The Tribunal afforded the respondent time to identify whether the appeal manager, Mr Hussey could attend the second day of the hearing in which case the Tribunal would be willing to adjourn the first day early to allow

- his attendance. However, after a short adjournment, the respondent's representative indicated that Mr Hussey would not attend the hearing the following day. There was therefore no evidence led from the respondent regarding the decision-making process in relation to the decision to dismiss the claimant or to dismiss her appeal. It was suggested by the respondent's representative that there were documents in the bundle regarding these matters. However, the Tribunal explained the evidential rules to the respondent's representative (who was from an external provider from whom the respondent obtained HR advice) whereby documents required to be introduced into evidence by witnesses who could give relevant evidence in relation to them.
- 5
- 10
5. Parties made oral submissions at the conclusion of the hearing.

Issues to determine

- 15
6. The Tribunal was required to determine whether the claimant had been dismissed for a potentially fair reason being capability and whether in the circumstances, that dismissal was fair. The respondent sought to argue that if the claimant's dismissal was procedurally unfair, the claimant would have been fairly dismissed had a fair procedure been followed.
- 20
7. In addition, the Tribunal was required to determine whether the claimant was a disabled person for the purposes of section 6 Equality Act 2010 at the material time, which was said to be between March and November 2023, and if so, whether the respondent had failed in a duty to make reasonable adjustments in relation to the claimant.
- 25
8. Finally, if either of the claimant's claims were successful the Tribunal was required to determine what, if any, compensation should be awarded to her.

Findings in fact

- 30
9. Having considered the evidence, the documents to which reference was made and the submissions of the parties, the Tribunal found the following material facts to have been established.

10. The claimant was employed by the respondent as a Telephone Account Manager ('TAM') from 8 May 2018 until her dismissal on 16 November 2023. Her role involved her being assigned to a particular client of the respondent for a particular campaign. Her duties required her to arrange appointments for field sales personnel of the company to meet with contacts in order to persuade them to stock a client's products. The claimant had worked for a number of clients. If a client terminated arrangements with the respondent, then a TAM would be transferred to another vacant role if one was available. If there was no such role available, they would be put at risk of redundancy. The claimant had carried out her duties from the respondent's offices initially but due to the pandemic had reverted to home working and continued with these arrangements after the restrictions imposed by the pandemic were lifted. The claimant worked from 8am until 12am five days a week.
11. The respondent is a company which provides marketing services to clients. They employ over 1000 staff.
12. The claimant was paid £1003 per month net.
13. The claimant was assigned to a contract with Britvic in around August 2022. The claimant reported to Mr Barry in this role who was a field account manager for this client. There was one other TAM employed on this contract who worked similar hours. The claimant was allocated contacts in London and her colleague had been allocated contacts in Scotland.
14. The claimant had previously been regarded as having performed well in roles to which she was assigned.
15. The claimant only met with her line manager in person on one occasion during her employment on the Britvic contract although Mr Barry lived close to the claimant.
16. The claimant met with Mr Barry online on 22 November 2022 to discuss her performance. He informed her that the matter might be passed on to another manager for investigation for disciplinary action.
17. A further meeting took place on 13 January 2023 between the claimant and Mr Barry to discuss her performance. The claimant was informed that she should make 2 appointments per day, have 10% of her calls result in speaking to the

relevant contact and make 30-50 calls a day. The claimant was informed that she was not making enough appointments.

18. The claimant was absent from work between 7 and 14 February 2023 and the fit note she supplied indicated her absence was because of a muscle neck strain.

5 19. A further online meeting took place on 16 February between Mr Barry and the claimant. The claimant had by this stage been informed that she had been placed on a 'performance improvement plan'. There was no policy followed by the respondent in devising a performance improvement plan, and no additional training or support was provided to the claimant in this regard. The claimant
10 asked at this meeting if she could swap areas with her colleague. Her request was refused. The notes of the meeting recorded that Mr Barry would "call Peninsula and see what they say the next steps should be and let you know." The respondent had an internal HR function but also used Peninsula's services for the provision of HR advice.

15 20. Mr Barry then passed the notes of the meetings he had had with the claimant to another manager, Ms Sunburk who had a meeting with the claimant and issued her with a final written warning on 1 March 2023 and gave her a period of 2 weeks in which to improve her performance. No reference to any procedure was made in this regard.

20 21. The claimant was then off sick from 22 March until the end of August 2023. During that time her fit notes made reference initially to stress, flare of anxiety and stomach issues, and then only to stress and anxiety.

22. The claimant indicated her consent to be referred for an occupational health appointment on 15 June 2023. The claimant had been informed by Mr Barry that
25 this was purely voluntary. He did not inform her that any decisions may be taken in relation to her employment as a result of whether or not she attended. An appointment for a telephone consultation was made for the claimant with an occupational health nurse which the claimant was going to attend in September. That appointment was cancelled by the occupational health provider because
30 the nurse was ill on the day and a further appointment was arranged shortly thereafter. The claimant was not well enough to attend the appointment at the rearranged time.

23. In August 2023, during her absence from work, the claimant was informed by Mr Barry that her role was at risk of redundancy. Britvic no longer wished to fund TAMs roles on the campaign the claimant had been working on and therefore the claimant was led to believe that she was likely to be made redundant.
- 5 24. The claimant had a return-to-work meeting online with Mr Barry on 29 August 2023. The claimant had informed Mr Barry that she had been prescribed medication for anxiety.
25. The claimant was advised around this time that she would not now be made redundant and would be moved to work on the Unilever team. She was
10 informed that this move would take place in the next week.
26. The claimant had understood that she was going to be made redundant and was becoming confused regarding her continued employment. Her confusion was exacerbated by the fact that she was suffering from anxiety.
27. A meeting took place between the claimant, Mr Barry and Ms Sunburk on 6
15 September. The claimant was led to believe at this meeting that she was still on a performance improvement plan although she was now to move roles. The respondent had no regard to the claimant's mental health condition when they were communicating with her. The did not provide her with details of any policy or procedure which was relevant.
- 20 28. The claimant then contacted HR to whom she expressed concern regarding her treatment. She was informed that she would not be moved to the new role with Unilever and that a new performance improvement plan would be put in place for a 2-week period in advance of that.
29. The claimant was then off sick again for around a 2-week period returning in
25 October 2023.
30. A meeting took place between the claimant, Mr Barry and Ms Sunburk on 2 November to review the claimant's performance. It was said that this was to review her performance over the 2-week period from 8 September. The claimant was asked questions about her performance prior to her absence from work in
30 March. The notes of the meeting recorded that the claimant was informed they could pick up later in the week to discuss and that they would still need to put a performance improvement plan in place as "these results cannot continue". By this stage the respondent was aware that the claimant would not continue to

work on this campaign as funding had been withdrawn by the client. It was agreed with Britvic that the respondent would directly fund the claimant's TAM role for 2 weeks.

31. Around this time the respondent made a settlement offer to the claimant which was refused by her, having taken advice. The offer was not a protected conversation, and it was not made on a without prejudice basis.
32. The claimant was dismissed on 23 November 2023 following a meeting with Mr McGeehan.
33. The claimant appealed against her dismissal and her appeal was not upheld by Mr Hussey.

Observations on evidence

34. The Tribunal was more surprised at the evidence it didn't hear than the evidence it did. It found the respondent's failure to ensure that a witness was available to speak to the decision to dismiss the claimant astonishing, given it was represented by an established company providing HR services.
35. Mr Barry's evidence was straightforward and the Tribunal found him to be credible and reliable. However, his evidence was of limited assistance to the issues the Tribunal was required to determine. He gave evidence about his interactions with the claimant regarding her performance. However, he did not give the claimant a final written warning and did not dismiss the claimant. In addition, there was no evidence led regarding any policies or procedures the respondent operated in order to address issues of capability or applied in relation to the claimant. The Tribunal found this extremely surprising given the size and administrative resources of the respondent. There was no evidence as to why an employee should be given a final written warning prior to any other formal warning for issues of performance.
36. Ms Middler's evidence was of very limited relevance. She had a conversation with the claimant regarding the renewed performance improvement plan on which the claimant was placed in September 2023. The claimant had given evidence that there was a settlement offer made to her to terminate her employment once she had spoken to Ms Middler, which the claimant refused.

The claimant's evidence in that regard was not challenged and there was no evidence from Mr Middler to counter the claimant's position. The respondent did not seek to argue that this was a protected conversation. The respondent's agent made a reference to the information being without prejudice towards the end of the proceedings, once the evidence had been given without challenge. No evidence was led to suggest that the offer had been made on a without prejudice basis. The matter had been raised in the claimant's details of claim and had not been addressed in the respondent's response. The Tribunal was satisfied therefore that it could make findings in fact in this regard.

37. The Tribunal found the claimant generally credible however, she could not remember when and how often she had informed the respondent that she suffered from anxiety. Given her condition that was not surprising, however it caused the Tribunal difficulty in determining whether she was a disabled person at the material time.

15 **Relevant law**

38. Section 98 Employment Rights Act 1996 ('ERA') provides that conduct is a potentially fair reason for dismissal. It also provides that a potentially fair reason for dismissal might be some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

39. Section 98(4) ERA provides that where an employer has fulfilled the requirements of establishing a potentially fair reason for dismissal, whether the dismissal is fair or unfair will depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking the employer acted reasonably or unreasonable in treating is as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.

40. Section 6 of the Equality Act 2010 ('EA') provides that a person will have a disability if they have a physical or mental impairment and the impairment has substantial and long-term adverse effect on the person's ability to carry out normal day-to-day activities.

41. Section 20 of the EA sets out the duty on an employer to make reasonable adjustments where a provision criterion or practice of the employer puts a

disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

Discussion and decision

5

Was there a potentially fair reason for dismissal?

42. In the first instance, consideration was given to the reason for the claimant's dismissal. There was no direct evidence regarding the decision to dismiss. The respondent's position was that the claimant had been dismissed for capability reasons. However, the claimant suggested that she might have been redundant. While the Tribunal accepted that there was evidence that the claimant's capability had been raised with her and that she had been informed she was subject to a performance improvement plan, in the absence of any evidence from the decision maker, the Tribunal could not find that a potentially fair reason had been established for the claimant's dismissal. The claimant's dismissal is therefore unfair on that basis, the respondent having failed to establish in evidence a potentially fair reason for dismissal. It did not seem to be apparent to the respondent that evidence was required in this regard, which the Tribunal found astonishing.

10
15
20

Was the decision to dismiss fair?

43. Notwithstanding the Tribunal's finding that the respondent had failed to establish a potentially fair reason for dismissal, the Tribunal went on to consider whether, if it was in error in that regard, the claimant's dismissal was fair.

25

44. There was no evidence before the Tribunal that the respondent applied any particular policy or procedure to its dealings with the claimant. The respondent was a large company, and the Tribunal might have expected it to operate a capability procedure. It was not at all clear why the respondent issued the claimant with a final written warning as a first stage in relation to a formal procedure regarding the claimant's capability when she had only been in the

30

role for a few months. The claimant had previously carried out her role in relation to other campaigns without any issue. Her evidence that she had been well regarded was not challenged. Mr Barry's evidence was that if the claimant had performance issues, he would have expected one of the other managers for whom the claimant had worked would have brought these to his attention when she moved to work in his team.

5
10
15
45. Although the respondent suggested that the claimant had been put on a performance improvement plan, the extent of that plan appeared to be that the targets expected of the claimant were reiterated to her. She was not given any additional training. Indeed, it appeared she was given little training on her new role at all. She asked if she could meet with Mr Barry and the other colleague who worked on the campaign in person and Mr Barry refused. She asked if she could swap her geographical area with her colleague as her colleague was covering Scotland when the claimant was based in Scotland and the claimant was covering London when her colleague was based in England. That request was refused. Mr Barry did not meet in person with the claimant to sit with her and go through the issues she was experiencing.

20
46. Although the claimant did not appeal against the final written warning she was issued with, the Tribunal was mindful that very shortly after, the claimant had gone on sick leave for an extended period due to amongst other issues anxiety and depression.

25
47. Even if it could be said that the final written warning was appropriate in the circumstances, and the Tribunal had reservations in that regard, it was not at all clear what steps were taken by the respondent to provide the claimant with support and assistance to allow her to meet the targets expected of her. Mr Barry listened in to her calls on a couple of occasions, and gave her some feedback, but the system did not allow the claimant to listen in to her colleague's calls and Mr Barry did not suggest that the claimant could sit with her colleague in person.

30
48. Moreover, the claimant had been informed that the role of TAMS in the campaign on which she was engaged had come to an end. However, the respondent still required the claimant to meet the targets expected of her when the client had already decided not to continue funding the role of TAMS. It

appeared to the Tribunal that the claimant was being set up to fail. It was not at all clear to the Tribunal why the claimant wasn't transferred to the new role which had been identified for her and her performance monitored on that campaign. Instead, the respondent kept the claimant in a role which had been
5 ended by the client and required to meet targets over a short period of time without any additional support or assistance. While the claimant was given access to the contacts of her colleague, who had by now left her role, it appeared to the Tribunal this was all too little and too late. In addition, during
10 this time the respondent was aware that the claimant was suffering from anxiety and that she was on medication for this condition. It is difficult to understand why an employer who genuinely wished to support an employee's performance to improve would place such an employee on a performance improvement plan, with no support in what was effectively a dead-end role.

49. In addition, there was no evidence regarding the extent to which the respondent
15 took into account the claimant's condition or her length of service when deciding whether to dismiss. There was no evidence regarding whether or not the respondent gave consideration to transferring the claimant to a new role for a short period in order to assess her performance.

50. In all of these circumstances, even if the respondent had established that the
20 claimant had been dismissed by reason of capability, the Tribunal would have found that her dismissal was not fair in the circumstances.

Would the claimant had been dismissed had a fair procedure been followed?

25 51. The respondent's position was that even if it was found that the claimant's dismissal was procedurally unfair, that the Polkey principle should apply. The Tribunal did not accept this submission. There was simply no evidence led which would have allowed the Tribunal to have found that a fair procedure would have resulted in the claimant's dismissal.

Was the claimant a disabled person?

52. The Tribunal then went on to consider whether the claimant was a disabled person at the material time, which was between March and November 2023.
- 5 The claimant had provided a disability impact statement and had provided an extract from her medical records. However, there was very limited evidence in those materials which addressed the issue of the claimant's condition. It was not clear to the Tribunal when the claimant's anxiety and depression started, what medication she took when, and what impact the condition had on her day-to-day activities. Although the claimant gave evidence that some days she couldn't get out of bed and needed her son's assistance, that she now had a disabled bus pass to get around, the timing to which these matters related was unclear and appeared to be more recent than the period under consideration.
- 10
53. The Tribunal accepted that the claimant suffered from anxiety during the relevant period, but there was simply insufficient evidence to allow the Tribunal to find that during that period the condition had a substantial adverse impact on her ability to perform normal day-to-day activities or at that time that it was likely to be long term.
- 15
54. As it transpires, it is clear that the condition has become long term, however that is not the question which the Tribunal is required to address. Rather the Tribunal is required to consider whether the claimant was a disabled person between March and November 2023. While she had been off for a substantial period of time, she had returned to work in October 2023. She did not give any evidence as to how her condition was at that time. While she did indicate that she was taking medication at the time, she also said that this medication kept changing in order to find a medication which assisted her. There was no evidence regarding how the claimant was without medication. There was no evidence to suggest that the condition was likely to continue for a significant period. While the Tribunal had some sympathy with the claimant's position, given that she was unrepresented, and therefore had limited knowledge of what was required from her, the respondent had set out the issues to her and made clear that the question of disability was still in dispute.
- 20
- 25
- 30

55. In these circumstances, on the basis of the evidence which was presented, the Tribunal could not find that the claimant was a disabled person for the purposes of the EA at the material time.

56. In any event, the Tribunal would have found that the respondent could not reasonably have known that the claimant was a disabled person at the material time for the reasons set out above.

Remedy

57. The Tribunal then went on to consider the issue of remedy. The Tribunal accepted that the claimant's dismissal had impacted on her mental health and that she was unable to work because of that. The respondent's position had been that the claimant would have been off work anyway and therefore would only have been entitled to statutory sick pay. The Tribunal did not accept that submission and formed the view that if the claimant had been transferred to the new role which had been identified for her it was possible that she would have maintained a good level of attendance. The Tribunal accepted the claimant's evidence that a new challenge in a new campaign would have assisted her with her performance and mental health, given that she had maintained that the leads were simply not available in her region on the Britvic campaign.

58. The claimant is therefore entitled to a basic award of 4 weeks' pay of £930.44 being based on a weekly wage of £232.61.

59. The claimant was paid in lieu of 4 weeks' notice which would cover her losses to 14 December 2023. The claimant's position is that she is likely to take around 6 months to be able to obtain alternative employment. The Tribunal concluded that this would be the maximum period in which the claimant would be able to secure alternatively and therefore concluded that she should be compensated for loss of income between 14 December 2023 and 14 December 2024, being a year's loss of earnings, which would amount to £12,095.72 net. In addition the claimant is entitled to compensation for loss of statutory rights of £500.

60. Therefore the respondent is ordered to pay to the claimant

	Basic award	£930.44
	Compensation	£12,095.72
	Loss of Statutory rights	500.00
5	Total due	<u>£13,526.16</u>

10

Employment Judge:	A Jones
Date of Judgment:	30 July 2024
Entered in register:	31 July 2024
and copied to parties	

15