



EMPLOYMENT TRIBUNALS

Claimant:
Mrs S Gough

v

Respondent:
East Midlands Crossroads –
Caring for Carers t/a Carers
Trust East Midlands

Heard at: Reading

On: 21 April 2017

Before: Employment Judge Chudleigh

Appearances

For the Claimant: Mr J West (Solicitor)

For the Respondent: Mr A Weiss (Counsel)

JUDGMENT

1. The respondent unfairly dismissed the claimant.
2. The respondent is ordered to pay the claimant compensation for unfair dismissal in the sum of £4,466.00 comprising a basic award of £1,176.00 and a compensatory award of £3,290.00.
3. The respondent wrongfully dismissed the claimant. The respondent is ordered to pay the claimant damages for wrongful dismissal in the sum of £784.00.
4. The respondent is ordered to pay to the claimant the tribunal fees in the sum of £1,200.00.
5. The recoupment provisions do not apply.

REASONS

1. In a claim form presented on 2 November 2016, the claimant complained of unfair dismissal and wrongful dismissal (breach of contract).
2. At the outset of the hearing, the parties produced an agreed list of issues:

Unfair dismissal

1. *It is agreed that the claimant was summarily dismissed with an effective date of termination on 10 August 2016. Was the claimant's dismissal for a potential fair reason within section 98 Employment Rights Act 1996 (the ERA)? In particular was the dismissal on the grounds of conduct?*
2. *What was the misconduct?*
3. *Did the respondent have a genuine belief that the claimant was guilty of this misconduct?*
4. *If so, at the time of dismissal did the respondent have reasonable grounds upon which to sustain that belief?*
5. *At the stage at which that belief was formed on those grounds, had the respondent carried out as much investigation into the matter as was reasonable in the circumstances?*
6. *Was the decision to dismiss upon that ground reasonable in all the circumstances having regard to:*
 - (a) *The size and administrative resources of the respondent;*
 - (b) *Equity;*
 - (c) *The band of reasonable responses; and*
 - (d) *The internal procedure adopted for the dismissal having regard to the respondent's own disciplinary policy and the ACAS Code for Disciplinary proceedings.*

Polkey v A E Dayton Services Ltd [1981] ICR 141

7. *Whether compensation should be dismissed on the basis that any procedural defects made no difference and/or because the claimant would have left anyway and if so, the extent of any reduction in compensation.*

Breach of Contract/Wrongful Dismissal

8. *It is accepted that the claimant was not paid her notice pay. On the evidence before the tribunal, were the claimant's actions gross misconduct warranting summary dismissal?*

Remedy

9. *What is the claimant's basic entitlement?*
10. *What compensatory award is appropriate?*

11. Did the claimant contribute to her dismissal? If so is it just and equitable to reduce any compensation awarded to the claimant (section 123 Employment Rights Act 1996)?

12. Should any uplift or reduction apply for any breach of the ACAS Code?

3. On behalf of the respondent, I heard evidence from Ms Chantal Murphy who is employed by an organisation called Direct Law and Personnel (DLP). That is an organisation which provides an outsourced HR function to the respondent; and from Melanie Wheeler, who is the respondent's deputy CEO. The claimant gave evidence on her own behalf

4. I made the following findings of fact:-

3.1 The claimant was born on 11 November 1951 and is now 65 years old. She was employed by the respondent or its predecessor in title as a care support worker from 1 May 2008 until 10 August 2016 when she was summarily dismissed.

3.2 The respondent did not have any concerns with the claimant's performance and she had a clean disciplinary record.

3.3 The claimant was on a zero hours contract but regularly worked 10 hours per week. She worked at the Maple Centre in Reading which was a day centre. She assisted in running activities for disabled clients such as quizzes, dances and other social events. Her line manager was Sumita Nanda who was employed as a care manager.

3.4 In July 2016, the staff at the Maple Centre planned a leaving tea party for an employee called Cathy. Leaving and birthday parties were a regular occurrence at the Centre. They involved tea, fizzy drinks and cakes and the clients joined in with the parties. Cathy asked the claimant if she could ask a former employee (Val) to the party. Val had worked for the respondent previously and after she had left paid employment with the respondent had continued to undertake voluntary work at the Maple Centre so was a regular visitor.

3.5 The claimant sent a text message to Val on 24 July 2016 inviting her to a party on 28 July 2016. Val responded later that day saying "Hello, yes I know and I would like to come...".

3.6 One of the activities that was undertaken at the Centre at the material time was pottery painting. A provider had been found to supply 10 sessions on Wednesday afternoons for two hours per week. On or about 13 July 2016, Sumita Nanda telephoned the claimant (she was not based at the centre) to say that the provider, Pottery Pals, would not be sending anyone in the next week because there was a funeral they had to attend. The claimant

suggested to Sumita Nanda that she should drive to Wokingham to collect the materials from Pottery Pals so that the clients could still have the pottery activity. Sumita Nanda agreed to this course.

- 3.7 The claimant drove to Wokingham on 20 July 2016 and was asked to take two weeks worth of materials back with her. The lady from Pottery Pals remarked to the claimant that the classes were not making economic sense for her because it was a 20 mile round trip and it took her 50 minutes to go each way. The session was a two hour session and there were low numbers. The claimant told the lady that there may be a way to do things differently, but that she would need to speak to the person at the respondent organisation who had booked her in the first place.
- 3.8 On 20 July, the pottery session took place and indeed it took place on 27 July. Those sessions occurred without Pottery Pals. The claimant and other staff simply supplied the clients with the pottery and the paint.
- 3.9 On 27 July 2016, the claimant was sent an email at 11.42 requiring her to attend a disciplinary hearing. It was alleged that the claimant had suggested to Pottery Pals that they should not send their own representative. It was also alleged that the claimant had sent a text message around to a small group of past and present care support workers inviting them to a leaving get together at the centre at which time the centre "may" not be covered by insurance.
- 3.10 Cathy's leaving party went ahead as planned on 28 July 2016 although the claimant did not attend. The respondent took no steps to prevent it taking place.
- 3.11 The hearing was set for 29 July 2016 at 12.00pm. The claimant was going on holiday that day returning on 7 August so the hearing did not take place on that date.
- 3.12 Pottery Pals did not attend the 3 August session.
- 3.13 The claimant was due into work after her holiday on 10 August 2016. On 9 August she was out with her husband and grandchildren when she received a phone call asking her where she was. It transpired that the respondent had convened a disciplinary hearing for that day. The claimant said that she knew nothing about a disciplinary hearing. It transpired that a revised disciplinary invite had been sent to her on 27 July 2016.
- 3.14 I consider it likely that the claimant had not received the invitation to the resumed disciplinary hearing. If she had received it she would have attended or alternatively would have said that the date (which was not a working day) was inconvenient.

- 3.15 Having heard from the claimant that she did not know about the hearing, Ms Murphy on behalf of the respondent asked whether she wanted to proceed by way of telephone hearing. However, the claimant declined this offer. Accordingly, Ms Murphy, along with Bridgit Dos Santos, held the disciplinary hearing in the claimant's absence and decided to dismiss. They set out their reasons in a letter dated 10 August 2016.
- 3.16 The findings were that the claimant had caused confusion with Pottery Pals and that she overstepped boundaries in so doing and that due to her actions, Pottery Pals had not attended the day centre on 27 July and 3 August. It was also found that the claimant had invited carers past and present to the day centre for a party which was considered a serious health and safety risk as insurance did not cover employee gatherings. Finally, it was found that the claimant had caused reputational damage to the respondent by her actions.
- 3.17 The claimant appealed, and it was decided on appeal to hold a rehearing. Ms Murphy and Sumita Nanda were present at the hearing on 7 September 2016.
- 3.18 The claimant explained that she had gone to Pottery Pals on 20 July 2016 to get the equipment with Sumita's consent because otherwise the activity would not have gone ahead for the clients. She said that when she was there, a lady told her that the work was not cost effective and that it was a 50 minute each way journey and 20 mile round trip for a two hour session. The claimant said that she suggested that the lady should ring the respondent. The lady said she would do this and that it how it was left.
- 3.19 As regards the party, the claimant agreed that she sent one text message to one ex-member of staff but that she could prove that that member of staff had already had a conversation with somebody at the respondent organisation and knew about the party. The claimant said she did not organise the party nor was she present. She also questioned why the party went ahead if it was so important that it should not as the respondent had become aware that there was going to be a party before it took place.
- 3.20 Following the hearing on 7 September 2016, Ms Murphy contacted Melanie Wheeler in order to put her recommendation to her that the claimant should be dismissed. Ms Wheeler did not see any of the documents but endorsed the decision. Accordingly, on 12 September 2016, the claimant was sent a letter telling her that following the rehearing, it was decided that she should be dismissed. The finding was that the discussion that the claimant had with Pottery Pals had led to confusion which resulted in them not sending their representative for two weeks. It was also concluded

that the claimant had failed to tell the respondent about her conversation with Pottery Pals and there was a loss of trust and confidence. Insofar as the party was concerned, the allegation against the claimant was upheld on the basis that she admitted to inviting a past employee to a leaving party at the tea club. The view was also taken that the claimant's actions had caused the respondent reputational damage.

- 3.21 The claimant was offered the right of appeal but did not do so. This was because she thought that an appeal would be pointless and she preferred to make a complaint to an employment tribunal.
- 3.22 The claimant went on a long holiday to Australia and New Zealand on 3 February 2017. She had not asked permission to go on that holiday at the time that she was dismissed.
- 3.23 The claimant applied unsuccessfully for a number of part time jobs and on 13 April 2017 started working as a volunteer with the Museum of Rural Life. She has been told that this might lead to a few hours' paid work a week but that the museum is not making any promises.

Submissions of the parties

5. On behalf of the claimant, it was submitted that taken at its highest, the reason for dismissal was not misconduct and that the dismissal was procedurally unfair. It was also said that the investigation was woefully inadequate and it was wrong for Ms Murphy to hold the hearing. It was argued that the charges were vague. It was alleged that the respondent breached the ACAS Code of Practice at paragraphs 5, 6 and 9. It was conceded that the claimant may well have resigned her employment in order to go on the holiday to Australia and New Zealand and suggested that losses should flow at the rate of 50% from the date of the holiday.
6. On behalf of the respondent, it was submitted that the Burchell test was met based on the claimant's admissions about the text she had sent to Val and the conversation she had had with Pottery Pals. It was submitted that the composition of the panel was unproblematic and that there was a 75% chance that the claimant would have resigned her employment at the point of the holiday to Australia and New Zealand. On this basis, it was said that the claimant should have 25% of her losses thereafter. It was submitted that the claimant's failure to appeal cancelled out the respondent's breaches of the ACAS Code.

The law

7. It was for the respondent to establish that the reason for the dismissal was capable of being fair within the meaning of section 98 of the ERA. In the event that a potentially fair reason was established, it was for the Tribunal

to consider whether the dismissal was fair or unfair within the meaning of s 98(4) of the ERA.

8. In a conduct dismissal, it was for the Tribunal to consider whether the employer genuinely believed that the employee was guilty of misconduct, on reasonable grounds following a reasonable investigation - see British Home Stores Ltd v Burchell [1980] ICR 303. The Tribunal was also entitled to examine the other procedural aspects of the dismissal, taking care not to substitute its view for the view of the employer, so as to determine the fairness of the dismissal. I reminded myself that the range of reasonable responses test applies just as much to the procedural aspects of the decision to dismiss as it does to the decision itself.
9. In the event of a finding of unfair dismissal, it was for the Tribunal, in considering the "Polkey" issue, to consider what the outcome may have been had fair procedures not been adopted. In undertaking this task, the Tribunal derived guidance from the decision of the EAT in Software 2000 v Andrews and others [2007] IRLR 568 and in particular the summary at para 54 although I bore in mind that s98A(2) has been repealed so there was no issue as to whether the dismissal was fair notwithstanding any procedural defects in this case.
10. When considering contribution, it was for the Tribunal to assess whether the claimant had been guilty of conduct that was culpable and blameworthy which contributed to the dismissal. The Tribunal had a wide discretion in relation to assessing the extent of any contribution.
11. When considering the wrongful dismissal complaint it was for the Tribunal to decide for itself whether the claimant had been guilty of repudiatory conduct.

Conclusions

12. The decision to dismiss took place on 10 August 2016 following a hearing in the absence of the claimant. The reason the claimant was dismissed on 10 August 2016 was that it was believed that she had had a conversation with Pottery Pals and had suggested that they need not send their own representative to the Maple Centre. In addition, it was believed that the claimant had sent a text message to a small group of past and present care support workers inviting them to a leaving get together which raised reputational and insurance issues as well as questions affecting the claimant's judgement which impacted on the trust and confidence the organisation had in her.
13. I concluded that the respondent genuinely believed that the claimant was guilty of misconduct but that that view was not based on reasonable grounds following a reasonable investigation. The investigation wholly inadequate even when judged through the prism of the range of reasonable responses test.

14. There was virtually no investigation. No witness statements were taken and the claimant was not interviewed. There was no evidence at all from Pottery Pals from which it could be fairly concluded that Pottery Pals did not show up to undertake activities as a result of anything the claimant had said to them. Pottery Pals had given the claimant enough pottery and paint for two weeks so it looked as if they were planning not to show up on 20 July and 27 July. The evidence also suggested that they did not consider the work cost effective which could have accounted for the failure to attend the following week. Whatever the reason, there was no evidence from Pottery Pals or anywhere else which established a connection between them not showing up and anything the claimant might have said to them. The respondent's conclusions were mere speculation.
15. Moreover, there was no evidence at all that the claimant emailed a group of past and present care support workers. The evidence was that the claimant sent a text to one individual who although being a past employee had regularly supplied voluntary work thereafter. The evidence also suggested that that employee had already been invited to the party by another individual as she knew about it before the claimant contacted her. There was no evidence from the past employee in question or indeed from any other employee about who contacted her and whether such parties were accepted practice.
16. The allegation about "reputational damage" took the matter no further as there was no evidence that there was any reputational damage.
17. It was also my view that dismissal was outside the range of reasonable responses even when taking the respondent's case at its highest. The matters that claimant was said to be guilty of did not warrant dismissal.
18. In the circumstances, I considered that the decision to dismiss was substantively unfair.
19. I considered that it was procedurally unfair for the hearing to have gone ahead in the claimant's absence. She was not due back at work until the day after the disciplinary hearing took place and she had not received the notice of hearing. This defect was cured on appeal as there was a complete rehearing. However, the decision following the 7 September hearing was still unfair - at that point the decision to dismiss was still not based on reasonable grounds following a reasonable investigation. In fact, there was even less of a case against the claimant as it should have been clear to the reasonable employer at that stage that she had only sent a text message about the party to one person. By this stage the respondent had determined to dismiss the claimant whatever she might say in her defence - the hearing was a sham conducted by outside contractors whose job, I believe was to return a decision to dismiss.
20. In addition, it was outside the range of responses open to a reasonable employer who employed 500-600 people to have an external HR company conduct the hearing. Ms Murphy referred to Ms Wheeler before making the

decision to dismiss but Ms Wheeler did not hear the claimant's evidence at the 7 September 2016 hearing and she was not supplied with the notes of the hearing setting out the claimant's case. She was not in a position to judge whether dismissal was warranted.

21. In the circumstances, I find that it would not be appropriate to adjust compensation pursuant to the principles in Polkey on the basis that there was a chance that dismissal would have taken place in any event but for the procedural irregularities.
22. Further, I consider that the claimant did not contribute at all to the dismissal by conduct that was culpable and blameworthy. In fact I consider that her conduct was innocuous. She went to Pottery Pals in order to assist the clients by collecting the materials for the pottery activity and responded perfectly appropriately to the lady from Pottery Pals when she said that the activity was not cost effective. Moreover, leaving parties and the like were common at the Maple Centre, and the text message the claimant sent to the former employee was in keeping with past practice. Moreover, the former employee in question was a regular visitor to the centre and having her present for the purpose of a tea party did not put any person or the respondent at risk. Had there been any such risk then the respondent would not have allowed the party to go ahead.
23. For the same reasons, I consider that the claimant was not guilty of gross misconduct - repudiatory behaviour which went to the root of the contract between the parties. Summary dismissal was not warranted.
24. However, I do consider that there is a chance that the claimant would have resigned with effect from 2 February 2017 had she not been dismissed, as there is some chance that the respondent would not have permitted her to go on an extended holiday. She was clear in her evidence that she would have gone on the holiday anyway, resigning if needs be. I consider that there was a 50% chance that that would have happened.
25. I also consider that the claimant's losses ceased on 13 April 2017 because that is when she started voluntary work and she has thereby taken herself out of the paid labour market.
26. I consider that the respondent breached the ACAS Code of Conduct as alleged. However, the claimant failed to appeal which was also a breach and I agreed with the respondent that these breaches cancelled each other out. Accordingly I make no uplift and no reduction.
27. In the circumstances, I uphold the complaint of wrongful dismissal and of unfair dismissal.
28. The claimant is entitled to damages for wrongful dismissal in the sum of £784.00 which is 8 weeks net pay at the agreed sum of £98.00 per week.

29. The claimant is entitled to compensation for loss of statutory rights in the sum claimed - £350.00. Taking into account the 8 weeks I have awarded for breach of contract, she is entitled to compensation to February 2017 at the rate of £98.00 per week - 25 weeks @ £98.00 which is £2450.00.
30. Thereafter, the claimant's losses ran for 10 weeks until 3 April 2017 at the rate of £98.00 per week which gives a total of £980.00 which I will divide by 50% and award £490.00 for this period.
31. Accordingly, the claimant is entitled to compensation for unfair dismissal in the sum of £4,466.00 which comprises a basic award of £1,176.00 and a compensatory award of £3,290.00. The claimant did not claim jobseeker's allowance so recoupment does not arise.
32. The claimant is also awarded the tribunal fees she paid of £1,200.00.

Employment Judge Chudleigh

Date: 10 May 2017

Judgment and Reasons

Sent to the parties on:

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For the Tribunal Office