



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Fower

**Respondent:** Shine

**HEARD AT:** CAMBRIDGE ET      **ON:** 2<sup>nd</sup> & 3<sup>rd</sup> May 2017

**BEFORE:** **Employment Judge Cassel**

**For the Claimant:** Ms S Bewley (Counsel).

**For the Respondent:** Miss R Eeley (Counsel).

## RESERVED JUDGMENT

1. The claimant was not unfairly dismissed and his claim fails.
2. The claim for breach of contract is dismissed.
3. There was an unlawful deduction from the Claimant's pay in the sum of £76.80 and the Respondent is to pay to the Claimant that sum net of tax and NI.

## REASONS

1. In his claim to the Employment Tribunal the Claimant, Mr Darren Fower, complains of unfair dismissal, wrongful dismissal/breach of contract and unlawful deductions from wages.

2. In the response submitted by the Respondent all of the claims are resisted and as a preliminary matters today the Tribunal indicated that evidence on liability and remedy would be heard together.
3. Evidence presented to the Tribunal was the following:-
  - (1) Bundle of documents comprising 332 pages.
  - (2) Bundle of mitigation documents comprising 106 pages.
  - (3) The written statement of the Claimant, Darren Fower.
  - (4) Statement of Mrs C McKillop, Director of the Respondent.
  - (5) Statement of Mrs N Conner, Finance Director.
  - (6) Statement of Mrs K Steele, Chief Executive.
  - (7) All of the witnesses gave evidence and were cross examined on their written statements.
  - (8) Further documents were provided including a list of agreed issues, which was amended.
  - (9) A schedule and counter schedule of loss and the Respondent's skeleton argument.

#### FINDINGS OF FACT

4. The Tribunal makes the following findings of fact based on the balance of probabilities having considered those documents to which attention was drawn.
5. The Respondent is a charity providing specialist support before birth and throughout the life of anyone living with, or supporting someone, with spina bifida and/or hydrocephalus. It is a registered charity with 55 employees of whom 27 are full time and 28 are part time. Their head office is in Peterborough and some of the staff are home based as the Respondent delivers services across England, Wales and Northern Ireland. In addition to the staff the organisation has a significant number of volunteers.
6. The Claimant was employed as a Media Development Officer and his role was to promote the work of the Respondent by online and offline media.

He commenced his employment on 27<sup>th</sup> August 2006 and apparently worked without difficulty until 2015. From the 26<sup>th</sup> August 2015 until the 21<sup>st</sup> October 2015 the Claimant was signed off work with stress and anxiety. He gave evidence that he regularly suffered panic attacks which causes him considerable distress and an inability to concentrate.

7. Terms and Conditions of Employment were provided to the Claimant and other employees apparently by online access. Those policies included policies in regard to absences, holidays and discretionary leave. In May 2015 a new CEO was appointed, Mrs Kate Steele. She initiated, amongst other things, a process whereby the policies were reviewed.
8. In evidence, Mrs Steele told the Tribunal that there were four employees who had absences of a degree that caused her concern. Under the absence management policy five absences move the management process from an informal basis to a formal one. There were three stages of the formal process, the third of which could lead to dismissal. She told the Tribunal that at its lowest, one days absence on five occasions could trigger the process.
9. A return to work meeting took place on 13<sup>th</sup> January 2016, chaired by Mrs Debra Chand, his manager. The dates and lengths of absence were detailed and, among other matters, the Claimant was told that there was cause for concern at the persistent short term absences, which were described as unacceptable, and “there is a possibility of termination of (your) employment.” Following that meeting there was clarification on a number of issues which included a request for a medical report, clarification that the Claimant could not work from home and that if he had, for example an accident or breaks a leg, the procedure was able to be used in a way that circumstances could be reviewed at Stage 2 and 3 and decisions made accordingly.
10. A medical report was subsequently obtained and Doctor K Remedious sent the report to the Respondent on the 12<sup>th</sup> February 2016 in which

there was reference to a collection of symptoms including sweats, headaches, hot/cold episodes, headache, body ache, lethargy and episodes of anxiety. The Doctor observed "it may be apparent that he does at least have at least mild to moderate symptoms of anxiety or depression ... usually with the right management symptoms of anxiety and depression can be managed quite well with counseling or medication." He concluded that he did not believe that the Claimant had a disability in accordance with the Equality Act 2010.

11. The Claimant was due to attend a review meeting and there was a further one scheduled for the 5<sup>th</sup> April 2016. Notes of the meeting were produced at pages 239 to 243. By the 5<sup>th</sup> April 2016 the Claimant had had 62 days absence in a rolling twelve month period and on that date, as indeed on other dates, he was invited to a return to work meeting which on this occasion took place with Mrs Conner, finance director, chairing the meeting and Mrs Chand, manager, in attendance. At that meeting the Claimant was given an attendance target of 100% and told that if he failed to meet that target the Respondent would proceed to Stage 2 of the formal absence policy procedure and further action, at Stage 3, would be considered which might include dismissal.
12. The meeting in June was cancelled following the Claimant taking a period of sickness at the start of June which related to a suspected hernia. Mrs Steele took the view that because the period of absence it related to was not considered a sporadic episode, and in evidence she distinguished this from a non sporadic episode of which the Claimant had previously several, discretion was exercised and his absence management did not proceed to the next stage.
13. On the 15<sup>th</sup> July 2016 the Claimant sent a text message to his manager Denise Fenn in the following terms "Morning Denise. Darren here I need to take today as Annual Leave plz)? My sister has been taken into hospital and I am now at hers looking after the kids. Andy her husband is with her and I've no idea at the mo how long they'll be there." In evidence

today, and for the first time, the Claimant gave evidence that he tried to telephone Mrs Fenn before sending that text message.

14. Working with the Claimant was a colleague Mr Asif Shaheed. He was also a neighbour of the Claimant and his parents. Mr Shaheed noted that the Claimant had not arrived at work on 15<sup>th</sup> July and he asked Ms Deborah Chand, another colleague, where the Claimant was. Ms Chand passed on the message she had heard from the Claimant's Line Manager, Mrs Fenn, that the Claimant's sister had been taken to hospital and the Claimant was taking a days leave to look after her children. Upon hearing this news Mr Shaheed called his wife to relay the news and suggested that she check that the Claimant's mother was ok. Later the same day Mr Shaheed saw a Facebook post by the Claimant's brother-in-law which was in terms that in fact they were at a Star Wars convention in London and among other things told Mrs Fenn of the Facebook post.
15. The following Monday, which was the next working day, the 18<sup>th</sup> July 2016, the Claimant attended work. During the day, probably at about lunchtime, (on this the evidence is unclear, but which in the circumstances is not material), he was called to a meeting at which he was suspended from his employment on full pay pending further investigations into an allegation. The suspension was made by Denise Fenn and confirmed in a letter prepared by Mrs Seymour, HR Manager. Within the letter of suspension was the following.

“As explained to you it is alleged that you claimed your sister had been admitted to hospital and you were looking after her children in order to gain permission for a days leave at short notice, when in fact she'd not been admitted to hospital.”

He was told that he would be required to attend a meeting on the 20<sup>th</sup> July and he could be accompanied by a work colleague or TU representative, and that if he wished he could bring to the meeting a written statement and

any other documents relevant to the investigation. He was also told that the allegation was considered very serious and “the matter is likely to be regarded as gross misconduct which could result in dismissal without notice for a first offence”.

16. The Claimant’s Trade Union representative was not available and the investigation meeting subsequently took place on the 28<sup>th</sup> July 2016 when Mrs Conner chaired the meeting.
17. The Claimant raised a grievance in relation to the disclosure of confidential information and the grievance hearing was heard on the 11<sup>th</sup> August 2016 by Mrs Conner who dismissed the grievance. The Claimant appealed and the grievance appeal took place on the 25<sup>th</sup> August 2016 when it was dismissed by Mrs K Steele.
18. On the 31<sup>st</sup> August 2016 the Claimant was notified of a disciplinary hearing and was sent copies of a number of documents as follows: Investigation Report; text message from him to D Fenn; Facebook screen shot from A Parkes; notes from investigatory meeting with A Shaheed; notes from investigatory meeting with the Claimant; email from the Claimant regarding his representatives availability and an email from the Claimant’s representative regarding her availability.
19. The disciplinary hearing took place on the 5<sup>th</sup> September Chaired by Mrs McKillop, Director. The Claimant was accompanied by his Unison Representative Ms Michelle Carpenter. The Claimant was able to comment on the documents that had been produced. The Claimant raised a number of concerns and among other things handed in a document with detail of the symptoms of panic attacks which had not come through at the investigation report. At the end of the meeting Mrs McKillop stated that she needed more time to consider the matter and would write with her decision.

20. On the 8<sup>th</sup> September 2016 she wrote a lengthy dismissal letter and noted that the Claimant had admitted that the statement he made on the 15<sup>th</sup> July was untrue, that he had had a panic attack on that day, that he had worked for the organisation for 10 years and to consider his actions as gross misconduct was heavy handed, that the action was reliant on a statement from someone with whom he had had bad blood, that his actions had been unacceptably monitored by the organisation and that he had been previously contacted by the former Chief Executive and told that his job was not secure and that he was not informed of the reason for his sickness absence management meeting having been cancelled and this lead to him feeling insecure about his job and that had he not been “mucked around” in this way then he may not have said what he did. He also added that there had been an inappropriate posting on Mr Shaheed’s Shine Account.
21. Mrs McKillop concluded that he was guilty of gross misconduct and had no alternative to dismiss. She gave the reasons for that decision briefly as follows. The first time he admitted his lie was on the 28<sup>th</sup> July and not the 15<sup>th</sup> July as had been stated in the hearing and that he had only accepted that it was a lie when he had been presented with Facebook evidence. She considered that he had the opportunity to explain what had happened at any time before that including his suspension meeting on the 18<sup>th</sup> July but chose not to do so. She concluded that he only accepted the lie once he was faced with irrefutable evidence and was therefore forced to do so. She also referred to the information he had provided on panic attacks and found on the balance of probabilities that he was not coming to work well before he sent the message and that he was highly unlikely to have made that decision and sent the message in a state of panic. She also concluded that having worked for the organisation for such a long time a higher standard of behaviour was expected. She also confirmed that Mr Shaheed’s statement was not the basis of the action that led to the lie being discovered and details that he had challenged in Mr Shaheed’s statement made no material difference to the facts of the case. She discounted the discovery as a result of monitoring and considered that any

conversation with a previous Chief Executive had no bearing on the outcome.

22. In evidence Mrs McKillop stated that the decision was based on the lie that he had to take time off from work for family reasons and that this undermined the trust and confidence that she had in the Claimant. The Claimant accepted that sending the text is an act of dishonesty and he could see it would undermine trust from his employer's point of view and "can see where they are coming from".
23. The Claimant was advised of his right to appeal. He did not exercise that right.
24. The Tribunal is satisfied that the Claimant was dismissed and that the effective date of the termination of his contract of employment was 9<sup>th</sup> September 2016. He was paid until the 8<sup>th</sup> September 2016 and is entitled to a days pay.

#### RELEVANT LAW

25. For unfair dismissal the relevant law is that which is provided for under Section 94 of the Employment Rights Act 1996 where the employee has the right not to be unfairly dismissed by his employer.
26. Within Section 98 of the Employment Rights Act 1996 is the following in determining for the purposes of this part whether the dismissal of an employee is fair or unfair:-

#### *98 General.*

- (1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*



- (a) *the reason (or, if more than one, the principal reason) for the dismissal, and*
  - (b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
- (2) *A reason falls within this subsection if it—*
  - (a) *relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
  - (b) *relates to the conduct of the employee,*
  - (c) *is that the employee was redundant, or*
  - (d) *is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*
- (4) *[Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
  - (a) *depends 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*
  - (b) *shall be determined in accordance with equity and the substantial merits of the case.*

27. Under the Employment Tribunal's Extension of Jurisdiction (England and Wales) Order 1994 Regulation 3, proceedings may be brought before an Employment Tribunal in respect of the claim of an employee for the recovery of damages for any sum (other than that they claim for damages over a sum due in respect of personal injury) if ... the claim arises or is outstanding on the termination of the employee's employment then submissions.
28. Miss Eeley provided written submissions to which she added oral submissions. Ms Bewley provided oral submissions. The Tribunal found these submissions very helpful and for which both counsel are thanked.
29. Ms Bewley referred to various case law and provided a copy of *Burdett v Aviva Employment Services Appeal Number UKEAT/0439/13/JOJ*.

## CONCLUSIONS

### Claim for unfair dismissal

30. During these submissions the Tribunal was reminded on more than one occasion of the leading case of *British Home Stores v Burchell [1980] ICR 303* ("*Burchell*").
31. The Tribunal reminded itself of the provisions and referred to comments made by HHJ Peter Clark in *Sheffield Health and Social Care NHS Foundation Trust v Crabtree [2009] UKEAT* at paragraphs 14 and 15 in the following terms, "It might be thought that the Burchell test as stated by Arnold J must be literally applied in conduct unfair dismissal cases. That would be a misunderstanding. The first question raised by Arnold J "Did the employer have a genuine belief in the misconduct alleged?" goes to the reason for dismissal. The burden of showing a potentially fair reason rests with the employer. However, the second and third questions, reasonable grounds for the belief based on a reasonable investigation go

to the question of reasonableness under Section 98 (4) ERA and there the burden is neutral”.

32. The Tribunal looked first at the nature of the investigation. We were reminded that a particularly high standard of investigation enquiry was called for in the dismissal of an employee of good character with ten year's continuous service. The Tribunal reminded itself that it must not substitute its own views as to what a reasonable investigation should be and that a range of reasonable responses tests applies equally to the investigation. In our judgment the investigation was a reasonable one. The investigation and the process by which the Claimant was required to appear at a disciplinary hearing was a reasonable one. The Claimant was provided with relevant documentary evidence, was able to comment on that evidence at a meeting at which he was accompanied and he was also given the right of appeal. Prior to the meeting he was informed that he was at risk of dismissal.
33. The process of decision making involved the consideration of evidence that was relevant to the alleged offence. There were discrepancies and a number of issues were raised in evidence and submission. Mrs McKillop was however certain that it was the lie that was the central issue in her decision making. The remaining matters, as far as she was concerned, were matters of mitigation. Ms Bewley in submissions criticised the approach taken by Mrs McKillop. She submitted that part of the reasoning for the dismissal was based on the view apparently taken by Mrs McKillop that the Claimant had predetermined to take time off before the text message was sent, and this allegation had not been put properly or at all to the Claimant. She also submitted that the Claimant was entitled to take advice before admitting the signal offence. He was so entitled. Mrs McKillop was however quite sure that had the Claimant admitted the lie straight away her attitude would have been quite different. She maintained that there was a 13 day delay before he told the truth and she was entitled to take this into account in her decision making. She accepted that she had concluded on the balance of probabilities that his actions

were preplanned but that was only part of her consideration. She remained adamant that in lying to the Respondent, and we were again reminded that he had admitted lying, he had undermined trust and in her words “I did not feel I could take confidence in what he was saying.”

34. We remind ourselves that the test for the second and third questions in Burchell is the balance of probabilities. Submissions were made by Ms Bewley and the Tribunal carefully considered them. On the evidence Mrs McKillop had reasonable grounds on which to reach her decision and, as noted above, the investigation was a reasonable one.
35. The Tribunal is satisfied that the Respondent showed that the real reason was conduct. Indeed, there was no real dispute and there was ample evidence to show that this was the only reason for the decision.
36. The Tribunal was reminded again that the test of reasonable responses applies to the sanction and has to determine whether the Respondent’s decision to dismiss the Claimant fell within the range of reasonable responses that a reasonable employer would have adopted in the circumstances. We are satisfied the dismissal does fall within that range of reasonable responses given the findings that were made against the Claimant and the consideration of any mitigating circumstances that were relevant.
37. For those reasons the claim of unfair dismissal is dismissed.
38. The test in a breach of contract claim is quite distinct from the test in a claim of unfair dismissal. An employer defending a wrongful dismissal claim or breach of contract must be able to show that the employee’s act of gross misconduct constituted a repudiatory breach of contract justifying summary dismissal. It is the Respondent who alleges a breach of contract and it is for the Tribunal to be satisfied on the balance of probabilities that a breach has been made out.

39. To amount to repudiatory breach the Claimant's behaviour must disclose a deliberate intention to disregard essential requirements of the contract under which he worked. It is a question of fact for the Tribunal to decide what degree of misconduct is necessary to amount to a repudiatory breach. Bearing in mind the findings of fact the Tribunal is satisfied that such a breach has been made out.
40. The Tribunal is also satisfied that the notice of dismissal reached the Claimant on 9<sup>th</sup> September. He was entitled to be paid for that day and was not. The agreed pay for a day is £76.80 and that is the sum the Tribunal awards to the Claimant.

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Employment Judge Cassel, Cambridge.

Date: 23 May 2017.....

Sent to the parties on: .....

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For the Tribunal Office