



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4113678/21

Heard on the 20 and 21 June 2022 on the CVP/Kinly platform

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Employment Judge Porter

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Alexander Hewitt

Claimant
Represented by:
Miss Hegarty, solicitor

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H&R Gray Haulage Ltd

Respondents
Represented by:
Mr Gray, director

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the judgment of the Employment Tribunal that the claimant was unfairly
35 dismissed. The Employment Tribunal orders the respondents to make payment to
the claimant of the sum of **TWO THOUSAND FOUR HUNDRED AND FORTY
EIGHT POUNDS (£2448)** basic award; and **TWO HUNDRED AND FORTY SEVEN
POUNDS AND FIFTY PENCE (£247.50)** compensatory award.

Introduction

1. The claimant was employed by the respondents as a Palletline Team Leader between 23 February 2015 to 12 August 2021. In these proceedings the claimant claims unfair dismissal. The claimant's claims are resisted and there was a Hearing on the Merits in the case on the CVP/Kinly platform on the 20 and 21 June 2022.
2. At the Hearing on the Merits claimant was represented by Miss Hegarty, solicitor and the respondents were represented by Robin Gray, Director. The respondents led evidence from Alan Holloway, their finance manager, Findlay Jack, the claimant's line manager and Robin Gray as he heard the claimant's appeal against dismissal.
3. The parties referred to productions numbered **1-66**. In addition, the respondents produced a letter dated 11 August 2021 which is numbered **67**.

Findings in Fact

4. The claimant's role was to manage the planning of deliveries and collections from the respondents' depot to their customers.
5. Between the 21 September 2020 and the 26 February 2021 there were a series of meetings between the claimant and Finlay Jack, his line manager, to discuss a number of performance issues on the claimant's part. These issues included failures in communication including emails, consignment failures, failure to plan routes, and failures in cost management including failures to consider fuel costs, man hours and mileage. Notes of these meetings are to be found at **1-14**.
6. In evidence the claimant recollected these meetings and was aware of the performance issues then raised. However, it was a matter of agreement between the parties that only a few of the Notes taken of these meetings were sent to the claimant.

7. On the 2 March 2021 the claimant attended a meeting with his line manager Finlay Jack. The claimant was not advised that the meeting would be a disciplinary hearing and believed it to be another informal discussion. The Tribunal accepted the evidence of Finlay Jack that at the outset of the meeting he asked the claimant whether the claimant wanted to be accompanied at the meeting. Notes of the meeting are to be found at **15-16** with a further copy at **17-18**.
8. At the outset of the meeting Finlay Jack told the claimant that it was “*just an informal chat*” (**15**) but proceeded to raise a number of performance issues many of which had been covered in the meetings that had taken place between the 21 September 2020 and the 26 February 2021.
9. On the 22 March 2022 the claimant was issued with a Notice of Written Warning (**23**) which referred both to the meeting of the 2 March 2022 and to a further ‘disciplinary’ meeting that had taken place that day. No notes of that further meeting were provided, nor was any evidence led on the meeting of 22 March 2022. The ‘Notice of Written Warning’ highlighted areas of improvement and provided for a timescale of 6 months from 22 March 2022 for improvement. The ‘Notice of Written Warning’ stated that the likely consequence of further misconduct or insufficient improvement was a final written warning. No mention was made of dismissal should the claimant continue to fail to perform.
10. The claimant was issued with a Performance Improvement Plan (“PIP”) on the 23 March 2021 (**19, 21**). The Tribunal found the PIP to be clear in its terms. There was no evidence led that the claimant did not understand the PIP or that he was unable to perform in accordance with the specific requirements there specified.
11. The claimant failed to perform in terms of the PIP. There were a series of further meetings between himself and Finlay Jack between the 19 April 2021 and the 5 August 2021 in which Finlay Jack highlighted the claimant’s continuing failure to perform in certain key areas. The claimant recollected these meetings; however, again, the respondents failed to provide the claimant

with copies of all of the Notes of these meetings. The Notes of these meetings are to be found at **24-30**.

12. The Tribunal concluded that, in the absence of an alternative explanation, the claimant's failure to perform in terms of the PIP was due to his own lack of effort to comply with the PIP.
13. On the 11 August 2021 the claimant was sent an "Invite to Follow Up Disciplinary Meeting" **(67)**. The Tribunal accepted the evidence of the respondents that this letter was sent to the claimant due to the continuing failure of the claimant to comply with the requirements of the PIP. The letter asked the claimant to attend a further meeting on 12 August 2021 and stated: *"At this meeting the question of further disciplinary action against you, in accordance with the Company Disciplinary Procedure will be considered regarding continued unacceptable performance."* The letter did not state that dismissal was a possible outcome of the meeting.
14. The claimant was dismissed at the meeting on the 12 August 2021. Notes of the meeting are to be found at **(35)**. A letter from the respondents confirming the dismissal was sent to the claimant that day **(36)**. On dismissal, the claimant received 3 months pay in lieu of notice and 3 days holiday pay.
15. The respondents provided no cogent explanation as to why the claimant was dismissed short of the 6 month period specified in the Notice of Written Warning **(23)**.
16. The Tribunal accepted the evidence of the claimant when he stated that he had not anticipated dismissal as a possible sanction and instead had believed that the worst outcome of the meeting on the 12 August 2021 would have been a final written warning.
17. The claimant appealed the decision to dismiss him, and that appeal was heard by Robin Gray. No notes are produced of the appeal, which was unsuccessful.
18. The claimant has not sustained loss of earnings as a result of his dismissal.

The Law

19. S98 of the Employment Rights Act 1996 (ERA) indicates how a tribunal should approach the question of whether a dismissal is fair. There are normally two stages: firstly, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in s98(1) and (2); and secondly, if the employer is successful at the first stage, the tribunal must then determine whether the dismissal was fair or unfair under s98(3A) and (4).
20. S123(1) of the ERA provides that the amount of any 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 claimant. A common reduction in awards is a 'Polkey' reduction where, following the House of Lords' decision in *Polkey v AE Dayton Services Ltd* 1998 ICR 142 HL, a reduction in the award is made to reflect the likelihood that the employee would still have been dismissed in any event had a proper procedure been followed.
21. In terms of s207A(2) of the Trade Union and Labour Reform (Consolidation) Act 1992 a Tribunal can increase any compensatory award made to an employee up to 25% if there has been a failure to comply with a relevant Code of Practice. To this end, in cases of unfair dismissal reference is made to the Acas Code of Practice on Disciplinary and Grievance Procedures.
22. S122(2) and s123(6) of the ERA provide for a deduction of the basic and compensatory awards on the grounds of contributory conduct on the part of the claimant where the dismissal is unfair. The wording of the two statutory provisions differ in that s122(2) gives the Tribunal a wide discretion whether or not to reduce the basic award on the grounds of any kind of conduct on the employee's part that occurred prior to the dismissal; whereas under s123(6) to justify any reduction on account of an employee's conduct the conduct in question must be shown to have caused or contributed to the employee's dismissal.

Submissions**The claimant**

The claimant's representative provided a summary of the claimant's submissions which are reproduced here:

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The Claimant invites the Tribunal to hold he has been unfairly dismissed by reason of the following submissions.

10 The Respondents have failed to satisfy the Section 98 (2) definition of the Employment Rights Act 1995 which entitles an employer to fairly dismiss on the grounds of capability or conduct.

15 It is submitted that there has not been any substantial evidence led by the Respondent that the Claimant's capability or conduct would satisfy Section 98 (2) and the dismissal was not for a fair reason.

20 *Esto* the Tribunal is satisfied the respondents have shown reason within Section 98 (2) or some other substantial reason in terms of Section 98 (1) b, the claimant invites the Tribunal to hold the respondents have not acted reasonably in treating the reason as a sufficient reason for dismissing him all in accordance with Section 98 (4).

25 In evidence it was heard that it was not made clear to the Claimant that an informal discussion on 2 March 2021 was a disciplinary hearing. The Claimant did not receive a written improvement plan until 23 March 2021, after he received a Notice of Written Warning on 22 March 2021. The said Notice of Written Warning provided the Claimant six months to improve after which a Final Written Warning would likely be issued. There has been no evidence led that justified or explained the Respondent's not upholding their explicit terms. The terms of the written warning should be
30 construed strictly against the employers who drafted it. The Claimant has not been given enough of an opportunity to improve nor is dismissal a reasonable response. If the Claimant did not improve within 6 months, then a reasonable response would have been to issue a Final Written Warning. In a case of incapacity, an employer will

normally not act reasonably unless he gives the employee fair warning and an opportunity to mend his ways and show that he can do the job.

Reduction to award

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The Tribunal is invited to hold that the Claimant cannot to any degree be held responsible for his unfair dismissal. There has been no substantial evidence led to show that the Claimant's conduct or capability which can reasonably be construed as culpable or blameworthy on his part. The Claimant was not reliably or clearly informed of what he was needed to do to improve nor was he provided enough time to improve. Moreover, if the Respondent followed their own procedure correctly then the Claimant would not have been dismissed, he would have been provided a Final Written Warning. Neither the Respondent nor the Tribunal are able to predict whether the Claimant's performance would improve following a final written warning. Accordingly, there should also be no *Polkey* reduction in compensation.

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CLAIMANT'S LOSSES

In the event the Tribunal holds the Claimant has been unfairly dismissed it is submitted that it would be just and equitable that the compensatory award should be uplifted by 25% for the Respondents failure to adhere to ACAS Code of Practice on Disciplinary Procedure. The failings being discussed above at paragraph 3.

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The respondents

In submissions, Mr Gray highlighted that the respondents pride themselves on being a good employer. As such, he submitted that the respondents have taken the present proceedings very seriously.

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Mr Gray submitted that the claimant had been underperforming within the respondents for some time, had been given an opportunity to improve through the PIP but had failed to demonstrate the level of improvement required.

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Mr Gray re-iterated that the respondents had given the claimant 3 months notice pay on his dismissal.

Discussion and Decision

5 The Tribunal considered firstly what the reason for the claimant's dismissal was, and whether this reason was one of the potentially fair reasons set out in s98(1) and (2) of the Employment Rights Act 1996. To this end, the reasons given in the 'Letter to End Employment' (36) were: 'There is not longer a requirement for the position; Not enough improvement in performance; Lack of communication; Complaints from the Team; Attitude towards the drivers.'

10 The Tribunal found that there was no evidence that was supportive of a redundancy situation. For his part, Mr Gray gave evidence that he had no idea why the statement: 'There is no longer a requirement for the position' had been included in the letter of dismissal.'

15 The Tribunal observed that although there was a very short passage of evidence of a single incident involving the claimant's attitude towards drivers, there was clear evidence that the reasons why the claimant was dismissed were his failures in performance and in particular his failure to improve following the PIP of the 23 March 2022 (19-20). In other words, the claimant was dismissed on the grounds of
20 capability which is a fair reason for dismissal under s98 (2) of the Employment Rights Act 1996.

The Tribunal then proceeded to consider whether that dismissal was fair or unfair under s98(3A) and (4) of the Employment Rights Act 1996.

25 After consideration of the evidence, the Tribunal concluded that the procedural failings in the process of dismissal were sufficient to render the dismissal unfair and outwith the band of reasonable responses open to the respondents. In reaching this conclusion, the Tribunal founded on the fact that the Disciplinary Hearing on the 2
30 March 2021 was categorised as 'just an informal chat' by Mr Jack (15); that the Notice of Written Warning dated 22 March 2021(23) issued following that meeting provided for a timescale of 6 months in which improvement was required; that the Notice of Written Warning stated that the likely consequence of insufficient improvement was a final written warning only; that the letter of 11 August 2021
35 inviting the claimant to a 'Follow up Disciplinary Meeting' did not state that dismissal

was a possible sanction at that meeting; and that the claimant was dismissed on the 12 August 2021 (36), within the six month period specified in the Notice of Written Warning (23).

5 **Compensation**

The Tribunal then proceeded to consider the question of compensation.

Basic Award

10 The claimant earned £655.38 gross prior to his dismissal. A basic award is claimed in the sum of £4896 calculated on the claimant's length of service.

The Tribunal considered whether to make any deductions from the claimant's basic award under s122(2) of the Employment Rights Act 1996. In deliberating this issue, the Tribunal had regard to its own conclusion that there was no evidence that the claimant was incapable of effecting improvements in accordance with the PIP and that instead the evidence all pointed to a lack of effort on the part of the claimant in effecting the required improvements. After taking into account the fact that the claimant was dismissed short of the six month period specified in the Notice of Written Warning, the Tribunal concluded that it is just and equitable to deduct 50% from the claimant's basic award in accordance with s122(2) of the Employment Rights Act 1996 to reflect the claimant's conduct prior to his dismissal.

25 The Tribunal therefore orders the respondents to make payment to the claimant of the sum of £2448 basic award.

Compensatory Award

The claimant claims the sum of £450 loss of statutory rights. No other compensatory award is claimed.

30 The Tribunal concluded firstly that there should be no 'Polkey' deduction from this award. In reaching this conclusion, the Tribunal found it difficult to conclude on the facts that a fair procedure would have inevitably resulted in a dismissal. To this end the Tribunal was unclear whether, if had the claimant known that the sanction of

dismissal was being considered, he would have had regard to the warnings and improved his performance sufficiently to avoid that sanction.

5 The Tribunal then proceeded to consider an uplift in terms of s207A(2) of the TULR(C) Act. In doing so, the Tribunal considered the fact that in dismissing the claimant the respondents did follow a procedure which consisted of two meetings, the first of which resulted in a PIP; and that a right of appeal was afforded to the claimant. After taking these factors into account, the Tribunal awards a 10% uplift on the compensatory award claimed, bringing that award to a total of £495.

10 The Tribunal then considered the issue of contributory fault under s123(6) of the Employment Rights Act 1996. To this end the Tribunal considered that there was a causal link between the claimant's lack of effort in complying with the PIP and his dismissal. The Tribunal saw no reason to depart from the deduction of 50% to the claimant's basic award made on the grounds of contributory fault.

In these circumstances the Tribunal orders the respondents to make payment to the claimant of the sum of £247.50 compensatory award.

20 The total amount awarded to the claimant is therefore £2695.50.

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30 **Employment Judge:** J Porter
Date of Judgment: 23 June 2022
Date sent to parties: 23 June 2022